Nick Hækkerup

Controls and Sanctions
in the EU law

Assisted by
Cecilie Reumert Wagtmann

Translated by
Steven Harris

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DJØF Publishing
17 Lyngbyvej
P.O.B. 2702
DK 2100 Copenhagen Ø

Phone: + 45 39 13 55 00
Fax: + 45 39 13 55 55
E-mail: fl@djoef.dk
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Contents

ADMINISTRATIVE CONTROLS AND SANCTIONS

SANCTIONS

THE REGULATION OF CONTROLS AND SANCTIONS IN A SOCIAL CONTEXT

EPILOGUE

Foreword to the Danish edition

This thesis undertakes the first comprehensive and systematic review of the regulation of controls and sanctions in EC law and the fight against irregularities against the EC's finances. The subject is dealt with using both legal theory and a socio-legal approach which presents the problem in its social context.

The socio-legal approach is new in relation to this subject, which was originally to be based on legal theory, and for which I was entered as a Ph.D. student at Copenhagen University, Institute of Legal Sciences A. My researches quickly showed that in order to give a qualified review of the fight against irregularities this would require more than just an analysis of the relevant law. The bi-disciplinary approach to the subject has given some understanding of the limits to the law while emphasising its true strengths.

I owe thanks to those who gave me interviews and thus so readily provided the basis for the socio-legal analysis, as well as to the very many people who helped in arranging the interviews. Also the financial help I received in order to carry out the wide-ranging travel programme in connection with conduct of the interviews was invaluable, and my thanks are due to Knud Højgaards Fund and to Margot and Thorvald Dreyers Fund.

I have met with considerable interest in and support for my project at Copenhagen University. In particular, Professor Hjalte Rasmussen dr. jur. has given me valuable professional guidance as well as giving strong support both practically and personally. Likewise, Professor Flemming Balvig dr. jur. has given me invaluable advice on socio-legal matters. Finally, I should mention Dorte Frandsen cand. jur., LL. M., who has been a good companion throughout the work on this thesis.

Above all I wish to thank Fie for her part in making this thesis possible.

This thesis was submitted for review in February 1998, and it includes material up to the beginning of 1997.

Nick Hækkerup

Copenhagen, February 1998

Foreword to the English edition

Following the publication of this thesis in Danish in 1998 I received considerable encouragement to produce a version in English. Unfortunately my own English skills are not equal to such a task. However, Djøf Publishing has been able to make arrangements for the translation from Danish to English which has been undertaken by Steven Harris. In addition, since this new edition comes three years after the first, it has required a certain amount of re-arranging and updating; this has been undertaken partly by myself and partly by Cecilie Wagtmann. Cecilie Wagtmann has made Herculean efforts, and without her help it would not have been possible to produce this edition, so it is only right that her name appears on the cover of the book.

Since, in the summer of 2000, I became Mayor of Hillerød this work has not been finished as quickly as I would have liked. The fact that it has nevertheless been possible to finish it is due not least to Vivi Antonsen of Djøf Publishing, as well as Steven Harris and Cecilie Wagtmann, who have been closely involved in the work. I am grateful to them for their efforts.

Nick Hækkerup

Hillerød, January 2001

PROLOGUE

CHAPTER 1

Formulating the problem

This PhD thesis is entitled 'Administrative Controls and Sanctions in EC law', with the subtitle 'Combating irregularities in EC finances'. The title thus gives an indication of some of the problems which have been the focus of considerable attention in recent decades; these problems have not only been of interest to lawyers, but also, and perhaps especially, to politicians and the media. Irregularities in the EC finances have been regarded with growing concern. Steps taken against these irregularities have first and foremost been to ensure that the rules are abided by, and, where this is not the case, sanctions applied.

On the various occasions when these problems have been taken up, they have usually been dealt with sporadically and unsystematically.

This thesis seeks to give a systematic description and analysis of the prevailing EC law on administrative controls and sanctions. The regulatory apparatus is dealt with in three stages. First, an analysis is undertaken and description given of the Community's regulation of the administrative controls and sanctions which Member States exercise over those who are subject to their law. Next, the thesis deals with the EC's own administrative controls and sanctions on those subject to the law of the Member States. Finally, the thesis sets out the EC's administrative controls and sanctions over the Member States themselves. In dealing with the legal theory of administrative controls and sanctions in EC law, there is also, to some extent, a description of the development of the law.

In such a comprehensive description of EC administrative controls and sanctions for combating irregularities in EC finances, it is not sufficient to treat the subject from the viewpoint of legal theory alone. Therefore this thesis also seeks to explain the social context within which regulation and the fight against irregularities take place. The thesis thus also deals with the subject from a socio-legal angle. There is thus an evaluation of whether there is an effective fight against irregularities under existing regulations, and there is likewise a

description and analysis of the factors that are decisive in creating and applying rules for administrative controls and sanctions for combating irregularities.

Against this background of jurisprudential and socio-legal description and analysis, the thesis concludes with an evaluation of whether and how irregularities in Community finances can be limited.

CHAPTER 2

Delimitation

2.1. Delimitation in law

The statement of the problem, together with the context of the subject, set the limits to the thesis.

It is therefore important to understand the particular context of EC financial irregularities. For example, in the same way as with criminality in connection with information technology, this is a phenomenon which has grown up in the last 30 to 40 years and which prompts its own particular legal and social questions which cannot be answered solely by reference to concepts which are familiar in national legal systems.

The characteristic feature of irregularities in EC finances lies particularly in the context in which the phenomenon occurs and in those who are involved: those who commit the irregularities, those who are the victims of them, and those who undertake the fight against them. The overall picture is one in which irregularities are committed within Member States, or across the borders of Member States, and concern finances that come from the Community or which are due to the Community. Those who commit the irregularities cover a broad spectrum, from individuals, to groups, businesses and (criminal) organisations, right up to the Member States themselves. This last in particular means that this form of irregularity is *sui generis*. The direct victim of these irregularities is the supranational co-operation, since the finances of the Community are not used as intended. The indirect victims are the Member States themselves, as well as those who are subject to their laws.[1] As for those who combat irregularities, the topic of this thesis differs from otherwise comparable national problems, since, in addition to the Member States themselves, the Community institutions play a significant role, through the exercise of direct authority. The scope of this thesis must respect this context.

Since the formulation of the problem pre-supposes both a jurisprudential and a socio-legal treatment, the purely jurisprudential scope of the thesis is re-

1. See also M Mendrinou, 'European Community fraud and the politics of institutional development' *European Journal of Political Research*, 1994, Vol. 26, No.1 p.82.

stricted. To complete the task within a reasonable period, and to avoid the thesis becoming unmanageably large, while addressing the need for proper legal analysis, the thesis only deals with those EC controls and sanctions which are concerned with the part of EC law which is directly significant to using or raising EC finances, as these are provided for and appear in the EC budget.[2]

Even with these limits, it should further be clarified that, in relation to the Community's own resources, this thesis will deal with controls and sanctions which are designed to ensure that the EC receives the value added tax, wealth tax, as well as customs duties and agricultural taxes which are due to it.[3] In other words, this thesis deals with those controls and sanctions which are designed to ensure the receipt of about 98% of the EC's own resources. As for the Community's expenses, the thesis deals with controls and sanctions concerned with the payment of expenses for the Common Agricultural Policy[4] as well the Structural Funds[5], which together account for about 84% of EC costs.[6] Thus, altogether, this thesis deals with controls and sanctions concerned with about 90% of the EC budget.

The internal controls and sanctions within and between the institutions of the Community are considered separately.

Even with these limits, the amount of EC legislation which dealing with controls and sanctions is overwhelming, and it is impossible to present an exhaustive survey of the laws in force. The treatment of much of the material must necessarily be brief and merely give a summary, while the treatment of

2. But in this context 'direct' means that there is a not insignificant direct effect between the regulation and the EC's budgeted financial circumstances. Thus controls and sanctions that are so associated with regulation that they can be said to affect the assumptions for the EC's financial situation or to have a tangential effect on them, are indirect and are not dealt with. By way of illustration, a situation in which companies make agreements about pricing, and thereby contravene the EC's rules on competition, raises questions of controls and sanctions which fall outside the scope of this thesis. The same applies to breaches of EC laws which a Member State might make to hinder the free movement of goods through measures having an equivalent effect.
3. The revenues accrued in the areas referred to amounted to 83.5 billion Euros in the budget for 1999. The only incomes which are not covered are those which in the budget are categorised as tax from the EC's employees and diverse incomes amounting in all to 0.6 billion Euros, as well as available excess from the previous accounting year etc. amounting to 1.5 billion Euros.
4. In 1999 the expenses in the area of agriculture were budgeted to be 40.9 billion Euros.
5. In 1999 the expenses in the area of the Structural Funds were budgeted to be 30.7 billion Euros.
6. The regulation of controls and sanctions which is not covered relate to the other areas of expenses which amounted to 14 billion Euros in the 1999 budget, of which the largest items were external measures with 4.2 billion Euros, research and technological development with 3.0 billion Euros, the Commission's administrative costs with 2.9 billion Euros, and the administration costs of the other institutions with 1.6 billion Euros.

secondary legislation must be selective. This applies to an even greater extent to the considerable mass of 'soft law' in the form of recommendations, opinions, communications and notices etc. which are associated with administrative controls and sanctions.

Furthermore, as the terminology used indicates, this thesis is limited to dealing with the co-operation covered by the Union's first pillar. Apart from the considerations of the quantity of material and the time required, referred to above, the exclusion of the second and third pillars is due to the fact that the legal character of the co-operation covered by these two pillars differs fundamentally from the supranational co-operation under the first pillar of the Union treaty, as well as the fact that regulation under the second and third pillars is still in its infancy, while the co-operation under the first pillar is well developed.

Finally, this thesis does not deal with the administrative controls and sanctions related to the European Coal and Steel Community or Euratom, since these have relatively limited significance.[7]

2.2. Socio-legal delimitation

2.2.1. The agents and the structures

In social science research there are those schools of thought and theories which explain social phenomena, including legal sociology, by reference to general structures. In other words, by reference to certain fundamental conditions which, independently of individuals, determine how society functions. Thus the factors which influence the structure are impersonal and often have an unconscious effect on individuals.

Opposed to this are other schools of thought which believe that social phenomena can be explained by concrete circumstances, including the behaviour of certain agents. These agents are defined as people or groups of people who consciously take certain actions or refrain from taking actions.[8]

7. Reference can be made to Declaration No. 41 on provisions relating to transparency, access to documents and the fight against fraud which is included as an appendix to the final text of the Amsterdam Treaty of 2nd October 1997. This declaration states that "The conference considers that the European Parliament, the Council and the Commission, when they act in pursuance of the Treaty establishing the European Coal and Steel Community and the Treaty establishing the European Atomic Energy Community, should draw guidance from the provisions relating to ... the fight against fraud in force within the framework of the Treaty establishing the European Community."
8. See Andersen, Heine and Kaspersen, Lars Bo (editors): *Klassisk og Moderne samfundsteori*, 1996, Balvig, Flemming (with others): *Retten i samfundsmæssig belysning*, 1997, and Dalberg-Larsen, Jørgen: *Lovene og Livet*, 1994.

The starting point for the theoretical analysis in this thesis puts emphasis on the agents, just as its empirical basis is also the agents. This does not mean that the importance of structural factors is disregarded but, on one hand, some interpretations of latent functions and dysfunctions lie in a grey zone between structural and agent-based explanations and, on the other hand, factors of a structural nature are included independently, where these are found in connection with the agent-based analysis.

The agents included in this thesis each appear as a unit in connection with the socio-legal processes surrounding irregularities in Community finances. They are thus considered externally.

Agents are defined as persons or groups of persons who consciously take certain actions or refrain from taking actions, which includes the possibility that each agent can be subdivided into numerous groups or individuals who can, in principle, be considered as independent agents. The agents are thus considered internally.

To the extent that interviews and analysis indicate that the relevant view of the socio-legal process requires that agents should be considered as composed of several independent units, this internal perspective is also used. To illustrate this, it is pointed out that Member States can be agents. These are primarily considered externally as one agent, but at the same time internal divisions can be made between individual Member States and groups of Member States, and between the central administrations and parliaments of Member States etc.

2.2.2. A description

The socio-legal part of the thesis seeks to give a description and analysis of the socio-legal processes surrounding the combating of irregularities in EC finances, and the administrative controls and sanctions of EC law.

In connection with this socio-legal analysis there are particular problems in showing that it is one given phenomenon rather than another which is the basis of a law. Or it is difficult to show that it is a particular given law which causes a given effect in society, and that this effect cannot be ascribed to any possible alternative phenomenon. The problem is even more pronounced when it concerns finding the relative importance of several phenomena.[9] Against this background, the aim of the thesis is limited to giving a description and analysis of the combating of irregularities which is not falsified by the available information,[10] as well as to indicate a corresponding range of central socio-legal factors connected with the regulation of administrative controls and sanctions in EC law.

9. See Dalberg-Larsen, Jørgen: *Lovene og Livet*, 1994.
10. Refer to section 4.2.1.7 below concerning the general validity of the interview research.

It must be emphasised that the analytical approach and the method (qualitative interview research) on which the socio-legal part of the thesis is based, does not make any theoretical or methodological advances, but is used to provoke the socio-legal descriptions and analyses which are necessary for a sufficiently well qualified treatment of the problem formulated in this thesis.

CHAPTER 3

The Analytical approach

The Community is a political system in which there are many different agents with wholly or partially conflicting interests. This means that the EC should not be regarded as a single entity, but as a bundle of agents each with its own will, each pursuing its own goals. It is thus a central characteristic that there is a constant struggle to promote certain interests at the cost of others.[11] In one of the interviews this situation is expressed as follows: 'It is in the interest of each institution to demonstrate its right to exist'. Since the Community can only be adequately understood from this point of view, the socio-legal analysis must have an analytical approach which promotes an analysis in this respect.

In my opinion, there is a well qualified starting point for this in the paradigm about manifest and latent functions, which was originally formulated by the American sociologist, Robert K Merton.[12]

In spite of his functionalist point of view, Merton makes a devastating criticism of the functionalist theory of the functional unity of society, of functionalism's universality and of functional necessity.

Thereafter, Merton uses the concept of function without reference to the concept of organisms and in his paradigm for functional analysis he distinguishes between functions and dysfunctions as well as between manifest and latent functions. This paradigm is used and taken further in Nordic legal sociology[13] and, in this thesis, is used with the limitations set out below.

According to Merton's conception, functions are the observed consequences which lead to the modification and adaptation of a system, while dysfunctions are observed consequences which lead to the maladjustment and reduced adaptation of the system. Vilhelm Aubert[14] has carried the concept further and has defined a function as an objective effect of an institution that increases the

11. See Rasmussen, Hjalte *EU-ret i kontekst* 1995, in which, under reference to 'checks and balances' it is shown that the EC is consciously based on the power-struggle between the various players.
12. Merton, Robert: *Social Theory and Social Structure*, 1964
13. Aubert, Vilhelm: *Om straffens sosiale funktion*, 1972 and *Om rettens sociale funktion*, 1976, Mathiesen, Thomas: *Retten i Samfunnet*, 1984, Dalberg-Larsen, Jørgen: *Lovene og Livet*, 1994, Balvig, Flemming (with others): *Retten i samfundsmæssig belysning*, 1997.
14. *Om straffens sosiale funktion*, 1972.

probability of the institution's continued existence, while the converse is defined as a dysfunction.[15] In the present thesis the concept of a function is used to describe an objective effect which originates from an agent and which increases the probability of that agent's continued existence, while a dysfunction is used to describe an objective effect which originates from an agent and which reduces the probability of that agent's continued existence.[16]

It should further be noted that, as the words suggest, objective effects will be conditions which can in fact be observed. However, it should also be acknowledged that an objective measure will appear somewhat abstract in certain circumstances, so that in this thesis the concept is used to a limited extent in relation to exceptions occurring in situations which can best be characterised as the setting aside of a duty to act.

With this definition the function is distinguished from the intention of the agent, with emphasis put on the objective effects which can well differ from the intention of the agent. Furthermore, the concepts of function and dysfunction relate to the individual agent and not to society as a whole. Thus, a function exists if there is an increase in the probability of the continued existence of the agent, regardless of whether it is a dysfunction in relation to other agents or to society as a whole. In my opinion this accords with Merton's dispute with functionalism's theory of the functional unity of society which is an important point in his paradigm of functional analysis.[17]

The next important element in the paradigm of functional analysis is the distinction between the manifest and the latent. Merton defines manifest functions as objective consequences for a given system (a person, a group, or a social or cultural system), which contribute to the system's adaptation, and which are intended and acknowledged by the system, while latent functions are the objective consequences which contribute to the system's adaptation, without being intended or acknowledged by the system. Merton states that this distinction can be used for analysis in a great number of areas.

15. See also Mathiesen, Thomas: *Retten i Samfunnet*, 1984, Balvig, Flemming (with others): *Retten i samfundsmæssig belysning*, 1997.
16. Merton also points to the possibility of non-functional consequences that are characterised by being without significance for the observed system. The concept is only taken further in Nordic legal-sociology to a limited extent, and is not included in this thesis, since, even though there are presumably many examples of this, it is of limited interest to the analysis of the socio-legal processes that concerned with the EC's regulating of controls and sanctions.
17. Merton, Robert: *Social Theory and Social Structure*, 1957, pages 50 and 63. See also Aubert, Vilhelm: *Om straffens sosiale funktion*, 1972, pages 2 and 3, but cf. Dalberg-Larsen, Jørgen: *Lovene og Livet*, 1994, pages 96 and 97.

The distinction is taken up in Aubert's[18] analysis of punishments. In this, manifest functions are defined as "an effect which is intended and officially approved by those who are the professional upholders of the penal system". Furthermore, he states that "other kinds of effects are much more seldom described in the motives for legislation and grounds for judgments. ... There can be no doubt that effects other than manifest functions can be brought about by penal laws and by punishment. Damaging consequences of various kinds have often been identified. ... In such cases the punishment is dysfunctional, in other words, its effects work to undermine the penal institutions. ... However, there is no doubt that penal measures have effects which differ from their manifest functions, but which can nevertheless have a positive effect on the existing penal institutions. Such effects are, to a limited extent, predicted or approved in official policy. These I call the latent functions".

Thomas Mathiesen[19] defines latent functions as "unintended effects which contribute to the continued existence of the phenomenon which causes the effect".

Dalberg-Larsen[20] considers functions to be manifest when they are acknowledged and intended by the agents taking the action, while latent functions are those which occur in spite of or in opposition to the consciously formulated wishes and expectations of the agents taking the action. Dalberg-Larsen's categories suffer from the disadvantage that they do not include a distinction from dysfunction.

In *The Law in a Social Perspective*[21] it is stated that a social phenomenon can have both manifest and latent functions. The manifest functions are acknowledged by individuals in society. They are intended or at least acknowledged and predicted. The latent functions are not acknowledged; they are unintended and unpredicted.

In the above review of conceptual developments there are important differences of nuance, but there also certain key words which recur. For manifest functions the key words are 'acknowledged' and 'intended', while for latent functions the words are 'unacknowledged' and 'unintended'. Since 'acknowledged' and 'intended' do not mean the same, a definition can only contain them both if there is further conceptual clarification or division into further categories. The possible combinations are stated schematically:

18. Aubert, Vilhelm: *Om straffens sosiale funktion*, 1972, page 9.
19. Mathiesen, Thomas: *Retten i Samfunnet*, 1984.
20. Dalberg-Larsen, Jørgen: *Lovene og Livet*, 1994.
21. Dalberg-Larsen, Jørgen: *Lovene og Livet*, 1994.

Possible combinations	Acknowledged	Unacknowledged
Intended	Yes	No
Unintended	Yes	Yes

Further subdivision would probably create more confusion than clarification and would be unlikely to contribute significantly to the socio-legal analysis. Correspondingly there is a risk of conceptual confusion which would be disproportionate to the potential benefits.

Against this background, I have chosen to use a key terminology in my conceptual structure. Since the analyses concentrate on the continued existence of the agents, and since the objective effect is taken account of in the distinction between functions and dysfunctions, it is most appropriate to emphasise what is intended or alternatively not intended by the agents.

This means that manifest functions are the functions which are intended by the agent, while the latent functions are functions which are not intended by the agent. The distinction applies correspondingly to manifest and latent dysfunctions. The intention or lack of intention is reflected first and foremost in the immediate objective effects which are included in the above definition of functions, but could also concern the consequences of the immediate objective effects. By way of illustration, it is conceivable that the making of a rule is an objective effect which is intended by the agent and is a manifest function, while the consequences, for example the weakening of the agent's legitimacy, is unintended and is a latent dysfunction.

With such a formulation of conceptual definitions, the group of manifest functions will be large and the group of manifest dysfunctions small. But there is a particular reason to consider the concept further in relation one aspect, since, with the stated conceptual structure, functions which are intended, but which the agent does *not* officially acknowledge, will be categorised as manifest functions. Under Aubert's[22] scheme these effects will be latent functions, since he assumes that an effect must be officially approved in order to be manifest. Thomas Mathiesen[23] states that it is not always easy to distinguish between intended and unintended effects, among other things because it can be unclear whether the unintended effects really are unintended, or whether they are intended at least by some groups in society. Indeed, in connection with the analysis of political processes associated with combating irregularities and their administrative controls and sanctions, there can be grounds for categorising this group of cases as latent functions. This emphasises the difference between what

22. Aubert, Vilhelm: *Om straffens sosiale funktion*, 1972, page 9.
23. Mathiesen, Thomas: *Retten i Samfunnet*, 1984.

some agents say officially and what they in fact intend, and highlights the fact that some agents may have objectives other than their stated objectives. With a conceptual structure such as this, the following matrix can be set out:

	Intended	Unintended
Increased probability for the agent's continued existence	Manifest function	Latent function
Reduced probability for the agent's continued existence	Manifest dysfunction	Latent dysfunction

The following definitions apply to the concepts used in the socio-legal analysis in this thesis:

Manifest functions:
Objective effects proceeding from an agent, which increase the probability of the agent's continued existence, and which are intended by the agent.

Manifest dysfunctions:
Objective effects proceeding from an agent, which reduce the probability of the agent's continued existence, and which are intended by the agent.

Latent dysfunctions:
Objective effects, proceeding from an agent, which reduce the probability of the agent's continued existence, and which are not intended by the agent.

Latent functions:
Objective effects proceeding from an agent, which increase the probability of the agent's continued existence, and which are not intended by the agent. This group also includes objective effects proceeding from an agent which increase the probability for the agent's continued existence, which are intended by the agent, but which the agent would not officially acknowledge if subjected to a hypothetical question.

With this analytical approach, an agent's significance for the socio-legal processes concerned with the EC's controls and sanctions for combating irregularities can only be understood if account is taken of both manifest and latent functions and dysfunctions. The inclusion of dysfunctions and latent functions means that the observer pays attention to wider questions than merely whether a given purpose is promoted. Furthermore, a functional analysis of this nature can be used to analyse changes in social structure and is not restricted to statistical analysis as with a purely functionalist approach.

In spite of these advantages, it should be noted that the conceptual structure stated above can risk becoming a straight-jacket for the analyses which are made. For example, in practice there is a smooth transition from the manifest to the latent, while the conceptual structure presumes a clear categorisation. This and corresponding limitations for the analysis are countered by using the above stated wide definitions of objective effects and a wide reference as to what is or is not intended.

CHAPTER 4

Method

As stated in the formulation of the problem, this thesis is bi-disciplinary, so it is based on both jurisprudential method and socio-legal method.

4.1. The jurisprudential method

The review of the law applicable to administrative controls and sanctions in EC law is a traditional account of a jurisprudential or legal theoretical nature, in which the generalising and systematising character is predominant, though with some emphasis on the description of the development of the applicable law.

Here, it would be possible to give a more or less comprehensive account of the legal theory and the legal method used. I will refrain from this and merely state that large parts of the legal theory in this thesis consist of an extended example of the use of the legal method which, in its indefinability, consists of the jurists' distinctive common characteristic.

Instead of this, I shall comment on the methodology which more specifically concerns the thesis and which is significant to its interpretation.

As traditionally required in accounts of EC law, the starting point for a consideration of the legal theory is the EC law. This means that an account is given of the legal position derived from EC laws, how they should be understood and how they should be interpreted. The significance of the laws for the various national legal systems and how Member States should relate to EC laws is not taken as the starting point.

The legal basis of EC law sets the agenda for the questions which can and will be dealt with in this thesis. Where there are questions which, seen through the eyes of national laws, are central to criminal law, for example, but which are nevertheless not discussed in this account of EC sanctions, this is because Community law does not give rise to this nor provide a basis for dealing with such questions.

It follows from this approach that the thesis is based on EC sources of law which can be divided into the following four categories (not in order of priority):

The primary sources of EC law are the Union's founding treaties, particularly, in relation to this thesis, the Treaty on the European Community and the general legal principles of the EC. Apart from being at the top of the regulatory hierarchy, these sources are typically broad and imprecise.

The secondary sources of EC law consist of legislation made by the institutions of the Community in accordance with procedures laid down in the treaties. These are first and foremost Regulations and Directives. In contrast to the primary law, secondary laws are often very detailed. These laws occupy a central place in this thesis, since, in the course of time, many administrative controls and sanctions have been created by secondary laws.

The third source of law is legal practice, derived from the decisions of the European Court of Justice. Legal practice occupies a central place in EC law, and it is hardly an exaggeration to say that it is in practice impossible to express a view on applying EC law without taking account of the practice of the Court of Justice. The Community's administrative controls and sanctions are no exception to this.

The fourth and last category of sources of law can be called the residual group, which includes legal literature. As in the case of Danish law, legal writing is also a source of EC law, though of somewhat lesser importance. This is due, among other things, to the fact that the literature is written in different languages and thus has difficulty in achieving the universality of legal writing connected with a single language area. In relation to administrative controls and sanctions in particular, these are issues which have been of only peripheral interest in European legal literature, and which have been left largely untouched in national accounts of corresponding issues. This is one of the reasons why the basis of this thesis is limited to Danish, English and, to a limited extent, French literature.

It follows from the above that, in connection with a legal theoretical account of the EC law on administrative controls and sanctions, there is a substantial challenge in carrying out the necessary pioneer work to turn the uncultivated juridical landscape into a fertile field through collecting, systematising and interpreting the primary law and the myriad of secondary laws without the benefit of significant support from the literature.

4.2. The socio-legal method

The thesis contains socio-legal descriptions and analyses both of the roots of the law and the effects of the law in society. The method which is the basis for this is first and foremost a comprehensive research based on qualitative interviews. To a limited extent this is supplemented by empirical materials, examples and other sociological treatments of the subject.

4.2.1. The interview research

4.2.1.1. Choice of form of interview

The choice of method is conditioned by the formulation of the problem. In the socio-legal treatment of the subject of this thesis, an attempt is made to give a description, analysis and interpretation of the factors which influence the combating of irregularities and the regulation of administrative controls and sanctions.

Since there is no pre-existing comprehensive treatment of this problem, I have created the necessary empirical basis.

Since I have sought to reveal both the manifest and the latent functions and dysfunctions, it has been important to have significant direct contact with the relevant agents in order to provide comprehensive material. The only method which can adequately meet this need is research based on qualitative interviews.

4.2.1.2. Choice of the agents to be interviewed

The requirement for processing the material obtained in research based on qualitative interviews, sets a limit to the number of interviews[24], so that only those agents who are most central to the problem can be chosen.

I have chosen to carry out interviews with representatives of eight agents, which are presented only briefly at this stage, since a more detailed account of their role in the socio-legal processes associated with combating irregularities and the regulation of administrative controls and sanctions is given at a later stage.

The first agent is the European Commission, also referred to as the Commission. The Commission is central to the creation of legislation, not least because of its monopoly of initiating laws.[25] In addition to this, the Commission plays a growing role in the applying and giving effect to adopted laws.

The second agent is the European Parliament, also referred to as the Parliament. Since the establishment of the Community the European Parliament's influence on the decision processes has grown, and today, the Parliament must be regarded as one of the central players in relation to the regulation of administrative controls and sanctions for combating irregularities, not least because of its special role in connection with the budget.

For a long time the European Court of Justice has played an active role in the creation of and understanding of EC laws through their interpretation. The regulation of administrative controls and sanctions is no exception to this; on the contrary, some of the most important legal principles in this area originate from the practice of the Court.

24. Cf. Kvale, Steiner: *Interviews, An Introduction to Qualitative Research Interviewing*, 1996.
25. Art. 192.2 and Art. 208 have not made any fundamental changes to this.

The Court of Auditors is the institution which is charged with seeing that the EC's means are used in accordance with its intentions. This has given the Court of Auditors a significant influence on the regulation of administrative controls and sanctions. In particular, repeated criticisms by the Court of Auditors in annual reports and special reports have given rise to initiatives for administrative controls and sanctions for combating irregularities in general.

The Council is the fifth agent in the interview research, because the Council is the central institution concerned with the adoption of EC laws. There is no EC decision-making process in which laws can be adopted which affect Member States without the involvement of the Council.

Apart from the institutions of the Community there are three further agents included in the interview research. First and foremost, the Member States are included as agents, since they play a significant role in the creation of laws, both in the adoption of laws in the Council, and because the central administrations of the Member States are an important part of a network of committees and sub-committees which the Commission draws on in drafting legislative proposals. Furthermore, the Member States are included in the research because they are key agents in applying the laws.

The media are included as the seventh agent since, through their treatment of EC budget irregularities, they influence both the creation of laws and their application.

Finally, representatives of special interests are included as the eighth and last agent. About these it is merely to noted here that there are a significant number of them present in Brussels and other places where EC laws are made and applied, with the sole purpose of exercising influence on these processes.

In selecting these agents to be interviewed, others are necessarily excluded.

First, the peoples of the Member States are not treated as independent agents. This is connected with the fact that the peoples' influence is indirect, through the election of members of the Parliament, referenda etc. It can however be argued that the people have a role in combating irregularities and relating to controls and sanctions, since there has been a political desire to do something about the poor level of popular support and interest which the EC enjoys,[26] which it has perhaps been assumed could be improved by, among other things, removing the irregularities to which the Community is subject. Ann Sherlock[27] has argued that the irregularities in the EC are too remote from the peoples of

26. To illustrate, the number of voters taking part in elections for the European Parliament is very low in most Member States, and it will be remembered that there were considerable problems in connection with the ratification of the Maastricht Treaty, with dead heats between supporters and opponents in both Denmark and France.
27. Sherlock, Ann; *Controlling Fraud within the European Community*, European Law Review, 1991, Vol. 16 p.21.

the Member States for them to generate the necessary agitation to create the political will to change the situation.

Another group of agents not dealt with is the experts. Only limited use is made of experts in national implementation of the EC's administrative controls and sanctions. Experts do play a role, among other things, by drawing attention to defects in the existing regulations. On this basis, experts were originally intended to be an independent group of agents in the research. However, after pilot interviews, it became clear that the other agents considered the experts to be without influence. For this reason, and to limit the extent of the thesis, I have chosen to omit them from the research.

4.2.1.3. Preparation of the interview research

Before commencing the interview research itself, I carried out pilot research consisting of three interviews. Primarily this gave valuable experience on the practical conduct of the interviews. Furthermore it led to a substantive change in the groups of agents to be included in the research, as the experts were dropped. Finally, the questions in the research were re-worked and the filtering structure of the questions established. Thus, the questions were introduced with an open question about the role of the interviewee in the EC's creation or application of rules, and thereafter the questions became more specific.

In research such as this, the number of people interviewed is not as important as who it is that is interviewed. It was therefore an important part of the preparation to identify the specific individuals who it would give optimal benefit to from the interviews.

Such a selection presumes a detailed knowledge of the EC system as well as the central administrations of the Member States, parliaments and other agents. Since this is knowledge in which I did not, to start with, fully possess, I identified relevant people through the contacts I already had in the EC institutions and Member States, or through people with whom I came into contact with by participating in conferences. In particular, participation in COSAC (Conférence des Commission des Affaires Européenes) has been fruitful. Further, I wrote to the Member States' embassies in Denmark and the Danish embassies in the other Member States. Finally I have made use of lists of participants at conferences, working groups, etc.

Having thus established a comprehensive list of possible interviewees, I wrote or telephoned to the people in question. It was frequently necessary to send reminders, but in the end the overall response was positive. The interviews were undertaken on visits to the various Member States and EC institutions etc.

In principle I arranged for as many interviews as possible in each place, as I wanted to be certain of obtaining interviews with representatives for the relevant agent groups, even though one or more of the interviews might be cancelled at the last moment. This was a desirable precaution, since in fact I

found myself in situations where the interview was cancelled after my arrival at the place of the interview. The main point is that all or nearly all the interviews arranged were carried out, so that I have undertaken 72 interviews, which is many more than is possible to present in detail.[28]

4.2.1.4. Carrying out the interviews

I chose to carry out all the interviews by travelling to visit the interviewees in the various Member States and EC institutions etc. In practice, nearly all interviews were carried out at the interviewee's place of work, though a single interview was done in a private home.

This choice is in accordance with the theory on high level interviews,[29] since the surroundings stimulate recollection of the subject, because, all things being equal, the interviewee is more open in his customary surroundings, and because the power in the interview situation is weighted on the side of the interviewee. It has also been an advantage that the interviewee is interrupted by telephones, colleagues and so on, which has given an opportunity to study the interviewee in action, and plan the further course of the interview.

The principle for the interview itself has been that it should, as far as possible, be like a normal conversation. I have therefore allowed the interviewee to speak, and have not doggedly asked all the questions in all the interviews.[30] For the same reason I did not in advance ask for a set amount of time for the interview, but I believe that the fact that I had travelled some distance for the interview often meant I was given sufficient time. Moreover, the interviewee often became very interested in the questions. In a number of cases more than one person who was interviewed together; especially in the case of interviews in central administrations, two people often came to the interview. In my experience this is an advantage, because the interviewees typically supplement one another, so the basis for interpretation is strengthened, and the dialogue is often more open.

The principle that the interview should be like a normal conversation is also one of the grounds why all interviews should be made using a tape-recorder. A tape-recording gives a most secure basis for subsequent analysis and interpretation and means that I, as interviewer, have been able to concentrate fully on the questions and answers. Only two interviewees refused the use of tape recording. One of these was at the Commission, where it was firmly stated that use of a tape-recorder could not be permitted, due to internal procedures. In an earlier

28. Cf. Kvale, Steiner: *Interviews, An Introduction to Qualitative Research Interviewing*, 1996.
29. See Jensen, Torben K; *Politik i praksis*, Samfundslitteratur, 1993.
30. In addition to this, some of the questions seemed irrelevant in relation to some of the groups of participants.

interview in the Commission this condition had not been referred to, so the earlier interview has been used in this research in its recorded form. The second place where the use of a tape-recorder was refused was in the French central administration; here the requirement was upheld in such a way that I had to write down the answers *in situ*. The only points at which I have consciously set aside the requirement that the interview be like a normal conversation has been where information has been given which appeared highly interesting, where, for example, it was controversial. In these situations I have later sought to return to the matter to obtain confirmation of the information.

As stated, 72 interviews have been carried out, of which 37 are included in the research, and only one of these is not based on a tape-recorded interview. One interview per agent has been used. This applies to the Commission, the European Parliament, the European Court of Justice, the Court of Auditors, the Council, the media the representative for special interests. With regard to the Member States, one interview has been used from the central administration and one from the parliament in each of the 15 Member States. The criteria for the number of qualitative interviews were satisfied by the 37 interviews, since the further interviews did not contain any significant additional information.

The total duration of the tape-recordings of the interviews was about 30 hours.

4.2.1.5. Transcription

I have undertaken the editing and analysis of the interviews with the help of the QSR NUD.IST[31] data programme because of the requirement that the interviews should be written out in full. The transcription has been done by two secretaries, with instructions that everything that was said on the tape should be included, though with pauses, coughs etc. merely noted, not written out.

Furthermore, the transcription has been written in the original language, i.e. in Danish, English, German and Scandinavian. The translation has been done by myself in connection with the subsequent analysis and editing. The reason for this is that it has been important to get the written version as close as possible to what was said for the best possible interpretation and to reduce the risk of mistakes which is inherent in transcription.

4.2.1.6. Method of analysis

As with other choices of methodology, the choice of the method of analysis depends on the formulation of the question in this thesis. First, this means that the method of analysis should concentrate on categorising the answers given in relation to the various agents, so as to establish a basis for drawing a picture of the socio-legal processes surrounding the regulation of administrative controls

31. Non-numerical Unstructured Data Indexing Searching and Theorising.

and sanctions. Secondly, the analytical approach must allow an interpretation of interviewees' answers.

This interpretation is at three levels, though with a smooth transition between them.

The first level is the interviewees' own understanding of what they say. The interpretation is limited to the interviewees' self-understanding.[32] As the interviews are generally interpreted together after categorisation, individual interviews are seldom considered in isolation, so the first level of interpretation is not prominent in this thesis.

The next level is a more general understanding of the content of the interview, which brings in a wider understanding than that of the interviewee himself, so the interview is set in a wider context,[33] in particular by drawing on what other interviewees have said on the same point, but also drawing on other sociological presentations of the subject, empirical evidence etc. to set the results of the interviews in the right context. This level is predominant in connection with the description of the role which the agents play in combating irregularities and the attitude of the agent in question to administrative controls and sanctions.

The final level is the theoretical level, where the paradigm is drawn into the interpretation,[34] and used to establish the manifest and latent functions and dysfunctions. This includes making interpretations which the interviewee might find surprising. This is especially the case with the latent functions and the dysfunctions, since these include matters which are not generally acknowledged, the functions are unintended and their consequences for the continued existence of the agent are often not understood. Thus, these results are often the most significant advances in knowledge and, to the extent they depart from the manifest functions, are often paradoxical.[35] It must, though, be remembered that the latent functions are a theoretical construction which cannot be demonstrated.

4.2.1.7. Validity, reliability and general applicability

The questions of validity, reliability and general applicability are referred to here to give an account of the precautions which have been taken in this thesis to ensure the validity and reliability of the research, and to evaluate how far it is possible to generalise on the basis of these results. No attempt is made to

32. Phenomenological.
33. Critical phenomenological.
34. As for the level of interpretation see Jensen, Torben K: *Politik i Praksis*. 1993.
35. The level of interpretation is also significant for the evaluation of validity, cf. Section 4.2.1.7 below.

make a general theoretical sociological argument for the use of interviews in scientific work.[36]

The question of validity concerns the extent to which the results of the research reflect the socio-legal processes surrounding EC controls and sanctions for combating irregularities in the Community's finances. In other words, whether I have in fact investigated what I wished to investigate and avoided systematic mistakes.

An important aspect of the question of validity is that the interviewee may have a special subjective interest in presenting his own and others' attitudes and actions in a particular way. In view of the analytical approach of the thesis, this may be considered a real risk. In order to combat this tendency, the interviewees have been questioned about the roles and attitudes of other agents. In this way there is a double check, where each agent has described a broader picture, not limited to itself and its role.

Another aspect of the question of validity is whether the research contains an over-representation of interviews with Danes. In addition to the interviews with people in the Danish central administration and parliament, the interviewee representing the Commission and the interviewee representing special interests are also Danes. As for the interview in the Commission, the interviewee was not chosen because the person concerned was a Dane, but because of his special knowledge of and association with combating irregularities and with administrative controls and sanctions. As for the interview with the representative for special interests, this is chosen from among several interviews because the person concerned has the greatest knowledge of the subject. In both these cases they have also had a long association with the EC system, which has tended to diminish the question of nationality. Against this background, I do not believe there is an over-representation of Danes among the interviewees which significantly affects the results of the research.

30 out of the 37 interviews dealt with in the analysis have been undertaken in the Member States, which could give rise to the suspicion that the Member States occupy a disproportionately prominent position in the research results. This view is rejected, first and foremost because I have been aware of this circumstance before working on the interviews, which has had the result I practically always make it clear which agent a quotation originates from.

The most frequent objection to the validity of qualitative interviews is the use of leading questions. I do not believe the questionnaire contains leading questions.[37] However, it can be argued that Question 13 is a leading question because it assumes that administrative controls and sanctions are ineffec-

36. For a more theoretical consideration of this see, Kvale, Steiner: *Interviews, An Introduction to Qualitative Research Interviewing*, 1996, p. 236 *et seq.*

37. The questions are printed in an appendix at the back of the book.

tive/inadequate, but it should be stressed that this question has only been asked when the interviewee has, in response to earlier questions, (particularly Question 12), expressed the view that regulation is ineffective/inadequate. Besides which, as stated above, the interviews were carried out, as far as possible, in the nature of a conversation, in which to a great extent it was the interviewee who decided the progress of the interview. Naturally it cannot be denied that some of the follow-up questions can be thought to be leading. Where this is the case, it is not highly problematic as this research concerns interviews carried out with people at a high level, with interviewees who are unlikely to submit to much manipulation by the interviewer.

The validity of the research is increased by the fact the interviews do not stand alone, but are supplemented by the inclusion of other sociological treatments of the subject, empirical evidence and so on.[38]

Reliability is a matter of avoiding random mistakes, in other words mistakes that are not necessarily repeated. For example, this could be the influence which I, as interviewer, exercise upon the result, whether consciously or unconsciously.

The choice of the 37 interviews to be included out of the 72 carried out can give rise to questions of reliability. The criteria by which interviews are included have been based partly on the linguistic ability of the interviewee and partly on my general impression of the interviewee's knowledge of and interest in the subject. In practice, the latter is difficult to hide in a qualitative research interview. As against this, I have at no point had regard to the substantive opinions which the interviewee has expressed.

In evaluating reliability, it is right to give due consideration to the fact that interpretations are subjective, so that different interpreters can draw differing conclusions from the same interview. This fact has led to the claim that qualitative interviews cannot be considered scientific. The argument for this is based on a requirement for objectivity where one statement can only have one correct and objective meaning, and the interpreter's task is to find that one correct meaning. I cannot support this is a view. Indeed, the analytical basis of this thesis points to the fact that the same circumstances can be interpreted differently, according to whether it is the manifest or latent functions or dysfunctions that are sought. Besides this, it should be remarked that jurists customarily use differing interpretative methods well knowing that each can lead to differing results. Thus, in the sphere of law, including socio-legal matters, it is legitimate to use one of a variety of interpretative methods, so that it is purposeless to

38. It is called criteria validity and covers the situation where other methods/materials lead to the same result.

require unanimity about any given interpretation.[39] Thus, in this thesis it is not possible to present *the* correct interpretation of the interview research. What is important, rather, is that precise and well reasoned arguments should be given for the interpretations, so they can be tested by the reader. This is especially relevant because the descriptions of the latent functions and dysfunctions are sometimes based on wide ranging interpretations. Furthermore, in my view, it is important that the statement of the analytical method makes clear the goals for the categorisation as well as the interpretation so that if a subjective element intrudes, it does so openly and can be evaluated subsequently.

There are various ways of ensuring general applicability in connection with qualitative interviews.[40]

The most common is the statistical validity. The basic requirement for this is that the interviewees should be chosen at random.

There would be an overwhelming risk that the socio-legal part of the thesis would be of little value if the requirement for random selection were met, since we are dealing with research into the processes by which rules are created and applied, and in which there are relatively few agents who have decisive roles, so that random selection could easily lead to an inadequate and irrelevant description. Statistical validation is also excluded, because the choice of the 37 interviews included in the thesis, out of the 72 carried out, was not made at random. Random selection was not used because that would risk the exclusion of valuable interviews and the inclusion of others less valuable. Among other things, it became apparent that some interviewees had such poor knowledge of English that I could not be sufficiently certain that they were able to express themselves accurately, so that to interpret these interviews would be irresponsible. Moreover, some of the interviewees in the Member States had very limited knowledge of the subject. Finally, statistical validation is not used because it should only be used where all the agents are of equal significance, whereas in the present thesis there are different agents with differing importance to different situations.

Thus statistical validation is deliberately rejected in favour of producing the best qualitative information and ensuring the illumination of the subject from the relevant angles. In this thesis analytical validation is used instead of statistical validation, involving a substantive evaluation of the extent to which it is

39. See also Kvale, Steiner: *Interviews, An Introduction to Qualitative Research Interviewing*, 1996, p. 210 *et seq.* and Strauss, Anslem L; *Qualitative Analysis for Social Scientists*, 1987.

40. Cf. Kvale, Steiner: *Interviews, An Introduction to Qualitative Research Interviewing*, 1996, p. 232, as well as Galtung, Johan: *Theory and Methods of Social Research*, 1967.

possible to generalise on the basis of the material available.[41] On the basis of the 37 interviews, an assumption is made that the results found are valid for the behaviour of the agents considered in the relevant socio-legal processes connected with controls and sanctions for combating irregularities in the EC finances. If the interviewee only expressed the attitude of the agent which they represented, it would not be problematical to make a significant generalisation based on the answers. In reality, the interviewees often expressed personal opinions. For example, it is obvious that a single member of the European Parliament can only to a very limited degree express the opinion of the whole Parliament to a given question, and the same applies to members of national parliaments, representatives of the media, and representatives of special interests, and to the other interviewees. The use of analytical validation, together with the fact that the interviewees sometimes express personal opinions, rather than speaking on behalf of the agent, means that it is impossible to make generalisations which can be said to prove the circumstances described or that the analyses and interpretations are correct. Thus a verification is impossible. Against this, it can be said that the descriptions and interpretations given cannot only *not* be falsified by the interviews, but can, on the contrary, find support in them. Additionally, several of the descriptions and analyses are supported by other available writings, which supports the argument that the picture revealed is generally applicable.

Against this background it is my opinion that the socio-legal processes described are, within certain limits, shown to be probable.

4.2.1.8. Ethical questions

All interview research raises ethical questions. In connection with the present thesis, the questions are characterised by the fact that the interviews have been conducted at a high level, and it is possible to work on the basis that the interviewees can look after their own interests to a great extent. Consequently, the obligation to the interviewees to give information both before and after the interview is diminished. Most of the interviewees had received prior notification in which I gave the reasons for requesting an interview, with an accompanying presentation of the project and a supporting letter. Where the interviewees requested it I sent the questions in advance as well as answering any other questions they might have. Following the interviews the interviewees were debriefed.

When the question arose I have told the interviewee that their identity would be kept confidential in connection with publication of the thesis. However, for

41. Cf. Kvale, Steiner: *Interviews, An Introduction to Qualitative Research Interviewing*, 1996 and Kennedy, M M; *Generalizing from single case studies*, Evaluation Quarterly, pp 661 to 678.

the great majority of the interviewees there would, in principle, be nothing to prevent naming them. Nevertheless I have chosen to keep confidential the identity of all those interviewed, and do not feel that publication of the names would contribute to the quality of the thesis. At the same time it is a consideration that all the interviewees have entirely voluntarily contributed to giving me a significant scientific basis for the research, so that I feel under a substantial obligation to show consideration to the interviewees as individuals.

4.2.1.9. Presentation of the results

The results of the interview research are part of an integrated description of administrative controls and sanctions in a social context. In particular, Section 18 of the thesis is virtually exclusively based on the interview research. This section is arranged so that for each of the eight agents there is a description of their function in the socio-legal processes concerned with the administrative controls and sanctions connected with the Community's finances, as well as a description of their attitude to combating irregularities. Thereafter, for each agent there follows an interpretation of their manifest and latent functions and dysfunctions. Both in the descriptions and the interpretations citations from the interviews are widely used. This is to illustrate the conclusions drawn as well as to characterise the basis for the interpretations made.

4.2.2. Statistical material

Section 17 of the thesis, evaluating the extent of irregularities, is largely based on statistical material obtained in the Commission's annual report on the protection of the financial interests as well as the DAS Report of the Court of Auditors.

4.2.3. Examples

Apart from the interview research and the statistical material, a number of examples of irregularities are used in the socio-legal part of the thesis to illustrate the problems caused by irregularities.

CHAPTER 5

Terminology

5.1. Irregularities

The central position of irregularities in this thesis creates a need for their strict definition. It is natural to look for a definition in EC law.

The first time the Community used the term irregularities was in 1989, in the work programme for the Commission.[42] It was some years before a Community definition of irregularities achieved the force of law. It occurred in the mid 1990's in Regulation 1469/95,[43] which concerns irregularities in the area of agriculture. The existing Community definition of irregularities is to be found in Council No 2988/95.[44] This Regulation seeks to establish some general and horizontal rules and terms for use in subsequent rule making in sectoral instruments. Thus, in Article 1.2 it is stated that the Regulation applies to all the Community's costs and revenues.

Since the Community has sought to create a universal definition of irregularities in Article 1.2 of Regulation 2988/95,[45] this is the definition used in this thesis. This means that "irregularities" are "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

42. Doc. DG VI/680/91.
43. Council Regulation (EC) No 1469/95 on measures to be taken with regard to certain beneficiaries of operations financed by the Guarantee Section of the EAGGF, (OJ 1995 L 145/1). Regulation 1469/95 provided that, pending the entry into force of horizontal provisions defining irregularities, the Commission should lay down a definition of irregularities which applies to the Regulation. This occurred in Commission Regulation (EC) No 745/96 laying down detailed rules for the application of Council Regulation (EC) No 1469/95 on measures to be taken with regard to certain beneficiaries of operations financed by the Guarantee Section of the EAGGF, (OJ 1996 L 102/15) in which Art. 1 provides that an 'irregularity' shall mean "any infringement of a provision of Community law ... that is the result of an act or omission by an economic operator which is harmful to or may be harmful to the EAGGF Guarantee Section."
44. Council Regulation (EC, Euratom) No 2988/95 on the protection of the European Communities financial interests (OJ 1995 L 312/1).
45. Council Regulation (EC, Euratom) No 2988/95 on the protection of the European Communities financial interests (OJ 1995 L 312/1).

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."

A key element of the definition is that there shall be an actual " infringement of a provision of Community law", so that a violation of the purpose of a provision will not be sufficient to qualify as an irregularity.

The requirement that the contravention shall be attributable to an economic operator confirms that an infringement can be committed both by natural and legal persons, which is not obvious in all Member States.

In this definition, acting and failing to act are treated equally. Looked at with Danish eyes this must be regarded as extensive, since failures to act are normally thought of as less punishable than actions,[46] but it is stated that "any ... omission" will qualify as an irregularity. However, there is no doubt about the equal status in law of actions and omissions.

There is no requirement that the Community's budget shall have suffered damage in fact; it is sufficient that the budget "would have" suffered damage. This considerably extends the scope of commission of an irregularity so that, for example, an irregularity will exist when incorrect information is given to an authority or when a deadline for giving information is overstepped.[47]

With regard to the financial effect, the definition states a requirement that the Community's revenues are (could be) reduced or lost or that expenses are (could be) unjustifiably paid. It is not material whether the Member States are responsible for collecting revenues or paying expenses, or whether this is undertaken by institutions of the Community. A payment can be incorrect regardless of who makes it, just as a reduction of income occurs or can occur regardless of who should be responsible for its collection. This is important because the Member States are responsible for the administration of the lion's share of the assets of the Community, so the definition of irregularities also applies to this. In extension of this, it should be noted that, according to the Regulation, irregularities can only be committed in relation to the Community's "own resources collected directly on behalf of the Communities", which means that VAT is outside the scope of the definition.[48] This limitation in relation to VAT is not relevant for this thesis.

46. In support of this see Greve, Vagn; *Bedrageri og andre uregelmæssigeheder i Den Europæiske Union*, Kriminalistisk Instituts Årbog, 1994.
47. In support of this see Greve, Vagn; *Bedrageri og andre uregelmæssigeheder i Den Europæiske Union*, Kriminalistisk Instituts Årbog, 1994.
48. Because VAT is collected by the Member States themselves, at their own expense, after which it is forwarded to the EC. See also; Protecting the Community's financial interests – The fight against fraud, Annual Report 1995 (COM/96/0173 Final). See further the original proposal for Art. 1.2 of the regulation.

According to the Regulation, it is a requirement, in relation to expenses, that there is an action or omission that prejudices or could prejudice the budget by the payment of "unjustified" expenses. It cannot be assumed that it is an independent condition in the requirement for irregularity which must be met when a Community provisions is contravened.

5.2. EC/EU

Since the entry into force of the Treaty on European Union on 1st November 1993, there has been some confusion about the terminology with regard to the names of the institutions, treaties etc. In this thesis use is sometimes made of terms which are formally correct and sometimes terms are used which have become so widely used that it is more natural to use them.

This means that as far as the institutions are concerned,[49] the European Commission is also referred to as the Commission, the European Parliament is referred to as the Parliament or EP, the EU Council is called the Council, the Court of Auditors is so called. Finally, the European Court of Justice is called the Court or ECJ. Collectively the institutions are called the institutions or the EC institutions.

With regard to the treaties, the European Community Treaty is called the EC Treaty, or the ECT, or purely and simply the Treaty, while the Treaty on European Union is also called the TEU, the Union Treaty or the EU Treaty.

Since the co-operation which is the subject of this thesis takes place within the first pillar of the EU, the terms EC or the Community are used, with their associated terms of EC law and Community law. Where the terms Union and EU are used, with their associated term of EU law, there is reference to co-operation within all three pillars.

As regards the budget which is subjected to the regulations dealt with in this thesis, it is referred to as the EC budget or the EC's budget. This is regardless of whether it also includes the second and third pillar, since practically all incomes and expenses concern the first pillar, and in particular that part of the first pillar which is the subject of this thesis.

49. Cf. EC Treaty Art. 7.

CHAPTER 6

Administrative controls

The purpose of this section is to describe the law applicable to administrative controls in EC law, as derived from the treaties, from fundamental legal principles and from secondary legislation. Furthermore, there will be an explanation of the development of the regulation of administrative controls.

This part of the thesis is arranged so that Section 7 contains an explanation of how EC law influences the administrative controls which national authorities in the Member States exercise over those subject to their jurisdiction.

Thereafter Section 8 explains the administrative controls which the Community is empowered to exercise over those subject to the jurisdiction of the Member States.

Section 9 deals with the Community's powers to undertake administrative control of national authorities.

Before the conclusion in Section 11, Section 10 describes the regulation of administrative controls between Member States and the scope which Member States have to carry out administrative controls on each other.

The treaty contains no definition of administrative controls. The same is true of secondary legislation. However, there are numerous laws which include a requirement for administrative controls and which include descriptions of the administrative controls that shall be undertaken.[50]

50. Council Directive 92/33/EEC on the marketing of vegetable propagating and planting material. other than seed, (OJ 1992 L 157/1) Art. 5, Art. 10 and Art. 17. For identical provisions see Council Directive 92/34/EEC on the marketing of fruit plant propagating material and fruit plants intended for fruit production (OJ 1993 L 157/10), Council Directive 91/682/EEC on the marketing of ornamental plant propagating material and ornamental plants (OJ 1991 L 376/21). See also Council Directive 92/5/EEC amending and updating Directive 77/99/EEC on health problems affecting intra-Community trade in meat products and amending Directive 64/433/EEC (OJ 1992 L 57/1), Council Directive 92/45/EEC on public health and animal health problems relating to the killing of wild game and the placing on the market of wild-game meat, (OJ 1992 L 268/35) and Council Regulation (EEC) No 2392/86 establishing a Community vineyard register (OJ 1986 L 208/1).

CHAPTER 7

The administrative controls which national authorities in the Member States exercise over those subject to their jurisdiction

Since the establishment of the Community, the administration of EC law has been a matter for Member States. This includes ensuring that regulations are adhered to and that sanctions are applied for failures to comply with the law. To a considerable extent the regulation of administrative controls has been reserved to national authorities.

This allocation of powers is a consequence of the principle of legality contained in Article 7, together with the absence of provisions in the treaty for the authorisation of administrative controls and sanctions. The principle of legality states as follows: "Each institution shall act within the limits of the powers conferred upon it by this Treaty." It follows from this that EC institutions can only act when their actions are positively empowered by the Treaty, and that the institutions may not act in conflict with written or unwritten EC law.[51]

The administration of EC law by Member States obliges them to ensure that provisions are correctly enforced. The allocation of power thus involves an obligation on national authorities to exercise administrative control. This was explicitly established by the Court in the leading cases 146, 192 and 193/81,[52] in which it stated that it is the general view, which is the basis for the allocation of powers, that "the machinery for intervention is operated by the national intervention agencies which are, accordingly, responsible for performing all the functions of supervisions needed . ... in its present state, Community law contains no specific provisions relating to the exercise of supervision by the competent national authorities. The only requirement which must be laid down in that regard from the point of view of the Community is that the national authorities are to act with the same degree of care as they exercise in implementing their national legislation, so as to prevent any erosion of the effectiveness of

51. Cf. *EF-ret* by Claus Gulmann and Karsten Hagel-Sørensen, 1988 p. 40. The principle of legality applies equally to the way in which the EU institutions carry out their administrative duties and the way in which its laws are adopted.
52. BayWa AG and others v Bundesanstalt für landwirtschaftliche Marktordnung. Joined cases 146, 192 and 193/81, [1982] ECR 1503.

Community law." The Court has confirmed the principle of this argument in several later cases. Thus, in the leading cases 205-215/82,[53] the Court stated in its judgment that "in so far as Community law, including its general principles, does not include common principles, [on applying Community provisions], the national authorities, when implementing Community regulations act in accordance with the procedural and substantive rules of their own national law." The Court added to this that the application of national law may not limit the extent and effect of Community law, and may not lead to different treatment. This was repeated *verbatim* in case C-290/91.[54]

The allocation of powers between the Community and the Member States was most recently confirmed in the important general and horizontal Regulation on the protection of the European Community's financial interests,[55] which states, under the heading of 'General Principles' that "Subject to the Community law applicable, the procedures for the application of Community checks, measures and penalties shall be governed by laws of the Member States". Thus the starting point is that national authorities shall supervise compliance with Community regulations, and this shall be carried out under the relevant national laws. The fact that the Commission is directly engaged in administrative controls in the area of agriculture, and fisheries policy, that OLAF plays an increasingly active role, and that the Court of Auditors also has a voice, does not change the basic structure of the allocation of powers.

Even though the presumption is that administrative competence lies with the Member States, this certainly does not mean they have unrestricted freedom. As has been indicated in the judgments cited, Community law reserves the right to review the exercise of the powers. This right has been exercised to a considerable degree. This applies both to the Treaty and to the fundamental legal principles, not least through the EC Court's interpretation of them. Furthermore, the Member States' freedom of action is limited by a myriad of secondary EC legislation.

7.1. The regulation of administrative controls in the EC Treaty and in the fundamental legal principles

Both the EC Treaty and the fundamental legal principles of the Community are relevant to the Member States' administrative controls over compliance with and sanctions for the breach of EC law.

53. Deutsche Milchkontor GmbH and others v Federal Republic of Germany. Joined cases 205 to 215/82, [1983] ECR 2633.
54. Johannes Peter v Hauptzollamt Regensburg, Case C-290/91, [1993] ECR I-2981.
55. Council Regulation (EC, Euratom) No 2988/95 on the protection of the European Communities financial interests (OJ 1995 L 312/1).

The argument that lies behind the binding character on the Member States of the fundamental legal principles is that, when implementing Community law, Member States act as instruments of the legal order of the Community, and are consequently under a duty to abide by its general principles.[56]

The fundamental legal principles are developed through the case law of the EC Court. As a basis for its legal thinking the Court has drawn on the constitutional traditions of the Member States and of international conventions. Thus, already by the beginning of the 1970's the Court stated in Case 4/73[57] that "fundamental rights are an integral part of the general principles of the law the observance of which the Court ensures. In safeguarding these rights the Court is bound to draw inspiration from the constitutional traditions common to the Member States and cannot uphold measures which are incompatible with the fundamental rights established and guaranteed by the constitutions of these states". Further, in the same case the Court declared "international treaties for the protection of human rights, on which the Member States have collaborated or of which they are signatories, can supply the guidelines which should be followed within the framework of Community law". In the later Case 44/79[58] the Court went a step further, in making a detailed investigation of the constitutional laws of the Member States in order to establish the extent of the Community's protection of basic rights. The Court has also explicitly referred to the European Convention on Human Rights, as a source of its thinking.[59]

56. Cf. the Advocate-General in Anklagemyndigheden v Hansen & Søn I/S, Case C-326/88, [1990] ECR I-2911.
57. Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities, Case 4-73, [1974] ECR 0491.
58. Liselotte Hauer v Land Rheinland-Pfalz, Case 44/79, [1979] ECR 3727.
59. It follows from the opinion of the European Court in Case 2/94 on 28 March 1996, [1996] ECR I-1759, that the Community would not as such be able to accede to the European Convention for the Protection of Human Rights. The EC is not bound by the Convention and the Community's institutions cannot be brought before the European Court of Human Rights, and thus need not follow the decisions of the court. However, the importance of human rights to the EU is emphasised in the EU Treaty which, in the preamble, confirms the "attachment [of the Member States] to the principles of liberty, democracy and respect for human rights ...." The requirement of respect for human rights is taken up in the Treaty of Amsterdam, Art. 6.1 which states "The Union is founded on the principles of liberty, democracy, respect for human rights, and the rule of law, principles which are common to the Member States." Moreover, Art. 6.2 of the Amsterdam Treaty repeats Art. F.2 of the Maastricht Treaty which stated that "The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms ..., and as they result from the constitutional traditions common to the Member States, as general principles of Community law." The Amsterdam Treaty increases the importance attached to human rights, in comparison with Art. F of the Maastricht Treaty. Further, Art. 7 of the Amsterdam Treaty allows the EU to impose sanctions on Member States which infringe the terms of Art. 6.1 by suspending certain rights deriving from the application of the Treaty to the Member State in question. The

Among more recent judgments which confirm the importance of the fundamental legal principles, reference can be made to Case C-326/88,[60] in which the Advocate General undertook a review of whether objective criminal responsibility is contrary to the constitutional traditions which are common to the Member States or to the European Convention on Human Rights, and concluded it was not. The EC Court will examine whether national legislation to implement EC legislation complies with the general legal principles of Community law as can be demonstrated by reference to a number of recent cases, in particular Case 5/88.[61]

As it appears from the above, the general legal principles are derived neither from the primary nor the secondary Community law, but from an independent source of law. This raises the question of the placing of the fundamental legal principles in the normative hierarchy of Community law. There is no doubt that the fundamental legal principles rank above secondary Community law, as has been well documented by the testing of the legality of secondary legislation against the fundamental legal principles. Whether the fundamental legal principles rank higher than primary Community law cannot be answered unambiguously for all the fundamental legal principles taken together, but must depend on an evaluation of the significance of the individual legal principles for administrative controls and sanctions.

Member States' administrative control of compliance with EC laws and sanctions when irregularities occur must be subject to the fundamental legal principles of EC law.

7.1.1. The principle of loyalty

The principle of loyalty, as stated in Article 10 of the Treaty has been of fundamental importance for the development of the legal status of administrative controls and sanctions in EC law.

The provision is formulated as both a positive and a negative duty. The positive duty is stated as follows: "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".

EC Treaty does not contain a list of human rights or administrative principles. But the Treaty contains several provisions which have a human rights character, e.g. Art.6, Art. 40.3 and Art. 119. See also Rasmussen, Hjalte, *EU-ret i kontekst*, 2nd edition, 1995, and Lars Adam Rehof, *Unionsborgerskab, Unions menneskeretsforpligtelse, fremmedret samt udviklingspolitik*, Juristen 1992 p.208.

60. Anklagemyndigheden v Hansen & Søn I/S. Case C-326/88. [1990] ECR I-2911.
61. Hubert Wachauf v Bundesamt für Ernährung und Forstwirtschaft, Case 5/88, [1989] ECR 2609. Meryem Demirel v Stadt Schwäbisch Gmünd, Case 12/86, [1987] ECR 3719, reason 28 to the contrary.

The negative duty is stated as follows: Member States "shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty". The positive duty, in particular, has been used as a lever for regulating administrative controls and especially sanctions.

However, the text of the provision cannot stand alone. Through its interpretation the Court has defined the duties and made them operational. In the collective Cases 205-215/82[62] it was laid down that Article 10 constitutes an obligation on Member States to carry out certain administrative controls to ensure compliance with Community measures. The Court interpreted Article 10 as containing a requirement that "Member States must verify by means of appropriate controls that ... Community aids are not paid in respect of products for which they ought not to be granted."

In the later Case 68/88[63], Greece was judged not to have fulfilled its duties under Article 10, by not having taken all appropriate steps to ensure the effectiveness of Community law. The Court stated that national authorities must be as attentive to infringements of Community laws as to infringements of their corresponding national laws. Advocate General Tesauro said in his submission, that, "particularly in an area as delicate as that of establishing own resources and combating fraud detrimental to the Community budget, the obligation to cooperate laid down in Article 10 of the EEC Treaty ... is one which must be strictly complied with by the Member States in order to ensure that the Community may dispose of its own resources in the best possible conditions".

If the institution of administrative controls is necessary to ensure the correct use of Community funds, Member States are under a clear obligation to do so under Article 10.

However, the extent of the administrative controls required remains largely a matter for the discretion of the Member States. In the collective Cases 205-215/82[64] referred to above, the Court said "It is for the national court to determine the controls necessary for this purpose, having regard in particular to the circumstances of the case and the techniques available at the time." However, the duty can be stated more specifically as including a requirement of non-discrimination since Member States' administrative controls must reflect the

62. Deutsche Milchkontor GmbH and others v Federal Republic of Germany, joined cases 205 to 215/82, [1983] ECR 2633.
63. Commission of the European Communities v Hellenic Republic, Case 68/88, [1989] ECR 2965.
64. Deutsche Milchkontor GmbH and others v Federal Republic of Germany, joined cases 205 to 215/82, [1983] ECR 2633.

equivalent rigour with regard to irregularities against the EC's budget as is shown with regard to the Member States' own finances, cf. Case 68/88.[65]

Article 10 is thus of great importance for national administrative controls in matters where secondary legislation is silent.

Article 10 is also relevant in cases where secondary legislation *does* contain provisions for administrative controls. This follows from the words of the Article that "Member States shall take all appropriate measures ... to ensure fulfilment of ... action(s) taken by the institutions of the Community". In Case C-8/88,[66] the question was whether Germany had lost its right to a refund by the Community for certain expenses, because its administrative controls had been insufficient. The relevant Regulation stated that there should be administrative controls, but did not give specific details for them, other than that there should be administrative controls supplemented by on the spot controls. Nevertheless, the Court found that "viewed in the light of the obligation of faithful co-operation with the Commission laid down in Article 10 of the Treaty ... Member States are required to set up comprehensive administrative checks and on-the-spot inspections guaranteeing the proper observance of the substantive and formal conditions for the grant of the premiums in question". The requirement that there should be a 'system' of administrative controls was not based on provisions in the secondary legislation. In general, Article 10 seems to increase the requirements for administrative controls.

There is thus a reciprocity between Article 10 and any administrative controls provided for in secondary legislation, since the administrative controls in the legislation will add to the obligations under Article 10, and Article 10 will add to the requirements for administrative controls in secondary legislation, or will at the very least mean that they must be interpreted widely.

When Article 10 refers to the Member States as being subject to an obligation, this applies to their judicial powers as well as to their executive and legislative powers, cf. for example Case 14/83,[67] in which the EC Court states that the "duty under Article 10 of the Treaty ... is binding on all the authorities of the Member States including, for matters within their jurisdiction, the courts."

65. Commission of the European Communities v Hellenic Republic, Case 68/88, [1989] ECR 2965. See also Firma Wilhelm Fromme v Bundesanstalt für landwirtschaftliche Marktordnung, Case 54/81, [1982] ECR 1449; in this judgment it was held that in their actions to recover Community moneys that have been wrongly paid, the national authorities of Member States shall show the same assiduity as when seeking recovery of national moneys.
66. Federal Republic of Germany v Commission of the European Communities, Case C-8/88, [1990] ECR I-2321.
67. Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen, Case 14/83, [1984] ECR 1891.

Contrary to what one might suppose from its wording, Article 10 does not only impose obligations on the Member States. Article 10 is interpreted as imposing reciprocal obligations of loyal co-operation between the Member States and the institutions of the Community. This means that the institutions of the Community are required to assist the Member States in connection with their administrative controls. In Case C-2/88[68] the national authorities in The Netherlands had identified an infringement of Community provisions on fishing quotas and, in the resulting criminal prosecution the Dutch court requested the delivery of the results of inspection reports which EC officials had made on the facts of the case, as well as requesting the possibility of calling the EC officials as witnesses. The Commission refused the request, whereupon the question was put before the EC Court. After confirming the duty of loyal co-operation under Article 10, the Court stated "It is incumbent upon every Community institution to give its active assistance to such national legal proceedings, by producing documents to the national court and authorising its officials to give evidence in the national proceedings". However the Court made an exception to this duty, saying that it did not apply if there were "imperative reasons relating to the need to safeguard the interests of the Communities which justify [the Commission's] refusal of authorisation". Referring to this exception, the Commission claimed in the following Case C-2/88,[69] that it was not required to deliver the documents nor to allow its officials to act as witnesses in the case in question. The Court rejected this. The exception is limited and applies only if the relevant Community institution shows that its co-operation would lead to a real risk to the functioning of the Community. In the case in question the Commission had argued that the exception should be made because delivery of the documents or allowing EC officials to appear as witnesses would conflict with the allocation of powers, under which the Commission controls the national authorities, while the national authorities control those who are subject to the jurisdiction of the Member States. The Court rejected this argument on the grounds that the national court had only requested the information to enable it to carry out its powers under national law.

Therefore, the practice of the EC Court supports the view that Article 10 should be interpreted so that national authorities, when exercising their administrative control of compliance with EC law, can demand the active assistance of the Community, including, among other things, the delivery up of materials. It follows directly from the way the Court's judgment is expressed that this obligation already existed in relation to the investigation of cases, in other words prior to the case in question. There is reason to believe that when a

68. J. J. Zwartveld and others (Zwartveld I), Case C-2/88 Imm., [1990] ECR I-3365.
69. J. J. Zwartveld and others (Zwartveld I), Case C-2/88 Imm., [1990] ECR I-3365.

provision imposes an obligation on EC institutions in their area of responsibility, it is the converse of the obligations to which the Member States are subject.

7.1.2. The principle of assimilation

With the entry into force of the Treaty on European Union, the fight against irregularities in the form of fraud received a new and stronger basis in the form of Article 280.

Article 280.2 states: " Member States shall take the same measures to counter fraud affecting the financial interests of the Community as they take to counter fraud affecting their own financial interests." The principle of law expressed here is called the principle of assimilation,[70] since there is a similarity between fraud against the Community and fraud against a Member State.

The mere fact that the Community takes note of the problem of irregularities at Treaty level is of significance, but from a legal point of view it is naturally of the highest importance that Member States are required to deal with fraud affecting the Community's financial interests in a manner similar to their treatment of fraud affecting their own financial interests.

Even if the concept of the first part of Article 280.2 is new,[71] this does not mean the provision is without a history. It was argued by the Commission[72] that this is a formulation of the principle of non-discrimination which was laid down by the Court in Case 68/88.[73] In that case the EC Court defined the meaning of Article 5, and stated that it followed from it that "Member States ... must ensure in particular that infringements of Community law are penalised under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance." A corresponding statement is found in Case C-326/88.[74]

While there is little doubt that Article 280.2 has its origin in the practice of the Court, nevertheless the principle of assimilation contained in the Treaty and the principle of non-discrimination developed in the practice of the Court are far from the same. It is probably more correct to say that the two principles overlap and supplement one another.

In support of this it can, in particular, be pointed out that Article 280.2 requires Member States to "take the same measures", while the practice of the

70. With regard to the nomenclature of the principle, see the report; Protection of the Community's Financial Interests – Synthesis Document, Brussels, 13th November 1995, COM/95/556 Final.
71. The provision was included in the EC Treaty, Maastricht Treaty Art. 209a.1.
72. See the Commission's Annual Report on Protecting the Community's Financial Interests – The Fight Against Fraud – Annual Report, COM/96/0173 Final.
73. Commission of the European Communities v Hellenic Republic, Case 68/88, [1989] ECR 2965. For further details about this judgment, see Section 13.1.1.
74. Anklagemyndigheden v Hansen & Søn I/S, Case C-326/88, [1990] ECR I-2911.

Court only requires that penalties shall be "analogous to those applicable to infringements of national law of a similar nature and importance." The Treaty provision is thus more specific since it requires precise equivalence.

Moreover, Article 280.2 has a considerably broader area of application than the principle of non-discrimination laid down by the EC Court. The principle of assimilation is not limited to dealing only with penalties for infringements, but rather applies to all "measures to counter fraud". In addition to administrative and criminal penalties, this applies equally to the administrative controls undertaken, investigations, provision of resources for countering fraud, administrative organisation, prosecution of cases of fraud, collection of amounts due, including the possibilities for settlement, periods of limitation, in general, all the elements which are relevant for countering fraud. Thus, under the principle of assimilation, Member States cannot meet their obligations merely by stating that penalties shall be applied without distinction between fraud against the Member State and fraud against the Community.

When one considers its otherwise broad applicability, it is surprising that, according to its wording, Article 280.2 is limited to dealing with "fraud" and not a broader concept such as, for example, "irregularities" or the term used in the practice of the Court, "infringements of Community law". This cannot be explained by the fact that the terminology concerning irregularities was first laid down in 1995-96, while the provision was adopted in 1992 in the Maastricht Treaty; on the one hand the formulation of Article 280.2 was maintained in the Amsterdam Treaty, and on the other, the important horizontal Regulation 2988/95,[75] which is godfather to the concept of irregularities, talks of irregularities in parallel with fraud. Thus, in the preamble to the Regulation it states "whereas the effectiveness of the combating of fraud against the Communities' financial interests calls for a common set of legal rules to be enacted for all areas covered by Community policies; whereas irregular conduct, and the administrative measures and penalties relating thereto, are provided for in sectoral rules in accordance with this Regulation; whereas the aforementioned conduct includes fraudulent actions as defined in the Convention on the protection of the European Communities financial interests." So the Community has a concept both of fraud and of irregularity, and it is the first of these which is referred to in Article 280.2. Since Article 280.2 does not itself contain a definition of fraud, and as a definition is not otherwise contained in the Treaty, it is natural, apart from anything else on the basis of the reference in Regulation

75. Council Regulation (EC, Euratom) No 2988/95 on the protection of the European Communities financial interests (OJ 1995 L 312/1).

2988/97,[76] to assume that the concept of fraud in Article 280.2 should be understood in accordance with the concept in the Convention on the protection of the European Community's financial interests.[77] Member States will be able to meet their obligations under the requirement for assimilation in Article 280.2 if, in their legal and administrative procedures, they deal with fraud against the financial interests of the Community on the same basis as fraud against its own financial interests.

There is reason to believe that the Member States will give a wider scope to equivalent treatment than merely applying it to fraud; on the one hand there is a tendency in national law for irregularities connected with Community financial interests to be dealt with on the same lines as irregularities against national financial interests, and on the other hand the great majority of the EC's payments are channelled through national budgets and are thus covered by the protection which applies to them.[78]

In summary, it can be said that Article 280.2 contains what can be called a concrete provision for subsidiarity, since the provision makes a requirement for

76. Council Regulation (EC, Euratom) No 2988/95 on the protection of the European Communities financial interests (OJ 1995 L 312/1). This is directly referred to in the preamble to Council Regulation (Euratom, EC) No 2185/96 concerning on-the-spot checks and inspections carried out by the Commission in order to protect the European Communities' financial interests against fraud and other irregularities.
77. The Convention on the protection of the European Communities' financial interests (COM 94/214 Final), drafted on the basis of Art. K in the Treaty on European Union and implemented by Council Act of 26 July 1995 drawing up the Convention on the protection of the European Communities' financial interests (OJ 1995 C 316/48) contains the following definitions of fraud in Art.1:
"Fraud against the Communities' financial interests' means any act or omission contrary to Community law committed either intentionally or through gross negligence in respect of a duty of care, which has as its object or effect:
- a diminution of the Communities' own resources or other revenue, or
- the misappropriation, wrongful retention or misapplication of monies paid by the Communities.

Fraud against the Communities' financial interests shall apply both to revenue and expenditure provided for by the general budget and to all other revenue and expenditure managed by or on behalf of a Community institution.
Fraud against the Communities' financial interests includes the following acts:
- the preparation, supply, use or presentation of false, incorrect or incomplete documents or statements where information is to be furnished prior to the grant of a subsidy or the receipt of monies,
- failure to furnish information to the relevant authorities in relation to any change in the circumstances giving rise to the grant of a subsidy or the receipt of monies,
- misappropriation or dissipation of funds,
- knowingly using aid or subsidies obtained on the basis of incorrect or incomplete statements or other misleading acts."
78. Cf. Protection of the Community's Financial Interests – Synthesis Document, Brussels, 13th November 1995, COM/95/556 Final.

assimilation which depends entirely on the legal order in the Member States, but not a qualitative requirement as to what there shall be similarity to.

Following the inclusion of Article 209a (the forerunner of Article 280.2) in the Maastricht Treaty there has been some doubt about the extent to which it can be an authority for secondary legislation, possibly in conjunction with other provisions. The doubt can clearly be seen in connection with the adoption of Regulation 2988/97.[79] In its original proposal the Commission referred to Article 235[80] as the basis of authority for the Regulation. The European Parliament's Committee on Budgetary Control gave its views on the proposal, and suggested that the legal basis for it should be amended to be Articles 43, 100a and 209a. The Commission based its choice of authority on the grounds that the aim of the proposed Regulation was to establish a horizontal Regulation for the general administration of the Community's assets, and, on this basis, it rejected the Parliament's suggestion for the legal authority. The Commission argued that Article 209a imposes a duty on Member States, but does not give any authority for proposing Regulations.[81] The representatives of the Member States in the Council had no objection to the Commission's choice of legal authority, and for this reason the Regulation was based on Article 235.[82] The Parliament's wish to change the basis of authority was probably not the result of deep thought and legal argument, but was presumably connected with the fact that in this way the Parliament's influence would have been changed from a right to give an opinion, under Article 235, to the co-decision procedure under Article 189b.[83]

Vervaele[84] has criticised the Commission's attitude, which he considers is legally debatable and a wasted opportunity to structure the harmonisation by pushing through EC law via Article 100a combined with Article 209a. On the other hand, he acknowledges that with the clear use of Article 235[85] it can in future be argued that the Treaty does not contain any other authority for such legislation.

In my opinion, on the basis of the wording of the then Article 209a, it could be argued that use of this provision as a legal authority for secondary legislation

79. Council Regulation (EC, Euratom) No 2988/95 on the protection of the European Communities financial interests (OJ 1995 L 312/1).
80. Renumbered Art. 308 in the Amsterdam Treaty.
81. See the preamble to Council Regulation (EC, Euratom) No 2988/95 on the protection of the European Communities financial interests (OJ 1995 L 312/1), and the notice of 10th May 1995 from the Northern group of foreign ministers on the Commission's proposal for a Council Regulation on the protection of the Community's financial interests., j.no. 400. D. 9-0-0.
82. Renumbered Art. 308 in the Amsterdam Treaty.
83. Renumbered Art. 308 and Art. 251 respectively in the Amsterdam Treaty.
84. Vervaele, J.A.E: *Law Enforcement in Community law within the First and Third Pillar: Do They Stand Alone?* 1996.
85. Renumbered Art. 308 in the Amsterdam Treaty.

was already excluded, apart from anything else, because it does not include any indication of the procedure to be used for adopting legislation, including whether a simple majority, a qualified majority or unanimity is required.

With the entry into force of the Amsterdam Treaty on 1st May 1999, Article 280.4 introduced the authority to adopt laws for combating fraud by secondary legislation. By using the co-decision procedure (Article 251) and after consulting the Court of Auditors, the Council can adopt "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."

7.1.3. The principle of proportionality

The principle of proportionality is written into the EU Treaty in Article 5, third paragraph. This is a codification of the principle of proportionality which has been developed in legal practice, and which, even before its inclusion in the Treaty, had a place in the normative hierarchy governing the Community's secondary legislation.[86]

This means that the considerable body of precedent dealing with the principle of proportionality can be used to interpret the Treaty's provision, and it also means that there is no difference between the principle of proportionality in the first pillar of the Community and the Treaty provision.

The Community law principle of proportionality consists of two elements; the requirements for appropriateness and necessity.[87] The requirement for appropriateness means that the actions taken under Community regulations

86. Cf. Rasmussen, Hjalte, *EU-ret i kontekst*, 2nd edition, 1995.
87. Cf. Steiner, Josephine; *Textbook on EC Law*, 4th edition, 1998. Michael Hansen Jensen: *Proportionalitetsprincippet i EF-retlig belysning*. GAD, 1990, has suggested a third requirement for the principle of proportionality, namely relating to degree, by which means that measures should be commensurate as to their objectives. However, he acknowledges that when the requirement as to degree is applied in relation to the choice of measure under Community law, this is merely another way of expressing the requirement of necessity. In his view the independent value of the requirement as to degree lies in the execution of such measures as may already have been chosen. This is particularly the case when there are quantifiable values as for example, taxes, length of periods of limitation etc. In the present connection it is not important to separate the question of degree as an independent requirement, as long as it is borne in mind in connection with the requirement of necessity that there is a need to strike a balance between the interests of regulation and the burdens imposed on those subject to the law. In support of the third requirement Michael Hansen Jensen refers to the following cases: Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel, Case 11-70, [1970] ECR 1125, Hauptzollamt Hamburg-Jonas v Plange Kraftfutterwerke GmbH & Co, Case 288/85, [1987] ECR 0611, and Fromançais SA v Fonds d' orientation et de régularisation des marchés agricoles (FORMA), Case 66/82, [1983] ECR 0395.

must be appropriate to achieve their objectives.[88] This does not mean that the objectives shall be achieved fully, merely that the measures shall, to some extent, be suitable for promoting the objectives. The second requirement is that that the actions shall be necessary to achieve the objectives. This means that it should not be possible to achieve the objectives by using equally appropriate but less invasive measures.[89] One aspect of this is that there should be restraint in the use of the strictest measures, so that supporting measures should be used in preference to legislation, mutual recognition rather than harmonisation, framework directives rather than detailed rules, etc.[90]

As the requirements indicate, an evaluation of proportionality is made by comparing the objective of a given Community provision with the actions chosen to achieve that objective, and by judging whether the measures are appropriate and necessary for achieving that objective. The same approach should be used when evaluating whether a given control complies with the principle of proportionality. This means that on the one hand those subject to the law are protected from control measures which are too wide in relation to their objectives, and on the other hand, as long as these conditions are met, those subject to the law must accept the administrative controls.[91]

It is important to emphasise that the principle of proportionality is not merely binding on the Community's institutions. Member States are also subject to the principle of proportionality in making regulations and in carrying out their administrative controls. This is especially apparent in connection with freedom of movement. In Case 203/80,[92] the question was whether Italian rules on the export of foreign currency were contrary to the Treaty. The Court rejected this, but at the same time held that by the principle of proportionality "Community law also sets certain limits ... as regards the control measures which it permits the Member States to maintain in connection with the free movement of goods and persons. Administrative measures or penalties must not go beyond what is

88. For example see Denkavit Nederland BV v Hoofdproduktschap voor Akkerbouwprodukten, Case 15/83, [1984] ECR 2171, reason 25, Office belge de l' économie et de l'agriculture (OBEA) v SA Nicolas Corman et fils, Case 125/83, [1985] ECR 3039 and Fromançais SA v Fonds d'orientation et de régularisation des marchés agricoles (FORMA), Case 66/82, [1983] ECR 0395.
89. In this connection it is also relevant to refer to the same judgment above on the requirement for appropriateness, and to the very illuminating case The Queen v H. M. Commissioners of Customs and Excise, ex parte: The National Dried Fruit Trade Association, Case 77/86, [1988] ECR 0757.
90. The Bulletin of the European Communities, 1992, No. 10 pp117 and 118.
91. See the opinion of Advocate-General Dutheillet de Lamothe in Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel, Case 11-70, [1970] ECR 1125 and Balkan-Import-Export GmbH v Hauptzollamt Berlin-Packhof, Case 5-73, [1973] ECR 1091.
92. Criminal proceedings against Guerrino Casati, Case 203/80, 1981 [ECR] 2595.

strictly necessary, control procedures must not be conceived in such a way as to restrict the freedom required by the Treaty, and they must not be accompanied by a penalty which is so disproportionate to the gravity of the infringement that it becomes an obstacle to the exercise of that freedom." In Case 406/85[93] the question was whether a Member State could introduce special arrangements for approving vehicles imported from another Member State where they had already been approved, with a view to ensuring that the imported vehicles in fact conformed to the required standard. The Court held, implicitly, that, for such control procedures to comply with the requirement for freedom of movement, they must respect the principle of proportionality.[94] The legality of actions by Member States which restrict free movement is dependant on their respecting the principle of proportionality.

7.1.4. The principle of subsidiarity

The principle of subsidiarity which was established in the Union Treaty,[95] is found in EC Treaty Article 5 second paragraph, which states as follows: "In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community".

It follows from this provision that in matters where the Community has exclusive competence, the principle of subsidiarity has no significance. However, the Treaty neither sets out the areas in which the Community has exclusive competence, nor gives a definition of the concept. This uncertainty has led

93. Procureur de la République v Daniel Gofette and Alfred Gilliard, Case 406/85, [1987] ECR 2525.
94. As regards Member States' capacity to undertake control measures in connection with the free movement of goods, see for example Leonce Cayrol v Giovanni Rivoira & Figli, Case 52-77, [1977] ECR 2261, and Procureur de la République v Michelangelo Rivoira and others, Case 179/78, [1979] ECR 1147, Jean Noël Royer, Case 48-75, [1976] ECR 0497 and Regina v Stanislaus Pieck, Case 157/79, [1980] ECR 2171.
95. Maastricht Treaty Art. G.5 compared with EU Treaty Art. B and F. Earlier ideas about subsidiarity are included in the Single European Act Art. 130r.4 in connection with environmental policy. For a more comprehensive historical review of the generation of the principle of subsidiarity see Cass, Deborah Z; *The word that saves Maastricht? The principle of subsidiarity and the division of powers within the European Community.* Common Market Law Review, 1992, No. 29 pp. 1107-1136. In the legal literature there are considerable differences of interpretation as to what the principle of subsidiarity consists of, see Kersbergen, Kees van and Verbeek, Bertjan; *The Politics of Subsidiarity in the European Union*, Journal of Common Market Studies, Vol. 32 No. 2, June 1994.

the Commission[96] to interpret the provisions in a way that minimises the principle of subsidiarity in relation to administrative control of compliance with Community law. Thus, it is the Commissions view that the principle is not significant for controlling compliance with Community law in areas where Community finances are involved. The Commission uses this interpretation in support of its budgetary obligations. Outside the area of Community finances, where the role of subsidiarity is acknowledged, administrative controls should, in the opinion of the Commission, only be transferred to the Member States where there are appropriate national systems for administrative controls.

Such a radical limitation of the scope of application of the principle of subsidiarity in relation to administrative controls does not appear to be supported by Article 5, and to declare that the Commission has exclusive competence in all matters which involve Community finances is way beyond any reasonable interpretation of the provision, and not supported by legal practice. On the contrary, it can be argued that administrative controls do not occupy a special position in relation to the principle of subsidiarity.

The areas in which the Community has exclusive competence must be identified by analysing existing legal practice. The current legal position seems to be based on the general approach that exclusive competence is related to the four basic freedoms and the establishment and working of the internal market. In precise terms, the Court has, in a number of cases,[97] laid down that the Community has exclusive competence in relation to the removal of barriers to the free movement for goods, persons, services and capital, the common trade policy, competition rules, the common agricultural policy, fisheries and the main elements of transport policy. The fact that the Community has exclusive competence in a particular area does not mean that the whole area, in its widest context, is subject to that exclusive competence. For example, the Community has exclusive competence over the Common Agricultural Policy, but not for agriculture as a whole. Correspondingly, not all measures relating to the functioning of the internal market are subject to exclusive competence. The above list of areas which are under the Community's exclusive competence is thus indica-

96. Cf. the Commission's notice to the Council and European Parliament on the principle of proximity, adopted by the Commission, 27th October 1992. Referred to in The Bulletin of the European Communities, 1992, No. 10, p.117.

97. Cf. Carmine Antonio Russo v Azienda di Stato per gli interventi sul mercato agricolo (AIMA), Case 60-75, [1976] ECR 0045, Commission of the European Communities v Federal Republic of Germany, Case 48/85, [1986] ECR 2549, Association comité économique agricole régional fruits et légumes de Bretagne v A. Le Campion, Case 218/85, [1986] ECR 3513, Commission of the European Communities v Kingdom of Belgium, Case 255/86, [1988] ECR 0693 and Rederij L. De Boer en Zn. BV v Produktschap voor Vis en Visprodukten, Case 207/84, [1985] ECR 3203.

tive, but is not necessarily applicable in each case.[98] The area of exclusive competence is, like so much else in Community law, determined by practice rather than by mathematical precision. Therefore, in questions of administrative control there will be areas which are covered by the Community's exclusive competence, and there will be significant areas which lie outside it, and where subsidiarity is important.

Where the Community has exclusive competence, the Court has established that this involves two factors. First, the Community may remove from Member States their power to act unilaterally.[99] But this does not mean that Member States may no longer legislate on matters which are subject to the exclusive competence of the Community, cf. Case 48/85,[100] where the Court laid down that a Member State only has competence if the matter is not regulated by a common trade provision, or if it has been granted regulatory competence. The other element of exclusive competence is that the Community has a duty to act, since the Community alone has the responsibility for carrying out certain tasks. The duty to act can follow directly from the Treaty, as for example Article 40, which requires the Community to "develop" a common agricultural policy. But it does not follow that the Community has exclusive competence just because it has been given a duty to act. For example, Article 2 of the EU Treaty states that there shall be the creation of an area without internal frontiers, through the strengthening of economic and social cohesion and through the establishment of economic and monetary union, without it being possible to say, for the time being, that the Community has exclusive competence on these important matters.

98. In support of this see the Commission's notice to the Council and European Parliament on the principle of proximity, adopted by the Commission, 27th October 1992. Referred to in The Bulletin of the European Communities, 1992, No. 10, pp. 114 *et seq.*

99. Cf. Carmine Antonio Russo v Azienda di Stato per gli interventi sul mercato agricolo (AIMA), Case 60-75, [1976] ECR 0045. In this case it was held that, for the sectors covered by a common commercial policy, Member States are prevented from making unilateral regulations which contain unnecessary repetition of Community regulations. In the case Rederij L. De Boer en Zn. BV v Produktschap voor Vis en Visprodukten, Case 207/84, [1985] ECR 3203, the Court held as an example that the common fisheries policy removed from Member States the powers to decide how fish should be prepared and traded, so that the Netherlands could not require that fish should be sold in a particular way. The case Association comité économique agricole régional fruits et légumes de Bretagne v A. Le Campion, Case 218/85, [1986] ECR 3513, opened up the possibility that national legislation could be declared invalid because the area is exhaustively regulated or because the rules interfere in the proper operation of the common commercial policy. And in the case Commission of the European Communities v Kingdom of Belgium, Case 255/86, [1988] ECR 0693, national rules were declared invalid solely on the basis of the exhaustiveness of Community regulation in the area of fruit and vegetables.

100. Commission of the European Communities v Federal Republic of Germany, Case 48/85, [1986] ECR 2549.

Outside the areas of the Community's exclusive competence, understanding the significance for national administrative controls of the principle of subsidiarity takes its starting point in the wording of the Treaty that: "the Community shall take action ... only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore ... be better achieved by the Community."

This wording creates the assumption that national regulation will be used in cases where either national or Community regulation could be chosen. Where a measure does not clearly belong either at Community level or at national level, the use of Community regulation depends on the circumstance that the intended action could not be adequately carried out by national regulation, and even then Community regulation is only permitted to the extent necessary to achieve the objective. This assessment should be made from case to case, so it is not possible to make a general assumption that any particular area is better regulated at Community level.[101]

This could give rise to the assumption that the regulation of administrative controls ought, as far as possible, to be reserved to national authorities. K Hagel-Sørensen[102] thus asks the question "whether it is possible to reconcile the principle of proximity with the fact that the EC Court increasingly sets standards for national administrations and national criminal laws." Against this can be argued that, if the principle of subsidiarity were to mean that the EC should not be so exacting with regard to compliance with its provisions, this would be destructive for the legal community which characterises the EC.[103] Perhaps such a consideration influenced the European Council when it pointed out that the Treaty lays duties upon the Community institutions with regard to implementing and enforcing Community law, as well as protecting the Community's means, and that these duties are not affected by the principle of subsidiarity. In particular, the principle of subsidiarity does not diminish the requirement that Community measures shall contain suitable provisions to enable the Commission and Member States to ensure that Community law is correctly enforced and to fulfil their obligations with regard to Community finances.[104] With this declaration there can be no doubt that the principle of subsidiarity cannot be used to shift responsibilities laid down in the Treaty, including the Commission's responsibility for the budget. As for administrative controls relating to the EC's financial interests, it can hardly be argued that the principle of subsidiarity means that regulating and carrying out administrative controls (and

101. In agreement with this see Rasmussen, Hjalte, *EU-ret i kontekst*, 2nd edition, 1995.
102. Cf. the article; *EF-retten og nærhedsprincippet*, Lov og Ret 1992. No. 10, p.13.
103. Cf. Christen Boye Jacobsen, *Subsidiaritetsbegrebet i EF-retten*, UfR 1992. B. 341.
104. Cf. Part A of the conclusions of the Presidency of the European Council, Edinburgh, 11th and 12th December 1992. For the value of this as a source of law see the discussion on this in Rasmussen, Hjalte, *EU-ret i kontekst*, 2nd edition, 1995.

applying penalties) should be a national matter to a greater extent than before. However it must be said that the Community has in fact lived up to it obligations under the Treaty, and much the greater part of administrative control regulation has been national, a practice which is now fixed in the treaty-based principle of subsidiarity. An example of the significance of the subsidiarity principle for administrative controls can be found in Regulation 2988/95,[105] where, in Article 8 it is stated that future regulation of administrative controls by the Community shall "take account of existing administrative practices and structures in Member States" .

With regard to implementing administrative controls, it has been pointed out that this is necessarily largely a national matter, since the Community neither has now, nor has the prospect of having, sufficient resources to exercise proper administrative controls of the use of its finances.

7.1.5. The principle of equality

The Community's basic Treaty does not contain any general provision on equality. But there are a number of provisions in the Treaty which prohibit particular forms of discrimination: Article 12 prohibits discrimination on the grounds of nationality; Article 141 prohibits discrimination on the grounds of sex; and within the immediate scope of this thesis, Article 34.2 prohibits discrimination between producers or consumers in connection with the common agricultural policy.

Besides these particular provisions, the EC Court has established that a general principle of equality exists. Thus, in several cases the Court has stated that the prohibition of discrimination in Article 34.2 is a concrete expression of the general principle of equality, which is one of the fundamental principles of Community law.[106]

Accordance to the principle of equality, situations which are of the same nature must be treated in the same way[107] and different situations may not be

105. Council Regulation (EC, Euratom) No 2988/95 on the protection of the European Communities financial interests (OJ 1995 L 312/1).

106. See the leading cases: Albert Ruckdeschel & Co. et Hansa-Lagerhaus Ströh & Co. Contre Hauptzollamt Hamburg-St. Annen ; Diamalt AG v Hauptzollamt Itzehoe, joined cases 117-76 and 16-77, [1977] ECR 1753, SA Moulins & Huileries de Pont-à-Mousson and Société coopérative Providence agricole de la Champagne v Office national interprofessionnel des céréales, joined cases 124-76 and 20-77, [1977] ECR 1795, Koninklijke Scholten-Honig NV and De Verenigde Zetmeelbedrijven "De Bijenkorf" BV v Hoof-dproduktschap voor Akkerbouwprodukten, Case 125/77, [1978] ECR 1991, and Royal Scholten-Honig (Holdings) Limited v Intervention Board for Agricultural Produce; Tunnel Refineries Limited v Intervention Board for Agricultural Produce, joined cases 103 and 145/77, [1978] ECR 2037.

107. Société des fonderies de Pont-à-Mousson v High Authority of the European Coal and Steel Community, Case 14-59, [1959] ECR 0445.

treated in the same way,[108] unless there are objective reasons for this.[109] The general principle of equality is thus an all embracing requirement for equal treatment, wider than merely prohibitions of particular kinds of discrimination. This can be illustrated, for example, in Case 21/74,[110] in which the Court found that the prohibition of discrimination in Article 141 did not apply, but used instead the general principle of equality. Corresponding references can be made to connected Cases 103 and 145/77,[111] which concerned Article 34.2, and the general principle of equality in agriculture. An example of the independent status of the principle is the fact that in relation to discrimination between producers and consumers, the principle of equality will apply, even in circumstances not covered by Article 34.2.

The principle of equality is binding on the Member States in their regulation and administration of controls. At the same time they are bound by the particular prohibitions against discrimination; for example in the connected Cases 201 and 202/85[112] and in Case 312/85,[113] it was laid down that Member States are subject to the provisions of Article 34.2 in their administration of the common agricultural policy.

7.1.6. Procedural principles

The EC Court has created a number of procedural principles which bind the Member States as well as Community institutions. Thus the Member States are required to use these principles when applying Community provisions in parallel with their national procedural principles. These concern, for example, the requirement for a statement of reasons,[114] and the possibility for challenging an administrative decision[115] and public policy.[116]

108. Italian Republic v Commission of the European Economic Community, Case 13-63, [1963] ECR 0337.
109. Mannesmann AG v High Authority of the European Coal and Steel Community, Case 19/61, [1962] ECR 0675.
110. Jeanne Airola v Commission of the European Communities, Case 21-74, [1975] ECR 0221.
111. Royal Scholten-Honig (Holdings) Limited v Intervention Board for Agricultural Produce; Tunnel Refineries Limited v Intervention Board for Agricultural Produce, joined cases 103 and 145/77, [1978] ECR 2037.
112. Marthe Klensch and others v Secrétaire d' État à l'Agriculture et à la Viticulture, joined cases 201 and 202/85, [1986] ECR 3477
113. SpA Villa Banfi v Regione Toscana and others, Case 312/85, [1986] ECR 4039.
114. Union nationale des entraîneurs et cadres techniques professionnels du football (Unectef) v Georges Heylens and others, Case 222/86, [1987] ECR 4097. In extension of this it should be noted that the requirement for justification is a consequence of the directives and not in fact a procedural principle created by the Court, and is often supplemented with a duty for the administration to provide advice on appeals.
115. Unectef v Georges Heylens and others, Case 222/86, [1987] ECR 4097.
116. Adriaan de Peijper, Managing Director of Centrafarm BV, (Centrafarm III), Case 104-75, [1976] ECR 0613.

In connection with Member States' administrative controls, the principle of the right to a defence should be emphasised; in accordance with this, Member States are obliged to hear those subject to a law, before a decision is taken. In Case 17/74[117] the Court stated that there is a duty to hold a hearing if a person's interests are substantially affected by an administrative decision, and in the later Case 85/76[118] it was laid down that there is a duty to hold a hearing in all cases in which penalties can be imposed. In direct relation to administrative controls, in Cases 46/87 and 227/87[119] the Court held that "the rights of the defence must be observed in administrative procedures which may lead to the imposition of penalties. But it is also necessary to prevent those rights from being irremediably impaired during preliminary inquiry procedures including, in particular, investigations which may be decisive in providing evidence of the unlawful nature of conduct engaged in by undertakings for which they may be liable". In this case the question was whether the Commission rather than the Member States had set aside the right to a defence in connection with an infringement of competition law, but the statement of the Court, taken together with judge-made procedural principles and consideration for the rule of law, meant that the right to a defence is binding on Member States so that parties must be heard in connection with applying administrative controls. This undoubtedly applies in cases which can lead to the imposition of penalties, and clearly in other cases concerning administrative decisions of a certain consequence. Finally, it should be remarked that judge-made procedural principles are of limited significance in Denmark, not least because of the Law of Administration.

7.2. Regulation of administrative controls in secondary legislation

The authority for regulating administrative controls is usually found in the same treaty provisions which are the basis for the substantive regulation which those administrative controls refer to. This has meant that, particularly in the section of the Treaty dealing with agriculture, Articles 36 and 37, have been the authority for regulating administrative controls, but among others, Articles 149, 150, 161, 162, 209 and 279 have also been used. Gradually, as administrative controls have assumed a greater independence, this structure has ceased to be

117. Transocean Marine Paint Association v Commission of the European Communities, Case 17-74, [1974] ECR 1063.
118. Hoffmann-La Roche & Co. AG v Commission of the European Communities, Case 85/76, [1979] ECR 0461.
119. Hoechst AG v Commission of the European Communities, joined cases 46/87 and 227/88, [1989] ECR 2859.

tenable, so Article 308 has been used as a supplementary[120] and independent authorising provision for regulations. The two most important examples of this type are Regulation 2988/95[121] and Regulation 2185/96.[122]

The Community has acknowledged[123] that the aim of regulating national administrative controls through secondary legislation has two purposes; first there is a desire to ensure a uniform and effective application of regulations, and second, there is a desire to prevent and to reveal irregularities. Administrative controls are thus not only a central element in the fight against irregularities connected with EC finances, they are also ascribed direct significance for the realisation of the vision of the inner market.

7.2.1. The form of regulation

The regulation of administrative controls and sanctions in secondary legislation predominantly takes the form of Council Regulations or implementing provisions in Commission Regulations and, to a limited extent, Directives.

Occasionally regulations for administrative controls appear in a the form of, e.g., Codes of Conduct or Internal Guidelines. The title is not so important, but it is characteristic that such rules are issued by the Commission, that they do not refer to any authority, that they are not signed by any member of the Commission, and that they are published in Section C of the Official Journal. Such a procedure is used because the administrative controls in Regulations and Directives are often imprecisely formulated so there is a need for a politically neutral clarification of an already existing regulation. In this connection, it is an advantage for the Commission to issue such rules, since it can avoid the sometimes long drawn out decision-making process of the Community. However, the problem is that if the administrative controls in question are given a wider scope than can be derived from pre-existing legislation, this constitutes a circumvention of the decision-making process on which the Community is built.

120. See for example Council Regulation (EEC) No 1468/81 on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs or agricultural matters (OJ 1981 L 144/1).
121. Council Regulation (EC, Euratom) No 2988/95 on the protection of the European Communities financial interests (OJ 1995 L 312/1).
122. Council Regulation (Euratom, EC) No 2185/96 concerning on-the-spot checks and inspections carried out by the Commission in order to protect the European Communities' financial interests against fraud and other irregularities (OJ 1996 L 292/2).
123. See for example Art.8.3 in the important horizontal Council Regulation (EC, Euratom) No 2988/95 on the protection of the European Communities financial interests (OJ 1995 L 312/1).

The essence of this problem is laid out in Case C-366/88.[124] The case concerned Article 9 of Regulation 729/70.[125] According to this provision, in the area of agriculture Member States are required to make information available to the Commission and, upon the request of the Commission, to undertake administrative controls. Furthermore, officers from the Commission are entitled to undertake administrative controls on the spot. Finally, Article 9.3 provides that "The Council, acting by a qualified majority on a proposal from the Commission, shall, as far as is necessary, lay down general rules for the application of this Article". By reference to the Regulation, and in particular to its Article 9, the Commission issued an 'internal service instruction' regulating the extent of the powers of the Commission's officials to undertake administrative controls by taking samples. After a close examination of the internal instruction, and a comparison between it and the provisions of the Regulation, the Court concluded that "the contested measure does not confine itself to making more explicit the rules laid down in Article 9 of Regulation No 729/70 but adds to the text of that provision by empowering the Commission to take samples, independently of the Member States, and by laying down detailed arrangements for its action in that regard." Thereafter, the Court referred to the fact that, according to Article 9, it is the Council which is empowered to issue the rules in question rather than the Commission, and the Court annulled the instruction. According to this judgment, the Commission can issue internal service instructions as long as these are limited to clarifying existing regulations, whereas instructions which lie outside the scope of existing regulations require particular authority.

In another case the Court considered the validity of another special set of rules in the form of a Code of Conduct. In the area of Structural Funds, the Community had adopted Regulation 4253/88,[126] in which in Article 23.1 there is the following provision: "In order to guarantee successful completion of operations carried out by public or private promoters, Member States shall take the necessary measures:

- to verify on a regular basis that operations financed by the Community have been properly carried out,
- to prevent and to take action against irregularities,
- to recover any amounts lost as a result of an irregularity or negligence. ...

124. French Republic v Commission of the European Communities, Case C-366/88, [1990] ECR I-3571.
125. Regulation (EEC) No 729/70 of the Council on the financing of the common agricultural policy (OJ 1970 L 094/13).
126. Council Regulation (EEC) No 4253/88, laying down provisions for implementing Regulation (EEC) No 2052/88 as regards coordination of the activities of the different Structural Funds between themselves and with the operations of the European Investment Bank and the other existing financial instruments (OJ 1988 L 374/1).

Member States shall inform the Commission of the measures taken for those purposes and, in particular, of the progress of administrative and judicial proceedings"

Less than two years after the entry into force of the Regulation, the Commission issued a "Code of conduct on the implementing provisions for Article 23(1) of Council Regulation (EEC) No 4253/88 relating to irregularities, and the organization of an information system for irregularities."[127] In a memorandum to the Member States the Commission stated that compliance with Article 23.1 of Regulation 4253/88[128] presupposed absolute compliance with the provisions in the Code, which, in the opinion of the Commission, was a description of the obligations under the Regulation. With regard to the legal character of the Code of Conduct, the Commission argued that it was in the nature of 'directions for use' or a 'gentlemen's agreement' which did not intend to give rise to new binding legal obligations. France and Belgium did not share this view, so these countries brought a case against the Commission for the annulment of the Code of Conduct, claiming that it was in reality a Regulation which the Commission was not empowered to issue. This led to Case C-303/90,[129] in which the Court concluded that "by imposing on Member States specific obligations concerning the content of the information to be provided to the Commission and the frequency and means of communicating it, the Code goes beyond what is provided for by Article 23(1) of Regulation No 4253/88." As the Commission did not have power to adopt laws with the content in question under other authority, the Court annulled the Code of Conduct.[130]

The two judgments are in line with each other and confirm that the Commission can issue rules which clarify an obligation which already exists under a

127. (OJ 1990 C 200/3).

128. Council Regulation (EEC) No 4253/88 of, laying down provisions for implementing Regulation (EEC) No 2052/88 as regards coordination of the activities of the different Structural Funds between themselves and with the operations of the European Investment Bank and the other existing financial instruments (OJ 1988 L 374/1).

129. French Republic v Commission of the European Communities, Case C-303/9, [1991] ECR I-5315.

130. It should be noted that the regulations which were repealed with the cancellation of the code of conduct have since been re-introduced in Commission Regulation (EC) No 1681/94 concerning irregularities and the recovery of sums wrongly paid in connection with the financing of the structural policies and the organization of an information system in this field (OJ 1994 L 178/43).

This Commission Regulation is made under the authority of Art. 23.1.4 of the subsequently adopted Council Regulation (EEC) No 4253/88, laying down provisions for implementing Regulation (EEC) No 2052/88 as regards coordination of the activities of the different Structural Funds between themselves and with the operations of the European Investment Bank and the other existing financial instruments (OJ 1988 L 374/1).

related regulation, but it cannot lay down additional rules for applying laws[131] or otherwise change the law in any way. Whether the Commission is within its powers or exceeds them, depends on the evaluation of the case in question.[132]

Apart from Regulations and Directives and the special rules dealt with above, the Commission also makes regulations for administrative controls in agreement with non-member states.

This is due to the fact that a significant proportion of the irregularities connected with the EC budget involves non-member states. The most obvious is the avoidance of payment of import duties to the Community and irregularities in connection with export restrictions.[133] Combating such cross-border irregularities requires the involvement of and co-operation with non-member states, which takes the form of agreements under international law between the Community on the one hand and the relevant non-member state on the other. Thus, numerous agreements have been entered into with non-member states.[134] The contents of such agreements vary from what are virtually Customs Unions, involving trade and economic co-operation, to agreements of more limited scope. Dealing with irregularities is not the prime purpose of these agreements, but is a limited part of them, often expressed as a protocol on mutual assistance in connection with the agreement. The substantive contents of the agreements is not the subject of this thesis, but what is significant is that the possibility is thus opened for officials from the Commission and Member States in question to have access to undertake control inspections in non-member states, in co-operation with the local authorities. This is a facility which is widely used.[135]

131. See reason No. 15 in French Republic v Commission of the European Communities, Case C-303/90, [1991] ECR I-5315.
132. The two cases under review concern rules with the different categorisations of 'internal instructions' and 'code of conduct'. Under Art. 230 of the Treaty the Court of Justice shall only review the legality of "acts". However, it is the established practice of the Court that its procedure to review legality can be used in relation to any provision adopted by any of the Community institutions, which is intended to give rise to legal consequences, regardless of their character or form. See Commission of the European Communities v Council of the European Communities, Case 22-70, [1971] ECR 0263. This view of which legislative provisions can be reviewed under the powers of Art. 230 of the Treaty is confirmed in both the cases referred to, which repeat the formulation word for word.
133. In this connection refer to Section 17.1.3 below.
134. Among others, agreements have been entered into with Bulgaria, the countries of the Andean Pact, Central America, Romania, the Baltic States, San Marino, Andorra, Hungary, Slovakia, The Czech Republic, Poland, Argentina, Uruguay, Tunisia, Morocco, Israel, Slovenia, Armenia, Azerbajdian, and Georgia.
135. See the Commission's Annual Report on Protecting the Community's Financial Interests – The Fight Against Fraud – Annual Report for 1993.

In Council Regulation No 2185/96,[136] Article 8.5 provides that when the Commission undertakes on the spot checks outside the area of the Community, the Commission inspectors shall prepare reports on their administrative controls in such a way that these can be valid evidence in administrative or legal proceedings in the Member State where they may be required. The obligations of this provision are upon the Commission, and there are no corresponding obligations on Member States to accept such reports in proceedings where they could be relevant.

7.2.2. The content of regulations for administrative controls

In describing, analysing or interpreting the content of administrative controls in secondary legislation, it would be desirable if, on the basis of the different sectoral regulations, it were possible to deduce some uniform principles for administrative controls, or if it were possible to point to regulations which were applicable to the whole of EC law, or at least had a horizontal application covering various areas and sectors.

The Community has itself pointed to the desirability of establishing uniform principles for administrative controls under EC law. Thus in 1988 the Commission set up a working group with representatives from several Directorates General, the Commission's legal service and UCLAF, which was asked, among other things, to develop a co-ordinated system with a view to establishing a systematic approach to administrative controls and sanctions. The Community argued[137] in favour of uniform principles for administrative controls as follows "in order to adapt the administration and control mechanisms to the new situation and improve their effectiveness and usefulness, it is necessary to set up a new integrated administration and control system covering the aid schemes for arable crops, beef and veal, sheepmeat and goatmeat, as well as specific measures for farming in mountain, hill and certain less-favoured areas; whereas provision should be made for the possibility of including, at a later date, other aid schemes linked to the cultivated area." As is clear, it is the view that the establishment of cross-sectoral regulatory administrative controls which would cover both agriculture and structural funds, would lead to a more effective and economic administrative controls. Other things being equal, this would also be the case if horizontally applicable principles for administrative controls were established or derived from existing administrative controls of compliance with

136. Council Regulation (Euratom, EC) No 2185/96 concerning on-the-spot checks and inspections carried out by the Commission in order to protect the European Communities' financial interests against fraud and other irregularities (OJ 1996 L 292/2).

137. Cf. the preamble to Council Regulation (EEC) No 3508/92 establishing an integrated administration and control system for certain Community aid schemes (OJ 1992 L 355/1).

EC regulations. Additionally, this would benefit the rule of law, since uniform principles would give to those who are subject to the law a more certain idea of what laws they should expect to be subject to and what administrative controls they must accept.

However, a review of existing regulations and their development shows that the Community's regulation of administrative controls have been very varied, beginning with a few vague regulations as appendices to other regulations for a narrow area, and developing from the early 1980's onwards, apparently without any plan, including, for example, administrative controls which cover several agricultural programmes, EC finances consisting of billions, and legislation which is wholly or largely concerned with administrative controls.

Even though there have been tendencies towards a well-considered horizontal regulation, the impression still remains, particularly with the adoption of Regulation 2988/95,[138] that a conscious decision has been made to make administrative controls sector-dependant. Thus, in Article 8.2 of the Regulation it states that "Measures providing for checks shall be appropriate to the specific nature of each sector and in proportion to the objectives to be pursued. ... The nature and frequency of the checks and the inspections to be carried out by the Member States and the procedure for performing them shall be determined as necessary by sectoral rules". The same Regulation contains a comprehensive horizontal regulation of administrative controls, which underlines the conscious political choice to keep administrative controls sector-oriented.

The fact that in this thesis Regulation 2988/95[139] is ascribed such significance is due in part to the fact that it is a framework measure with the intention that it should lay down the guidelines for future regulation, and in part to the fact that the Regulation has a horizontal approach to the question of combating irregularities, though not to administrative controls. The horizontal application of the Regulation means that all the Community's expenses and its traditional sources of income are covered by it, with only VAT excluded;[140] in other words Structural Funds, agricultural subsidies, collection of duties etc. are covered by the Regulation. Even given the obvious opportunity, with this Regulation, to establish general rules for administrative controls, the Community nevertheless

138. Council Regulation (EC, Euratom) No 2988/95 on the protection of the European Communities financial interests (OJ 1995 L 312/1).
139. Council Regulation (EC, Euratom) No 2988/95 on the protection of the European Communities financial interests (OJ 1995 L 312/1).
140. See Art.1.2 of the regulation and the Commission's Annual Report on Protecting the Community's Financial Interests – The Fight Against Fraud – Annual Report for 1995 COM/96/0173 Final. See a possibly alternative approach in the Commission's original proposal to the Regulation Proposal for Council of European Union Act establishing a Convention for the protection of the Communities' financial interests, Art. 1.2 COM/94/0214 Final (OJ 1994 C 216/14)

chose to make administrative controls sector-dependant. However, it should be noted that the Regulation does contain a few general principles for administrative controls.

As the Community has chosen to make administrative controls sector-dependant, this means that in practice the application of the law depends on the interpretation of the provisions for controls for each individual sector. Nevertheless, it is possible, in the following, to identify some general characteristics and trends for administrative controls.

7.2.2.1. The duty to control

Even though secondary legislation has long contained administrative controls, it is only since the mid 1980's[141] that an attempt has been made to establish the duty of Member States to control that Community laws are complied with.

This duty was confirmed with the adoption of the significant horizontal and general framework Regulation 2988/95.[142] In the preamble it states that "Community law imposes on the Commission and the Member States an obligation to check that Community budget resources are used for their intended purposes." In Article 8.1, in the section dealing with administrative controls, it provides that "In accordance with their national laws and administrative provisions, the Member States shall take the measures necessary to ensure the regularity and reality of transactions involving the Communities' financial interests". Member States are thus under a duty to ensure that transactions neither infringe nor circumvent Community rules. The duty is indeed framed within national laws, but it follows from Article 2.1 that the administrative controls shall be exercised to the extent necessary to ensure the correct application of Community law. Controls shall be effective, proportionate and have a sufficient deterrent effect to ensure the necessary protection of the European Communities' financial interest. Thus it now follows from secondary legislation that there is an duty on Member States to ensure that Community rules are complied with.

The more detailed content of the duty depends on the relevant secondary legislation, but the practice of the EC Court gives grounds for assuming that the regulations should not be narrowly interpreted. Thus the duty of the Member States, under Regulation 729/70[143] to "prevent and prosecute irregularities" was

141. The working group, previously referred to, which the Commission set up in 1988, pointed out, among other things, that Member States should be obliged to undertake thorough investigations in connection with subsidies.
142. Council Regulation (EC, Euratom) No 2988/95 on the protection of the European Communities financial interests (OJ 1995 L 312/1).
143. Regulation (EEC) No 729/70 of the Council on the financing of the common agricultural policy (OJ 1970 L 094/13).

interpreted in the leading Cases 205-215/82[144] as including a duty that "the competent national authorities are bound to exercise all the supervision necessary to ensure that aids are granted only upon the conditions laid down by the Community regulations." The judgment gives grounds for believing that even very vague wording about national administrative controls implies a duty of control, and that this applies regardless of whether the words 'administrative controls' are in fact used.

7.2.2.2. What should be controlled

The regulation of national administrative controls in secondary EC legislation began, as referred to above, in a sporadic and not particularly extensive way, in connection with substantive regulation. Among other things this meant that the regulation of administrative controls usually left it to Member States to decide what criteria should be used to decide which natural or legal persons should be controlled. However, the Community began to be increasingly interested in these questions from the end of the 1980's.

As previously stated, in 1988 the Commission set up a working group with representatives from several Directorates General, the Commission's legal service and UCLAF, which was asked, among other things, to develop a co-ordinated system with a view to establishing a systematic approach to administrative controls and sanctions. The group proposed a number of general principles, including that, depending on the actual area concerned, administrative controls should be based on five principles. One principle was that what is to be controlled should be clearly specified, with a detailed description of where administrative controls should be applied in the relevant regulatory area. In practice this took place with the introduction of risk analysis.

Risk analysis is understood as an attempt to identify risks and to determine the level of risk, as the basis for deciding who shall be controlled.[145] The idea of risk analysis is that controls should be applied and with appropriate intensity at the place and/or time where there is the greatest risk of irregularities. Risk analysis is thus not in itself an administrative control.

A good early example of the introduction of the requirement for risk analysis is to be found in Regulation 4045/89,[146] which deals with obligations of Member States to exercise administrative controls in the area of agriculture. Among other things the Regulation is characterised by detailed provisions as to how

144. Deutsche Milchkontor GmbH and others v Federal Republic of Germany, joined cases 205 to 215/82, [1983] ECR 2633.

145. See also Commission Regulation (EC) No 3122/94 laying down criteria for risk analysis as regards agricultural products receiving refunds (OJ 1994 L 330/31).

146. Council Directive 77/435/EEC on scrutiny by Member States of transactions forming part of the system of financing by the Guarantee Section of the European Agricultural Guidance and Guarantee Fund (OJ 1977 L 172/17).

frequently various recipients of subsidies and those liable to make payments should be controlled within a control period of 1 year. The basic principle is that the greater the involvement of EC money, the more frequent the administrative controls. However, despite this principle, the Regulation does not apply to smaller businesses, where deciding the frequency of administrative controls is left to Member States. For larger businesses, where income or expenses or the sum of both under the arrangements for financing under EAGGF is over 60,000 ECU, Member States shall ensure that at least half of them shall be controlled each year. For each individual business whose sum of income and expenses exceeds 200,000 ECU, there shall be a control at least every other year. In general it is stated in Article 2 of the Regulation that, in choosing which businesses to control, Member States shall seek to ensure that the measures for preventing and disclosing irregularities should be as effective as possible, and that in making the choice they should "have regard to the financial importance of the business .... and other risk factors." The use of risk analysis was thus introduced in the law, though given only limited significance. At the end of 1994 the Regulation was revised[147] and the principle of risk analysis extended. Thus Article 2 is supplemented with the following "In relation to each current scrutiny period, commencing with the 1995/96 scrutiny period, Member States shall ... select the undertakings to be scrutinized on the basis of risk analysis in the export refunds sector". Within the limits of the different amounts, risk analysis has thus become a central tool in the selection of businesses for administrative control. If Member States do not believe risk analysis should be used, control is obligatory for businesses whose income or expenses or the sum of both under the arrangements for financing under EAGGF guarantee is over 300,000 ECU if the business has not been controlled in either of the two preceding control periods. Not only is risk analysis hereby made a central criteria for the choice of businesses to be controlled, but for the largest businesses, use of risk analysis alone can be substituted by obligatory administrative controls. However, the developments from 1989 to 1994 did not end with the changes to Article 2 referred to. The earlier Article 3 in Regulation 4045/89[148] stated: "The accuracy of primary data under scrutiny shall be verified in appropriate cases

147. Council Regulation (EC) No 3094/94 amending Regulation (EEC) No 4045/89 on scrutiny by Member States of transactions forming part of the system of financing by the Guarantee Section of the European Agricultural Guidance and Guarantee Fund (OJ 1994 L 328/1).
148. Council Regulation (EEC) No 4045/89 on scrutiny by Member States of transactions forming part of the system of financing by the Guarantee Section of the European Agricultural Guidance and Guarantee Fund and repealing Directive 77/435/EEC (OJ 1989 L 388/18).

by an adequate number of cross-checks". In Regulation 3094/94[149] the provision had this addition "appropriate to the degree of risk presented" with the further inclusion of a new subsection 3 to Article 3: "In the selection of transactions to be checked, full account shall be taken of the degree of risk presented." Thus, not only is risk analysis made central to administrative controls themselves, but the choice of which data shall be cross-checked, possibly with physical checks, shall be made on the basis of risk analysis.[150]

149. Council Regulation (EC) No 3094/94 amending Regulation (EEC) No 4045/89 on scrutiny by Member States of transactions forming part of the system of financing by the Guarantee Section of the European Agricultural Guidance and Guarantee Fund (OJ 1994 L 328/1).

150. Another example of the increasing use made of risk analysis in the fight against irregularities is found in Council Regulation (EEC) No 386/90 on the monitoring carried out at the time of export of agricultural products receiving refunds or other amounts (OJ 1990 L 42/6). As regards the physical checks which are dealt with in this regulation, it is provided that the checks shall be made by means of taking samples, and that they shall be frequent and made without prior notice. This is supplemented by a more concrete provision that checks should in any case cover at least 5% of all applications for export refunds or other amounts to be paid in connection with exports. The 5% requirement shall not only be met within each calendar year, but also within each customs area and each product sector (for a definition of a customs area and a product sector see Art.3 and 4 in Commission Regulation (EC) No 2221/95 laying down detailed rules for the application of Council Regulation (EEC) No 386/90 as regards physical checks carried out at the time of export of agricultural products qualifying for refunds (OJ 1995 L 224/13) which puts some considerable restrictions on Member States' freedom to organise their own controls. Several Member States have criticised this situation and pointed out that the strict requirement for 5% has a negative effect on the customs authorities' other control tasks, since the national budgets do not allow for the possibility of increasing customs staff, see the Report on the application of Regulation (EEC) No 386/90 on the monitoring carried out at the time of export of agricultural products receiving refunds or other amounts, COM/93/13Final. In extension of this, reference was made to the suitability of controls based on risk analysis. In 1994 this led to a note that the rate of 5% per product sector could be substituted with a rate of 5% for all product sectors combined, as long as the Member State used a selection system based on risk analysis, however retaining an obligatory minimum of 2% for each product sector. The requirement of 5% per customs area per calendar year is still in force, cf. Council Regulation (EC) No 163/94 amending Regulation (EEC) No 386/90 on the monitoring carried out at the time of export of agricultural products receiving refunds or other amounts (OJ 1994 L 024/2). A third example of the use of risk analysis is in Commission Regulation (EEC) No 85/93 concerning control agencies in the tobacco sector (OJ 1993 L 012/9); under Art.3, by which a programme for control shall be worked out on the basis of, among other things, risk analysis by product sector and production area. Also, Art. 22 of Council Regulation (EEC) No 386/90 on the monitoring carried out at the time of export of agricultural products receiving refunds or other amounts (OJ 1990 L 042/6), refers to the use of risk analysis, regardless of whether or not this term is in fact used, since it provides that: "Should the competent authorities of a Member State establish that the activities of a Community fishing vessel have seriously or repeatedly failed to comply with this Regulation, the flag Member State may subject the vessel in question to additional control measures."

Risk analysis is a relatively new concept, whose content is obscured by the fact that the relevant EC rules only seldom include actual criteria for undertaking risk analysis. Naturally, this circumstance goes together with the fact that those criteria which are included in actual risk analyses must be treated with a certain amount of confidentiality, since knowledge of the criteria included could be used to make reasoned assumptions as to where administrative controls will take place, and thereby indicate the precautions necessary to avoid being controlled. However, there are examples where the Community has laid down criteria for risk analysis.

In the control of agricultural products exported from the Community with rebates or other forms for subsidy, it is stated in Regulation 3122/94[151] that Member States' authorities can use the following criteria in choosing which goods shall be controlled. As regards the as regards the products: their origin, their nature, their characteristics in terms of the refund nomenclature, their value, their customs status, the risk of tariff slippage, the rate of refund in terms of technical characteristics and the presentation of the goods (fat, water, meat, ash content, packaging, etc.), their becoming newly eligible for refunds, the quantity, analyses of previous samples, and binding tariff information. As regards trade: its frequency, the appearance of unusual trade and/or the development of new trade, diversions of trade. As regards the refund nomenclature: the rate of refund, the nomenclatures in respect of which most export refunds are paid, the risks of slippages of refund rates in terms of technical characteristics and the presentation of the goods (fat, water, meat, ash content, packaging, etc.). As for exporters the following shall be considered: their reputation and trustworthiness, their financial position, the appearance of new exporters, exports without any immediately apparent economic justification, previous disputes, in particular, cases of fraud. Proven or presumed irregularities in relation to certain kinds of goods can also constitute a criteria. And the Regulation also points to the customs arrangements used and whether a normal or simplified form for customs declaration is used. Finally, there are criteria relating to granting export refunds: prefinancing (for processed or unprocessed products), or whether it concerns direct exports. There can thus be up to 30 different criteria which can be considered in a risk analysis. The Regulation does not compel the use of any particular criteria, but leaves it entirely to

151. Commission Regulation (EC) No 3122/94 laying down criteria for risk analysis as regards agricultural products receiving refunds (OJ 1994 L 330/31). This regulation is associated with the regulation referred to above, Council Regulation (EEC) No 386/90 on the monitoring carried out at the time of export of agricultural products receiving refunds or other amounts (OJ 1990 L 042/6).

Member States themselves to use one, some or all of the criteria, or even to use some entirely different ones.[152]

Undertaking risk analysis seems to be built up in such a way that the controlling authority should take each of the elements which relate to a transaction, (in this case: the goods, the trade, the categories of rebates, the exporter, the irregularities, customs procedures and the export rebate) and in each of these areas should use risk related criteria to draw conclusions to decide who shall be controlled. These include factors which concern the actual transaction, such as the exporter's reputation and trustworthiness, and factors which are much wider, including the frequency of trade, presumed irregularities in relation to certain kinds of goods etc. This reflects two basic methods for assessing the risk of irregularities in connection with the EC's budget:[153] the first is an assessment of the actual circumstances of the individual transaction, and the second is a general or theoretical assessment. The two distinct methods are not in opposition, but complement one another.

The use of risk analysis in planning control inspections means that those sectors which are regarded as being liable to risk, and which ought therefore to be controlled, are identifiable by analysing information from various sectors, and in this connection the EC's databases, e.g. IRENE, play a part.

As desirable as it is that the Community should make detailed regulations for criteria for risk analysis, it can be very complex, depending on the circumstances, to make such regulations before sufficient experience has been gathered to know where to apply them. The Community has acknowledged this difficulty. In Regulation 3122/94,[154] there is, as already noted, a long list of criteria which can be taken into account in risk analysis in accordance with the Regulation, and in extension of this it is provided that "The Member States and

152. Another, though less wide ranging, example of Community regulation of the criteria for prescribed risk analysis is in Art. 6.4 if Commission Regulation (EEC) No 3887/92 laying down detailed rules for applying the integrated administration and control system for certain Community aid schemes (OJ 1992 L 391/1). In accordance with tradition, it provides that the national authorities shall decide which businesses shall be subject to on-the-spot controls, which "shall be selected .... on the basis of a risk analysis." The risk analysis shall take account of the amount of aid involved, the number of parcels and the area or number of animals for which aid is requested, changes from the previous year, the findings of checks made in past years, other factors to be defined by the Member State. As regards the criteria "the findings of checks made in past years," this is already expanded upon in the regulation, since Art.6.3 also provides that "Should on-the-spot checks reveal significant irregularities in a region or part of a region the competent authority shall make additional checks during the current year in that area and shall increase the percentage of applications to be checked in the following year."

153. See the Commission's Annual Report on Protecting the Community's Financial Interests – The Fight Against Fraud – Annual Report for 1994, COM (94)98 Final.

154. Commission Regulation (EC) No 3122/94 laying down criteria for risk analysis as regards agricultural products receiving refunds (OJ 1994 L 330/31).

the Commission shall jointly assess the reliability and relevance of these criteria on the basis of experience acquired in order to make – in case of need – any necessary adjustments to the system and selection parameters to make physical checks more effective and improve targeting."[155] In the Commission's 1992 annual report on combating fraud,[156] it is pointed out that effective administrative controls require, among other things, techniques for risk analysis, and that in the relevant committees[157] within the Community members should keep one another informed about experience gathered at national level, in the same way as they work to target administrative controls of their own finances in areas where the risk of fraud is greatest. The area of agriculture was picked out for its significant progress, since the administration concerned with EAGGF had attempted to raise the consciousness of Member States on various aspects of risk analysis, had held discussions on the experiences gathered, and prepared documentation for defining the subject and carrying out analyses within individual sectors, especially in connection with export.

When risk analysis is used today in connection with administrative controls, it is to target and activate administrative controls in those cases where the risk of irregularity is greatest. However, it is conceivable that analysis could be carried further, for example, to identify cases where there is the best possibility of collecting wrongly paid amounts, or the greatest potential of imposing the severest penalties on offenders, or a combination of both.

Risk related analysis can also be used in other circumstances. For example, the EC's revenues can be divided into two basic categories. On the one hand there are the taxes etc. which are due in whole to the Community, which are normally collected by the administrations of the Member States and forwarded to the EC. On the other hand there are the revenues from VAT etc. which are also collected by Member States, but, in contrast to the above, Member States themselves retain much the greater share.[158] This distinction is drawn because, all things being equal, Member States' enthusiasm for collecting money can be assumed to be greater when part of the amount collected belongs to themselves than when they are merely acting as an administrative office for the Community.[159] From the point of view of risk analysis, this means that the EC ought to be alert to ensuring, through its regulation of controls, that Member States

155. Such adjustment was not made at the start of 1999.
156. Annual Report from the Commission on the fight against fraud – 1992 Report and Action Programme for 1993, COM/93/141Final.
157. Among other things the annual report refers to COCOLAF, the advisory committee on the Community's own revenues, the committee on customs questions.
158. Sherlock, Ann; *Controlling Fraud within the European Community*, European Law Review, 1991, Vol. 16 p.23.
159. On the question of the loyalty of the Member States towards the Community, see Section 19.1.6 below.

effectively control those subject to their jurisdiction in the latter cases, just as the Community's control of Member States' administration ought to concentrate on such cases.

7.2.2.3. The geographical locality of administrative controls

It is within the sovereignty of Member States that each shall control compliance with Community laws in its own territory. The establishment of a common market and the gradual removal of border controls has, however, necessitated modifications to this. If, for example, Member States are to accept free movement of agricultural products, they must be satisfied that the products meet an acceptable standard from a veterinary and health and safety point of view, and that this is adequately controlled. The Community was aware of this long before mad cow disease in the UK sent shudders through the EC in the spring of 1996. Thus, the Community has sought to secure the confidence of Member States in a number of cases by making provisions in secondary legislation for national controls in the Member State where the goods originate, while ensuring the effectiveness of the internal market by limiting the control in the receiving state.

Thus, as a step towards implementing the internal market, Council Directive 89/662/EEC[160] undertook harmonisation of veterinary standards for animal products. The intention of the Directive was to limit veterinary controls to the place of dispatch.[161] Among other things this was be achieved by introducing a health or hygiene certificate. Articles 3 and 4 of the Directive give responsibility to the competent authorities in the exporting state to control that the requirements of the Directive are complied with. Simultaneously, the receiving state's opportunity to control is limited, since, under Article 5, it is only allowed to take random samples at the place of receipt. In cases of transit, or if the receiving state has information which indicates that there has been an infringement of the requirements of the Directive, administrative controls can also be carried out during transportation.[162]

160. Council Directive 89/662/EEC concerning veterinary checks in intra-Community trade with a view to the completion of the internal market, (OJ 1989 L 395/13).
161. Cf. Art. 3. Art. 2 of the directive defines 'veterinary checks' as meaning "any physical check and/or administrative formality which applies to the products referred to .... and which is intended for the protection, direct or otherwise, of public or animal health."
162. The directive has been amended most recently by Council Directive 92/67/EEC amending Directive 89/662/EEC concerning veterinary checks in intra-Community trade with a view to the completion of the internal market, (OJ 1992 L 268/73). Veterinary control for all animal products was thereby abolished at the Community's internal borders. An example of a regulation of a corresponding nature is Council Directive 77/99/EEC on health problems affecting intra-Community trade in meat products (OJ 1977 L 026/85), which was aimed at making the health provisions of trade in meat products uniform, in connection with the abolition of veterinary controls at the borders between Member

In a number of cases, instead of directly limiting the administrative controls to the originating Member State, the Community has used a form of regulation which has effectively achieved the same result. This is the case with Council Directives 91/495/EEC,[163] 91/682/EEC,[164] 92/33/EEC[165] and 92/34/EEC,[166] and is based on the concept of self-control. In these Directives the regulation and the associated administrative controls are arranged so that the supplier of a product is responsible for compliance with the Directive, while the Member State's authorities have a duty to carry out controls to ensure that the supplier meets his obligations. This is entirely in line with previous practice. What is new is that the supplier shall be approved by the national authorities to act as a supplier, and this includes a duty of self-control. Self-control means that the

States. This occurs with an extension of controls over the production of meat and other animal products. The requirement for the control over businesses was previously vaguely expressed, cf. Art. 6 in Council Directive 77/99/EEC on health problems affecting intra-Community trade in meat products (OJ 1977 L 026/85), but with Council Directive 92/5/EEC amending and updating Directive 77/99/EEC (OJ 1992 L 057/1), there was a noticeable tightening of the requirements since, under Art. 8.2 national authorities must at all times have free access to all parts of establishments in order to ensure that this Directive is being complied with and must regularly analyse the results of the checks made as part of the self-control of the businesses. For further examples of veterinary control, see Council Directive 92/45/EEC on public health and animal health problems relating to the killing of wild game and the placing on the market of wild-game meat (OJ 1992 L 268/35), Council Directive 92/35/EEC laying down control rules and measures to combat African horse sickness (OJ 1992 L 157/19), and Council Directive 92/46/EEC laying down the health rules for the production and placing on the market of raw milk, heat-treated milk and milk-based products (OJ 1992 L 268/1).

163. Council Directive 91/495/EEC concerning public health and animal health problems affecting the production and placing on the market of rabbit meat and farmed game meat (OJ 1991 L 268/41).
164. Council Directive 91/682/EEC on the marketing of ornamental plant propagating material and ornamental plants (OJ 1991 L 376/21). See the associated implementing directive, Commission Directive 93/63/EEC setting out the implementing measures concerning the supervision and monitoring of suppliers and establishments pursuant to Council Directive 91/682/EEC on the marketing of ornamental plant propagating material and ornamental plants (OJ 1993 L 250/31).
165. Council Directive 92/33/EEC on the marketing of vegetable propagating and planting material, other than seed (OJ 1992 L 157/1). See the associated implementing directive, Commission Directive 93/62/EEC setting out the implementing measures concerning the supervision and monitoring of suppliers and establishments pursuant to Council Directive 92/33/EEC on the marketing of vegetable propagating and planting material, other than seed (OJ 1993 L 250/29).
166. Council Directive 92/34/EEC on the marketing of fruit plant propagating material and fruit plants intended for fruit production (OJ 1992 L 157/10). See the associated implementing directive, Commission Directive 93/64/EEC setting out the implementing measures concerning the supervision and monitoring of suppliers and establishments pursuant to Council Directive 92/34/EEC on the marketing of fruit plant propagating material and fruit plants intended for fruit production (OJ 1993 L 250/33).

supplier itself shall undertake control on the basis of stated parameters. As for the duty of the Member States to exercise control, it is stated, among other things, that "Monitoring and administrative controls of suppliers shall be regularly carried out by the responsible official body," and that this body "shall at all times have free access to all parts of the premises to ensure that the requirements of this Directive are complied with." Furthermore, there is a requirement for inspection both of the production and of the products, and in this connection samples can be taken. In the implementing Directives unambiguous emphasis is put on the Member States' control of suppliers' self-control. Use of self-control fixes the responsibility for control on the supplier; when the Member States' control is added to this, it means that in reality control is firmly set in the exporting state, since it will only be possible to exercise control where the supplier has his business. These regulations do not exclude the receiving state from carrying out controls, but it is clearly stated in the Directives that products which meet the requirements of the Directive in question may not be subject to import restrictions, including inspection procedures, other than those laid down in the Directive.

From these examples it appears that if the needs of the internal market are satisfied by each Member State exercising control in its own territory, then such controls should be located in exporting states while being limited in the receiving state. This is a circumstance which in itself increases the need for Community regulation of administrative controls.

7.2.2.4. Frequency of control

The frequency of controls is only seldom dealt with in Community regulations, and when there is an explicit requirement for the frequency of controls, it is usually merely stated that controls shall be made regularly. For example in the regulation of the financial control of the Structural Funds in Regulation 2082/93[167] it is stated that "Member States shall take the necessary measures ... to verify on a regular basis that operations financed by the Community have

167. Council Regulation (EEC) No 2082/93 amending Regulation (EEC) No 4253/88 laying down provisions for implementing Regulation (EEC) No 2052/88 as regards coordination of the activities of the different Structural Funds between themselves and with the operations of the European Investment Bank and the other existing financial instruments (OJ 1993 L 193/20).

This provision is a continuation of Council Regulation (EEC) No 4253/88, laying down provisions for implementing Regulation (EEC) No 2052/88 as regards coordination of the activities of the different Structural Funds between themselves and with the operations of the European Investment Bank and the other existing financial instruments (OJ 1988 L 374/1).

been properly carried out"[168] Correspondingly Council Directives 91/682/EEC[169], 92/33/EEC[170] and 92/34/EEC[171] provide that " Monitoring and control of suppliers shall be regularly carried out by the responsible official body".

Even though it is the exception, it is possible to point to more comprehensive regulation of the frequency of controls. In the area of agriculture, Article 2 of Regulation 4045/89,[172] as amended by Regulation 3094/94,[173] made the frequency of control dependent on the size of the business. For the smallest businesses the frequency of control is decided by the Member States themselves, with prior notification to the Commission, cf. Article 10. For the medium sized businesses, Member States are required to ensure that at least half are controlled in each EAGGF accounting year. For the largest businesses, there is a requirement that individual business which have not been controlled in either of the two preceding control periods, must be controlled, unless the Member State uses risk analysis.[174] Thus the frequency of control increases in proportion to the amount of EC finances involved.

In additional, in several instances the Community has indirectly ensured a certain frequency of control by prescribing how large a percentage of the

168. There is a corresponding wording in Council Regulation (EC) No 1164/94 establishing a Cohesion Fund (OJ 1991 L 376/21).
169. Council Directive 91/682/EEC on the marketing of ornamental plant propagating material and ornamental plants (OJ 1991 L 376/21). See the associated implementing provisions in Commission Directive 93/63/EEC setting out the implementing measures concerning the supervision and monitoring of suppliers and establishments pursuant to Council Directive 91/682/EEC on the marketing of ornamental plant propagating material and ornamental plants (OJ 1993 L 250/31).
170. Council Directive 92/33/EEC on the marketing of vegetable propagating and planting material, other than seed (OJ 1992 L 157/1). See the associated implementing provisions in Commission Directive 93/62/EEC setting out the implementing measures concerning the supervision and monitoring of suppliers and establishments pursuant to Council Directive 92/33/EEC on the marketing of vegetable propagating and planting material, other than seed (OJ 1993 L 250/29).
171. Council Directive 92/34/EEC on the marketing of fruit plant propagating material and fruit plants intended for fruit production (OJ 1992 L 157/10). See the associated implementing provisions in Commission Directive 93/64/EEC setting out the implementing measures concerning the supervision and monitoring of suppliers and establishments pursuant to Council Directive 92/34/EEC on the marketing of fruit plant propagating material and fruit plants intended for fruit production (OJ 1993 L 250/33).
172. Council Directive 77/435/EEC on scrutiny by Member States of transactions forming part of the system of financing by the Guarantee Section of the European Agricultural Guidance and Guarantee Fund (OJ 1977 L 172/17).
173. Council Regulation (EC) No 3094/94 amending Regulation (EEC) No 4045/89 on scrutiny by Member States of transactions forming part of the system of financing by the Guarantee Section of the European Agricultural Guidance and Guarantee Fund (OJ 1994 L 328/1).
174. See Section 7.2.2.2 for more details on this provision, including categorisation between large, medium and small businesses.

possible instances shall be controlled. The seed of this form of regulation was planted in 1988 when the Commission, as earlier referred to, set up a working group which was asked, among other things, to develop a co-ordinated system with a view to establishing a systematic approach to administrative controls and sanctions. The group recommended that regulations should require that a minimum percent be covered by controls. This percentage should be increased in cases where serious irregularities were discovered. In relation to physical checks, Regulation 386/90[175] provides that samples shall be taken "frequently and without notice". This is supplemented with a more specific provision that controls shall in any case include 5% of all applications for export rebates or other payments connected with exports. The requirement of 5% shall be fulfilled not only in relation to each calendar year, but also in relation to each customs district[176] and each product sector. As previously referred to, in 1994 it was decided[177] that 5% per product sector should be replaced with 5% for all sectors together, as long as Member States use a system of selection based on risk analysis, with an obligatory minimum level of 2% per product sector.[178]

In a clear majority of cases where secondary legislation refers neither directly not indirectly to the frequency of controls, it must be assumed that these regulations for control rely on a presumption of a certain frequency of control, and that such a requirement would not be met if controls were never or only seldom carried out.

7.2.2.5. The intensity of control

The intensity of control provided for in regulations in secondary legislation varies from the question not being dealt with at all to comprehensive and detailed regulation of the controls to be made.

175. Council Regulation (EEC) No 386/90 on the monitoring carried out at the time of export of agricultural products receiving refunds or other amounts (OJ 1990 L 042/6).
176. For a definition of customs areas and product sectors see Art. 3 and 4 in Commission Regulation (EC) No 2221/95 laying down detailed rules for the application of Council Regulation (EEC) No 386/90 as regards physical checks carried out at the time of export of agricultural products qualifying for refunds (OJ 1995 L 224/13).
177. Council Regulation (EC) No 163/94 amending Regulation (EEC) No 386/90 on the monitoring carried out at the time of export of agricultural products receiving refunds or other amounts (OJ 1994 L 024/2).
178. See also Commission Regulation (EEC) No 3887/92 laying down detailed rules for applying the integrated administration and control system for certain Community aid schemes (OJ 1992 L 391/36), which has the requirement that "On-the-spot checks shall cover at least a significant percentage of applications." This requirement is stated in some detail in that "The significant percentage shall represent at least: 10 % of ' live-stock' aid applications ... and 5 % of 'area' aid applications. However, this percentage shall be reduced to 3 % for area aid applications numbering more than 700 000 per Member State in the calendar year."

The most intensive regulation of national controls is in the area of agriculture. As part of the agricultural reforms of 1992, an integrated system of administrative controls was established, which applies both to arable and livestock farming, as well as to Structural Fund support.[179] The basis of this system is that, in order to obtain support, individual farmers must give detailed information about their land, for precise identification of its acreage and location.[180] It is further required that an application shall include information as to which fields are used for pasturage, which have been taken out of agricultural production, and which lie fallow, and it is a requirement that information shall be given within certain deadlines.[181] Correspondingly, information shall be given about livestock so that it can be identified.[182] Each year all the information shall be updated, and changes to existing circumstances must be notified. All information from each farm unit shall be entered in a database. This database is the basis for control. The implementation of the Member States' controls is also closely regulated in the integrated control system. Thus, Article 8 of Regulation 3508/92[183] provides that "Member States shall carry out administrative checks on aid applications. Administrative checks shall be supplemented by on-the-spot checks covering a sample of agricultural holdings. For all these checks, Member States shall draw up a sampling plan. ... National authorities may, under conditions to be laid down, use remote sensing to determine the area of

179. See Council Regulation (EEC) No 3508/92 establishing an integrated administration and control system for certain Community aid schemes (OJ 1992 L 355/1). The integrated control system established by this regulation applies to support systems for certain arable crops as well as premium arrangements for beef and veal producers and for sheepmeat producers, and specific measures for farming in certain less-favoured areas. Furthermore, the Council may, acting by a qualified majority on a Commission proposal, extend the scope of the integrated system to other Community aid schemes. Even though Council Regulation (EEC) No 3508/92 has undergone subsequent amendments, the basis of it is unaltered.
180. See Council Regulation (EEC) No 1765/92 establishing a support system for producers of certain arable crops (OJ 1992 L 181/12).
181. See Art. 6.1 and 2 in Council Regulation (EEC) No 3508/92 establishing an integrated administration and control system for certain Community aid schemes (OJ 1992 L 355/1), as well as Art. 4 in Commission Regulation (EEC) No 3887/92 laying down detailed rules for applying the integrated administration and control system for certain Community aid schemes (OJ 1992 L 391/36). Art. 6.2 in Council Regulation (EEC) No 3508/92 is amended by Council Regulation (EC) No 2466/96 amending Regulation (EEC) No 3508/92 establishing an integrated administrative and control system for certain Community aid schemes (OJ 1996 L 335/1).
182. See Council Directive 92/102/EEC on the identification and registration of animals (OJ 1992 L 355/32), as well as Art. 5 in Commission Regulation (EEC) No 3887/92 laying down detailed rules for applying the integrated administration and control system for certain Community aid schemes (OJ 1992 L 391/36).
183. Council Regulation (EEC) No 3508/92 establishing an integrated administration and control system for certain Community aid schemes (OJ 1996 L 335/1).

agricultural parcels, identify crops and verify their status." The obligation in the Regulation upon Member States to carry out administrative checks should be understood as an obligation for complete administrative control, in other words, all applications for support must be controlled. This interpretation does not follow directly from the provisions for administrative controls, but from these taken together with the succeeding requirement that on-the-spot controls should only be carried out with "a sample".[184]

The integrated system is comprehensive and in Regulation 3508/92[185] it was pre-supposed that a number of implementing regulations would be adopted. To a large extent this occurred with Regulation 3887/92,[186] which, among other things, includes rules for field identification, applications for subsidies, the extent of controls, the use of risk analysis and increased controls in the case of irregularities. Further implementing rules were adopted in Regulation 165/94,[187] which contains rules on the Community's partial financing of satellite surveys to establish field acreage, identify their use and examine their condition. It is clear that this consists of a uniform and thoroughly regulated control system which, with time, can be extended to cover the whole of the agricultural sector.

184. This obligation is more precisely regulated in Art. 6 of Commission Regulation (EEC) No 3887/92 laying down detailed rules for applying the integrated administration and control system for certain Community aid schemes (OJ 1992 L 391/36), which has the requirement that at least: 10% of livestock aid applications and 5% of area aid applications shall be subject to on-the-spot checks.
185. Council Regulation (EEC) No 3508/92 establishing an integrated administration and control system for certain Community aid schemes (OJ 1992 L 355/1).
186. Commission Regulation (EEC) No 3887/92 laying down detailed rules for applying the integrated administration and control system for certain Community aid schemes (OJ 1992 L 391/36). The regulation is amended by Commission Regulation (EC) No. 1648/95 amending Regulation (EEC) No 3887/92 laying down detailed rules for applying the integrated administration and control system for certain Community aid schemes (OJ 1992 L 391/36).
187. Council Regulation (EC) No 165/94 concerning the co-financing by the Community of remote sensing checks and amending Regulation (EEC) No 3508/92 establishing an integrated administration and control system for certain Community aid schemes (OJ 1994 L 024/6).

Examples of intensive regulation of administrative controls can also be found in the area of the Structural Fund. This applies to Regulation 2082/93[188] and Regulation 1164/94.[189]

It has been argued that Community regulation of administrative controls has been through a considerable development in recent years. The intensity of regulation is no exception to this, as can be seen by a review of fisheries regulation. Regulation 2241/87[190] required Member States to "monitor fishing activity and related activities". Member States should "inspect fishing vessels and all activities whose inspection would enable verification of the implementation of this Regulation, including the activities of landing, selling and storing fish and recording landings and sales." In addition to this the Regulation gave powers for basic implementing regulations for each individual step in the controls, for example, the procedures to be followed with inspections. The Regulation also contained detailed rules as to the obligation of Member States to control the catch, consisting of a control of the information on the catch which fishing skippers were required to give in their log books and in information given to the authorities. This intensive regulation of administrative controls has since been carried further and built upon by Regulation 2847/93[191] which contains a detailed network of regulations both for administrative controls and sanctions.

188. Council Regulation (EEC) No 2082/93 amending Regulation (EEC) No 4253/88 laying down provisions for implementing Regulation (EEC) No 2052/88 as regards coordination of the activities of the different Structural Funds between themselves and with the operations of the European Investment Bank and the other existing financial instruments (OJ 1993 L 193/20). The regulation includes a requirement that "Member States shall take the necessary measures in implementing the operations .... to verify on a regular basis that operations financed by the Community have been properly carried out." The obligations of the regulation in relation to the structural fund for agriculture are set out in more detail in Art. 36 of Council Regulation (EEC) No 2328/91 on improving the efficiency of agricultural structures (OJ 1991 L 218/1), which requires that "Member States shall make provision for effective monitoring which shall include at least verification of the essential aspects of the beneficiary' s undertaking and of the supporting documents, and on-the-spot checks to verify that the information contained in the application corresponds to the true situation." The regulation includes requirements as to the degree of detail in the controls since it requires verification of 'essential aspects' at the same time as assuming control of documentation and on-the-spot checks.
189. Council Regulation (EC) No 1164/94 establishing a Cohesion Fund (OJ 1994 L 130/1).
190. Council Regulation (EEC) No 2241/87 establishing certain control measures for fishing activities (OJ 1987 L 207/1). Before this regulation, fisheries control was regulated by the less comprehensive Council Regulation (EEC) No 2057/82 establishing certain control measures for fishing activities by vessels of the Member States (OJ 1982 L 220/1). Council Regulation (EEC) No 2241/87 was amended by Council Regulation (EEC) No 3483/88 amending Regulation (EEC) No 2241/87 establishing certain control measures for fishing activities (OJ 1988 L 306/2).
191. Council Regulation (EEC) No 2847/93 establishing a control system applicable to the common fisheries policy (OJ 1993 L 261/1).

Among other things there has been a tightening up of the rules on the duty of fishing skippers to keep logs and report information. What in fact has happened is that the freedom to regulate and implement controls which has traditionally been the responsibility of Member States, has been considerably restricted by the Community. It should also be noted that the Commission's proposal for the Regulation was even more wide ranging than the resulting Regulation 2847/93.[192]

The provisions reviewed above show that the Community is increasingly aware of the question of controls, and that the EC's regulation of controls is being intensified. But there is still a long way to go before general intensive regulation of administrative controls will be seen.

Even though the important horizontal Regulation 2988/95[193] retains administrative controls as sector oriented, the Regulation does establish some general principles for regulating Member States' administrative controls and for the controls themselves. For example, it provides that the measures shall have regard for the administrative structures and practices of the Member States, and not involve disproportionate burdens or administrative costs. In other words the obligations of administrative controls shall not be either economically or administratively burdensome on Member States. That the Community's regulation of controls shall take account of the Member States' administrative structures and practices must be seen as an important principle for future regulation, which, if applied to the letter, will change the direction of the development of the Community's regulation of control. Further, Article 2 of Regulation 2988/95[194] lays down the important principle for both Community regulation of administrative controls and national regulation and implementation of administrative controls that "administrative checks shall be effective, proportionate and dissuasive so they provide adequate protection for the Communities' financial interests." There is thus laid down a requirement for proportionality with, on the one side, a requirement that controls should be effective and have deterrent effect and, on the other side, that they may not involve disproportionate burdens or administrative costs.

With a view to the guidelines as to what shall, in future, be regulated, Article 8.3 establishes the goal of regulation as being "to ensure equivalent checks",

192. Council Regulation (EEC) No 2847/93 establishing a control system applicable to the common fisheries policy (OJ 1993 L 261/1).
193. Council Regulation (EC, Euratom) No 2988/95 on the protection of the European Communities financial interests (OJ 1995 L 312/1).
194. Council Regulation (EC, Euratom) No 2988/95 on the protection of the European Communities financial interests (OJ 1995 L 312/1). The principle derives from Commission of the European Communities v Hellenic Republic, Case 68/88, [1989] ECR 2965, where the Court said that Member States' penalties should be "effective, proportionate and dissuasive." In Regulation No. 2988/95 this is extended to the issue of controls.

which shall be achieved through "the approximation of procedures and checking methods". In particular, this last quote creates the basis for an increasingly comprehensive and intensive regulation of administrative controls, which coincides with the development of the rule of law over the last several years, as illustrated above, and which can lead to a thoroughly regulated system of administrative controls in secondary legislation. However, it should be noted that the starting point for the Community in Regulation 2988/95[195] is that regard must be had for Member States' existing administrative controls structures, and that respect for proportionality is a central requirement.

7.2.2.6. The initiative for controls

By virtue of their administrative competence, the right to initiate controls lies with the Member States.

Even at an early stage, rigid adherence to this legal position was found to be unsatisfactory. When, at the start of the 1970's, the financing of the Community changed so it became financed out of its own incomes, it was laid down that administrative controls, collection and transfer of moneys depended on Member States, and in furtherance of this Regulation 2/71[196] provided that, in connection with administrative controls, Member States should "carry out additional inspection measures at the Commission's request. In its request the Commission shall state the reasons for the additional inspection". The Commission's right in this respect was carried forward in Regulation 2891/77[197] and is today found in Article 18.2 of Regulation 1552/89.[198]

The Community has long had a right to take initiatives for controls in connection with the financing of the Common Agricultural Policy. Thus, Regulation 729/70[199] contained authority for the Commission to request the relevant authorities in a Member State to undertake an audit or on-the-spot checks. Only two years later the Commission's right to request controls was replaced with a right

195. Council Regulation (EC, Euratom) No 2988/95 on the protection of the European Communities financial interests (OJ 1995 L 312/1).
196. Regulation (EEC, Euratom, ECSC) No 2/71 of the Council implementing the Decision of 21 April 1970 on the replacement of financial contributions from Member States by the Communities' own resources (OJ 1971 L 003/1).
197. Council Regulation (EEC, Euratom, ECSC) No 2891/77 implementing the Decision of 21 April 1970 on the replacement of financial contributions from Member States by the Communities' own resources (OJ 1977 L 336/1).
198. Council Regulation (EEC, Euratom) No 1552/89 implementing Decision 88/376/EEC, Euratom on the system of the Communities' own resources (OJ 1989 L 155/1).
199. Regulation (EEC) No 729/70 of the Council on the financing of the common agricultural policy (OJ 1970 L 094/13) Art. 9.2.

to demand controls, as article 6 of Regulation 283/72[200] provided that, if the Commission had grounds to believe that irregularities existed, it could require that the relevant Member State(s) should carry out administrative investigations in which an officer of the Commission could take part. Where it was established that there were irregularities, the Member State had a duty to "institute as rapidly as possible an administrative or judicial procedure." This gave rise to conflicts. The Commission had thus to resort to use of Article 169 to force Belgium and Italy to comply with the Regulation.[201] This led to the amendment of the provision when the Regulation was replaced by Regulation 595/91[202] which is currently in force. Under this, if it believes irregularities to exist, the Commission can still require Member States to carry out administrative investigations in which an officer of the Commission can take part. If the investigations show that there are irregularities, the Member State shall inform the Commission of this and report on what action it takes in this respect.

In the regulation for the Structural Funds there are also provisions on the right of the Community to initiate the exercise of controls. Thus it is provided that "The Commission may require the Member State concerned to carry out an on-the-spot check to verify the regularity of payment requests. Commission officials or servants may take part in such checks and must do so if the Member State concerned so requests."[203]

So it is possible to point to several provisions in secondary legislation which give the Community the right to initiate national controls, including in certain cases the right to demand the implementation of controls. However, in each

200. Regulation (EEC) No 283/72 of the Council concerning irregularities and the recovery of sums wrongly paid in connection with the financing of the common agricultural policy and the organization of an information system in this field (OJ 1972 L 036/1).
201. Cf. Flaesch-Moulin, C; *La CEE et la lutte contre les fraudes au détriment du budget communautaire*, Cahiers du droit Européen, 1983 p.422.
202. Council Regulation (EEC) No 595/91 concerning irregularities and the recovery of sums wrongly paid in connection with the financing of the common agricultural policy and the organization of an information system in this field and repealing Regulation (EEC) No 283/72 (OJ 1991 L 067/11).
203. See Art. 23.2 in Council Regulation (EEC) No 2082/93 amending Regulation (EEC) No 4253/88 laying down provisions for implementing Regulation (EEC) No 2052/88 as regards coordination of the activities of the different Structural Funds between themselves and with the operations of the European Investment Bank and the other existing financial instruments (OJ 1993 L 193/20), a provision which was previously in Art. 23.2 in Council Regulation (EEC) No 4253/88, laying down provisions for implementing Regulation (EEC) No 2052/88 as regards coordination of the activities of the different Structural Funds between themselves and with the operations of the European Investment Bank and the other existing financial instruments (OJ 1988 L 374/1). There is a corresponding provision for the Cohesion Fund is in Appendix II to Council Regulation (EC) No 1164/94 establishing a Cohesion Fund (OJ 1994 L 130/1).

case it is a question of a right to supplement and not replace the national right to initiate controls.

7.2.2.7. Special control authorities

In several instances the Community has sought to ensure control by establishing special control authorities.

The first true example of this was in Regulation 2262/84[204] in respect of olive oil. The regulation required Member States to set up specific agencies for carrying out a number of specified control activities. Subsequently the agencies' powers increased, under Regulation 593/92,[205] since the control of EC subsidies for olive oil has been transferred to them, with the exception of export refunds.

Prompted by this regulation, Regulation 85/93[206] was adopted. This regulation provided for setting up control agencies for tobacco in all (relevant) Member States, and included very precise provisions for controls by Member States. The core of the regulation was the duty of the control agency to check all deliveries to primary processing plants and to make frequent visits, without prior notice, to primary processing plants. The agency was required to prepare an annual work programme and to send this to the Commission, with a view to amendment. The provisions concerning the annual work programme must be interpreted as empowering the Commission to approve the programme, by which means the Commission was granted significant influence on the actual implementation of controls. The regulation for the control agencies for tobacco has now been repealed cf. Regulation 1636/98.[207]

The control agencies for olive oil (and the previous control agencies for tobacco) are characterised by being particularly independent of the national authorities.

This status is not so far-reaching in relation to the third example to be given. However, this does not alter the significance of the fact that by Article 11 of

204. Council Regulation (EEC) No 2262/84 laying down special measures in respect of olive oil (OJ 1984 L 208/11).
205. Council Regulation (EEC) No 593/92 amending Regulation (EEC) No 2262/84 laying down special measures in respect of olive oil (OJ 1992 L 064/1).
206. Commission Regulation (EEC) No 85/93 concerning control agencies in the tobacco sector (OJ 1993 L 012/9). This regulation was adopted by reference to Council Regulation (EEC) No 2075/92 on the common organization of the market in raw tobacco (OJ 1992 L 215/70) which, in Art.20.2 prescribes the setting up of a specific agency to carry out certain checks in connection with the Community arrangements for tobacco, in those Member States where the annual tobacco production exceeds a stated quantity.
207. Council Regulation (EC) No 1636/98 amending Regulation (EEC) No 2075/92 on the common organisation of the market in raw tobacco (OJ 1998 L 210/23).

Regulation 4045/89,[208] the Community required that each Member State should set up a special organisation to monitor the application of the regulation and to carry out the controls provided for in it. There is a requirement that the controlling authority should be assured independence from the authorities that are responsible for the payment of agricultural subsidies, or investigations prior to their payment, which are dealt with in the regulation. This functional independence means that Member States cannot merely give responsibility for the control function to the national authority which is otherwise responsible for the administration of the subsidy programme.

The examples given of the Community requiring the establishment of special control authorities, and in particular their administratively independent status, indicates a particular interest in the question of controls which will presumably contribute significantly to achieving objective and effective control. However, regardless of its intention, it can also be seen as an expression of lack of confidence in national controls and a form of 'control imperialism' on the part of the Community.

7.2.2.8. The nature of the control

With the Community's growing interest in combating irregularities from the mid '80's onwards, national controls have been more closely regulated. In this connection it has been acknowledged that secondary legislation should specify the nature of the control to be undertaken, whether, for example, the control should be by physical investigation, auditing or otherwise.[209]

However, the Community is not consistent in its use of the different forms of control. For example, many instruments of secondary legislation require that administrative control shall be carried out, without giving a clear indication of what is meant by this,[210] just as on-the-spot control and physical control are sometimes used synonymously, without reference to any fixed definitions of these terms.

Basically the forms of control can be divided between administrative controls and on-the-spot controls.

208. Council Regulation (EEC) No 4045/89 on scrutiny by Member States of transactions forming part of the system of financing by the Guarantee Section of the European Agricultural Guidance and Guarantee Fund and repealing Directive 77/435/EEC (OJ 1989 L 388/18).
209. Cf. the working group, previously referred to, set up by the Commission in 1988.
210. This applies, for example, to Commission Regulation (EEC) No 3888/92 establishing certain transitional provisions in the beef and veal sector pending the entry into force of the integrated administration and control system for certain Community aid schemes (OJ 1992 L 391/46).

7.2.2.8.1. Administrative control

The characteristic of administrative control is that it is carried out without the controller himself carrying out an investigation; it is based on documents etc. forwarded by those who are subject to the control or by others. The control can either be based of information given with a view to carrying out the control, and/or based on information which has been given in another context.

Thus article 3 of Regulation 3508/93[211] provides that, in order to obtain support, an individual farmer must give detailed information about his land to enable its precise identification[212] and there are corresponding requirements in relation to livestock.[213]

The information received from applicants for agricultural support is entered into a database. According to the preamble, this is to ensure that requests made for support are "subjected to a thorough administrative check carried out with the aid of computerized data bases"

A common form of administrative control is accounting control. This takes the form of a subsequent administrative control to ensure that the support which is paid out to the business or producer in question is used for the purposes for which the support is paid, as well as to ensure that the business or producer in question is not paid more than entitled to.

Administrative control has the clear advantage that it does not require such great resources, making it possible to investigate a large proportion of all applications made. As previously referred to, article 8 of Regulation 3508/92[214] can be understood as a duty for complete administrative control, in other words, that all applications for support must be controlled.

It can be added that administrative control has shown itself to be highly effective in combating irregularities. Accounting control plays a significant role, so that in 1992 2556 case of irregularities were reported[215] in relation to

211. Council Regulation (EEC) No 3508/92 establishing an integrated administration and control system for certain Community aid schemes (OJ 1992 L 355/1).
212. See Council Regulation (EEC) No 1765/92 establishing a support system for producers of certain arable crops (OJ 1992 L 391/12).
213. See Council Directive 92/102/EEC on the identification and registration of animals (OJ 1992 L 355/32), as well as Art.5 in Commission Regulation (EEC) No 3887/92 laying down detailed rules for applying the integrated administration and control system for certain Community aid schemes (OJ 1992 L 391/36).
214. Council Regulation (EEC) No 3508/92 establishing an integrated administration and control system for certain Community aid schemes (OJ 1992 L 355/1).
215. Annual Report from the Commission on the fight against fraud – 1992 Report and Action Programme for 1993 COM/93/141Final, p.30.

Regulation 283/72[216] and Regulation 595/91;[217] of these, 1016 cases were uncovered by subsequent accounting control, which corresponds to over 40% of the irregularities discovered, and represents two-thirds of the amount involved in irregularities. The increasing potential for carrying out administrative controls, including cross-checks, by means of information technology will presumably increase the effectiveness of this form of control.

Cross-checks are a special form of control which are independent of the division between administrative controls and on-the-spot controls.

The characteristic of control by cross-check is that the same information is approached by different methods. For example, a cross-check can consist in comparing business documentation before and after a transaction has been carried out, in which case the cross-check has the nature of an administrative control. Or a cross-check can consist of a comparison of business documentation with, for example, the quantity and nature of stocks or business, in which case this requires on-the-spot checking. Community laws include both types of cross-checking. According to article 3 of Regulation 4045/89[218] as amended by Regulation 3094/94[219] "The accuracy of primary data under scrutiny shall be verified by the number of cross-checks." As regards controls of the documentation of a business, the regulation states that this can for example be invoices, receipts, accounts and correspondence, and cross-checking can be used in this connection to ensure that the information contained in the documentation is correct. Thus it appears that cross-checking can consist of, among other things, comparing the documentation with that from suppliers, customers, freight companies and other third parties, but cross-checking also includes "physical checks, where appropriate, upon the quantity and nature of stocks." An example of a cross-check which only consists of an administrative control is to found in

216. Regulation (EEC) No 283/72 of the Council concerning irregularities and the recovery of sums wrongly paid in connection with the financing of the common agricultural policy and the organization of an information system in this field (OJ 1972 L 036/1).
217. Council Regulation (EEC) No 595/91 concerning irregularities and the recovery of sums wrongly paid in connection with the financing of the common agricultural policy and the organization of an information system in this field and repealing Regulation (EEC) No 283/72 (OJ 1991 L 067/11).
218. Council Regulation (EEC) No 4045/89 on scrutiny by Member States of transactions forming part of the system of financing by the Guarantee Section of the European Agricultural Guidance and Guarantee Fund and repealing Directive 77/435/EEC (OJ 1989 L 388/18).
219. Council Regulation (EC) No 3094/94 amending Regulation (EEC) No 4045/89 on scrutiny by Member States of transactions forming part of the system of financing by the Guarantee Section of the European Agricultural Guidance and Guarantee Fund (OJ 1994 L 328/1).

Regulation 3508/92.[220] In the preamble to the regulation it says that "the administration of the data collected and its use for the verification of aid applications make it necessary to set up high-performance computerized data bases allowing cross-checks in particular to be made." In the implementation regulation[221] it states that the administrative controls required "shall include cross-checks on parcels and animals declared in order to ensure that aid is not granted twice in respect of the same calendar year without justification."[222]

7.2.2.8.2. On-the spot control

The characteristic of on-the-spot control is that the controlling authority itself undertakes an investigation of those subject to the control. This, for example, can consist of an inspection of the agricultural holding, business or means of transport, and by that means to collect information, documents etc. at first hand. In other words the control is not based on information supplied by those who are to be controlled or by some third party.

In EC secondary legislation there are many examples of provisions for control of this kind. Regulation 2328/91[223] thus requires Member States to establish effective control measures which shall at least include "on-the-spot checks with a view to investigating whether the information in applications for supports correspond to factual circumstances." There is another example in Regulation 4045/89,[224] as amended by Regulation 3094/94[225] which, in article

220. Council Regulation (EEC) No 3508/92 establishing an integrated administration and control system for certain Community aid schemes (OJ 1992 L 355/1).
221. Commission Regulation (EEC) No 3887/92 laying down detailed rules for applying the integrated administration and control system for certain Community aid schemes (OJ 1992 L 391/36).
222. Council Regulation (EEC) No 386/90 on the monitoring carried out at the time of export of agricultural products receiving refunds or other amounts (OJ 1990 L 042/6), contains another example of a prescription for administrative control, regardless of whether this is the terminology used. Thus Art. 2 provides that Member States shall undertake "scrutiny of the documents in the payment application file" while Art. 4 requires that "Paying agencies shall scrutinize, on the basis of the payment application files and other available information, in particular on the basis of the documents relating to the export and the comments of the customs services, all the evidence in these files adduced to justify the payment of the amounts in question."
223. Council Regulation (EEC) No 2328/91 on improving the efficiency of agricultural structures (OJ 1991 L 218/1).
224. Council Regulation (EEC) No 4045/89 on scrutiny by Member States of transactions forming part of the system of financing by the Guarantee Section of the European Agricultural Guidance and Guarantee Fund and repealing Directive 77/435/EEC (OJ 1989 L 388/18).
225. Council Regulation (EC) No 3094/94 amending Regulation (EEC) No 4045/89 on scrutiny by Member States of transactions forming part of the system of financing by the Guarantee Section of the European Agricultural Guidance and Guarantee Fund (OJ 1994 L 328/1).

3.2 allows for the possibility that on-the-spot checking be made concerning the quantity and nature of stocks.[226] As a final example, reference is made to article 6.3 in Regulation 3887/92[227] which not only lays down a requirement for on-the-spot checks, but at the same time lays down a percentage of how large a part of the total number of applications shall be controlled in this way.

Depending on the purpose of the control, on-the-spot checks can be directed towards various elements, in some case towards business documentation, in other cases animals, stock of goods etc.

The method of control required varies. Article 2 in Regulation 386/90[228] contains a requirement that Member States shall undertake physical controls[229] of agricultural products which carry an entitlement to payment of refunds. The control can be made in connection with carrying out customs formalities, before an export licence is given for the goods. What is meant by physical control is explained in article 3.3, from which it appears that physical control is primarily "ordinary visual inspection"; where this is insufficient, it can be supplemented "by using all the senses or by applying physical measures that may go as far as submitting the goods for analysis by laboratories specially equipped for the purpose." In the implementing provisions in Regulation 2221/95[230] article 5 further states that a physical check shall be understood to mean verification that the export declaration, including documents submitted in support thereof, and the goods correspond as regards quantity, nature and characteristics. If the rate of refund depends on a particular content, the customs office of export shall, as part of the physical check, take representative samples for analysis of the ingredients by a competent laboratory. Moreover, it is stated that a physical

226. See also Council Directive 92/46/EEC laying down the health rules for the production and placing on the market of raw milk, heat-treated milk and milk-based products (OJ 1992 L 268/1) which, in Art.10.2, cf. Appendix C, Chapter VI, expressly refers to the taking of samples for laboratory testing, and Council Directive 88/166/EEC complying with the judgment of the Court of Justice in Case 131/86 (annulment of Council Directive 86/113/EEC of 25 March 1986 laying down minimum standards for the protection of laying hens kept in battery cages) (OJ 1988 L 074/83) Art. 6 and the Appendix to the directive.
227. Commission Regulation (EEC) No 3887/92 laying down detailed rules for applying the integrated administration and control system for certain Community aid schemes (OJ 1992 L 391/36).
228. Council Regulation (EEC) No 386/90 on the monitoring carried out at the time of export of agricultural products receiving refunds or other amounts (OJ 1990 L 042/6).
229. As noted previously, the Community uses the terms 'on-the-spot checks' and 'physical controls' without their being within an overall conceptual scheme, so that in the present context the terms can be treated as being the same.
230. Commission Regulation (EC) No 2221/95 laying down detailed rules for the application of Council Regulation (EEC) No 386/90 as regards physical checks carried out at the time of export of agricultural products qualifying for refunds (OJ 1995 L 224/13).

control of which the exporter has had prior notice cannot be reckoned to be a physical control.[231]

As indicated, one of the methods necessary to ensure effective control can be to take possession of evidence. This is not unknown in EC law as part of carrying out on-the -spot checks. Regulation 4045/89[232] states that "Member States shall ensure that officials responsible for the scrutiny shall be entitled to seize commercial documents, or have them seized." However, this power comes with a provision that such seizure "shall be exercised with due regard for relevant national provisions and shall not affect the application of rules governing proceedings in criminal matters concerning the seizure of documents." Seizure may thus not be done in a manner which is foreign to the national legal system, but only in accordance with the national laws governing it.

On-the-spot checks can thus be of a more or less invasive character, from visual inspection, to taking samples and laboratory investigation, up to and including seizing evidence. Common to all is that on-the-spot checks enable close first hand investigation of actual circumstances. The Commission has also pointed out several times that on-the-spot checks are important when the issue is the payment of money on the basis of the quantity and quality of goods.[233]

Just as the use of modern technology lightens the burden of carrying out administrative controls, there is a similar trend in the development of Community law in relation to on-the-spot checks. In the preamble to Regulation 3508/92[234] it states that in relation to agricultural holdings "on-the-spot checks on areas may be replaced by remote sensing." This followed up by the statement that "Member States shall carry out administrative checks on aid applica-

231. Another example of the regulation of the conduct of on-the-spot checks is Commission Regulation (EEC) No 85/93 concerning control agencies in the tobacco sector (OJ 1993 L 012/9), which, in Art. 2.4 authorises taking samples of tobacco "to obtain any information or evidence and carry out any checks which may be necessary as part of the inspection of producers, producers' organizations, processors and any other persons covered by the rules for the sector." A third example is Council Directive 91/496/EEC laying down the principles governing the organization of veterinary checks on animals entering the Community from third countries and amending Directives 89/662/EEC, 90/425/EEC and 90/675/EEC (OJ 1991 L 268/56) which in Art.2.2(c) authorising control "of the animal itself, possibly including sampling and laboratory testing and, where appropriate, additional checks during quarantine."

232. Council Regulation (EEC) No 4045/89 on scrutiny by Member States of transactions forming part of the system of financing by the Guarantee Section of the European Agricultural Guidance and Guarantee Fund and repealing Directive 77/435/EEC (OJ 1989 L 388/18).

233. Protecting the Community's financial interests – The fight against fraud, Annual Report 1993, Protecting the Community's financial interests – The fight against fraud, Annual Report 1995 (COM/96/0173 Final), p. 71.

234. Council Regulation (EEC) No 3508/92 establishing an integrated administration and control system for certain Community aid schemes (OJ 1992 L 355/1).

tions. Administrative checks shall be supplemented by on-the-spot checks covering a sample of agricultural holdings. For all these checks, Member States shall draw up a sampling plan. ... National authorities may, under conditions to be laid down, use remote sensing to determine the area of agricultural parcels, identify crops and verify their status." The Commission has adopted the anticipated follow-up regulation in article 7 of Regulation 3887/92[235] which provides that Member States can carry out on-the-spot checks by remote sensing. This is to take place by means of aerial photographs and satellite images. However, the regulation contains a reservation that if there is doubt about the accuracy of checks by imaging, then there shall be on-the-spot checks of chosen holdings.[236]

Regardless of the schematic division, it must be emphasised that administrative controls and on-the-spot checks are not mutually exclusive, but rather they supplement each other. The most effective control will often be achieved when the two types of control are used in combination, as is often provided for in secondary legislation.

Regulation 4045/89,[237] as amended by Regulation 3094/94[238] seek to combat irregularities in the area of agriculture by means of a combination of subsequent accounting control supplemented by on-the-spot checks. Regulation 3888/92[239] directly provides that "administrative checks shall be supplemented by on-the-spot checks," and furthermore "On-the-spot checks shall be unannounced and cover all the animals covered by one or more applications. Advance warning limited to the strict minimum necessary may however be given. This should not generally exceed 48 hours."

It is no surprise that administrative and physical controls are used to supplement one another, for while administrative controls have their prime advantage in breadth, because they allow control of a large number of cases, on-the-spot

235. Commission Regulation (EEC) No 3887/92 laying down detailed rules for applying the integrated administration and control system for certain Community aid schemes (OJ 1992 L 391/36).
236. Council Regulation (EEC) No 2847/93 establishing a control system applicable to the common fisheries policy (OJ 1993 L 261/1) paves the way for increased use of modern technology for monitoring, including the possible use of satellite observation in the fisheries sector.
237. Council Regulation (EEC) No 4045/89 on scrutiny by Member States of transactions forming part of the system of financing by the Guarantee Section of the European Agricultural Guidance and Guarantee Fund and repealing Directive 77/435/EEC (OJ 1989 L 388/18).
238. Council Regulation (EC) No 3094/94 amending Regulation (EEC) No 4045/89 on scrutiny by Member States of transactions forming part of the system of financing by the Guarantee Section of the European Agricultural Guidance and Guarantee Fund (OJ 1994 L 328/1).
239. Commission Regulation (EEC) No 3888/92 establishing certain transitional provisions in the beef and veal sector pending the entry into force of the integrated administration and control system for certain Community aid schemes (OJ 1992 L 391/46).

checks have the advantage of depth in the form of thorough investigations of individual cases.

7.2.3. The financial context of regulation

In the final analysis, irregularities against the Community budget are irregularities against the Member States, so there ought to be a direct incentive for Member States to combat them. However, this consideration does not match the reasoning of the Member States, nor their conduct in practice.[240] In acknowledgement of this, special economic incentives have been introduced for Member States to carry out effective control. It is these that are dealt with in the present section of this thesis.

7.2.3.1. Member States' liability for incorrectly paid amounts

As stated above, under the Treaty, Member States have a duty to combat irregularities against the Community, including controlling that its rules are abided by and that they demand the repayment of incorrectly paid amounts. In the leading cases 146, 192 and 193/81,[241] Member States have an express duty to recover money which has been unduly paid or paid on the basis of irregularities, regardless of whether the national authorities are able to assess the expediency of requiring the repayment.[242]

Where incorrectly paid amounts are not recovered in full, the assumption is that it is the Community which has to accept the risk of loss which follows. However, Member States must bear the loss which is the result of such irregularities or neglect for which the authorities or agencies of the Member State are responsible. It must be assumed that the principles of compensation which the Community has promoted in other contexts will support this assessment. This is an assessment which will, in the first instance, be made by the Commission in connection with the requirement for repayment and a subsequent consideration of possible legal action against the Member State.

Instead of merely considering Member States as simply administrators of Community rules, thus letting the Community bear the consequences of irregularities, the EC has created a situation in which Member States are obliged to recover wrongly paid amounts. This is an obligation for which the Member States have a liability. The aim of this is to give the Member States an incentive

240. See Section 18.1.6

241. BayWa AG and others v Bundesanstalt für landwirtschaftliche Marktordnung, joined cases 146, 192 and 193/81, [1982] ECR 1503.

242. This legal principle is also expressed in secondary legislation, see Art. 8 in Regulation (EEC) No 729/70 of the Council on the financing of the common agricultural policy (OJ 1970 L 094/13).

to ensure that the administration of the Community's financial means shall be as effective and smooth as possible.

Nevertheless, it is possible to imagine another scenario; if a Member State has grounds for believing that irregularities exist, but judges that there is a risk the Commission will decide that the amount which cannot be recovered shall be the liability of the Member State, this could result in the Member State failing to try to investigate the situation. In this way it protects itself against the risk of having to pay for the loss. A similar situation could also arise if, for example, some farmers who have committed irregularities are in administration, bankrupt or otherwise in economic difficulties. The Community is aware of this situation and has sought to minimise this risk, cf. Regulation 595/91,[243] as well as giving a direct economic incentive to the Member States to recover incorrectly paid amounts. Under this regulation Member States may retain 20% of the recovered payments, unless the irregularities are the result of a gross infringement of the provisions of the regulation.

7.2.3.2. The Community's financing of controls

The Member States' responsibility for ensuring the correct and effective implementation of Community law is implied by the fact that the expenses for national control are, in the first instance, paid by the national authorities as part of their administration of EC law.[244] As the Community's requirements for national control have become more extensive, for example with regard to their intensity and frequency, with a consequent increased cost for Member States, the assumption of responsibility for payment has altered, and the EC contributes to the financing of controls in a number of situations.[245]

243. Council Regulation (EEC) No 595/91 concerning irregularities and the recovery of sums wrongly paid in connection with the financing of the common agricultural policy and the organization of an information system in this field and repealing Regulation (EEC) No 283/72 (OJ 1991 L 067/11).
244. Art.1.4 of Regulation (EEC) No 729/70 of the Council on the financing of the common agricultural policy (OJ 1970 L 094/13) provides that the expenses connected with the administration of the Common Agricultural Policy shall be met by national authorities.
245. As examples of the regulation of EC financing of national controls, see Regulation (EEC) No 283/72 of the Council concerning irregularities and the recovery of sums wrongly paid in connection with the financing of the common agricultural policy and the organization of an information system in this field (OJ 1972 L 036/1), Council Regulation (EEC) No 765/85 on increasing the staff of the departments responsible for quality control of agricultural products in Greece (OJ 1985 L 086/5), Council Regulation (EEC) No 2262/84 laying down special measures in respect of olive oil (OJ 1984 L 208/11), Council Regulation (EEC) No 2048/89 laying down general rules on controls in the wine sector (OJ 1989 L 202/32), Council Regulation (EEC) No 4045/89 on scrutiny by Member States of transactions forming part of the system of financing by the Guarantee Section of the European Agricultural Guidance and Guarantee Fund and repealing Directive 77/435/EEC (OJ 1989 L 388/18), Council Regulation (EEC) No 307/91 on

Apart from relieving Member States from some of the economic burden which is the result of the many requirements for national controls, the Community has been prompted to join in financing controls because it can in this way promote the introduction of new methods of control[246] and secure greater influence over national controls as well as ensuring their effectiveness.

The money which the Community uses for the financing of control measures comes from, among other things, the EC budgets for combating irregularities, which underlines the interplay between controls and the combating of irregularities.

In the following sections the Community's finances are divided into categories for supporting the structure of controls and supporting legal proceedings.

7.2.3.2.1. Support for establishing control structures

Regulation 4045/89[247] is an example of a provision which authorises the establishment of control structures. According to this, the Community contributes to the expenses of personnel who are employed with a view to carrying out controls. The contribution is for a five year period and consists of 50% of the actual costs in the first three years, with a maximum of 250,000 ECU in the case of Denmark, and thereafter 25% in the fourth and fifth year, with a maximum of 125,000 ECU in Denmark. Correspondingly, support is given for the training of personnel, though the maximum support is somewhat lower here. Finally, within certain limits, the EC will pay for the whole of the costs of the purchase

reinforcing the monitoring of certain expenditure chargeable to the Guarantee Section of the European Agricultural Guidance and Guarantee Fund (OJ 1991 L 037/5), Council Regulation (EEC) No 3508/92 establishing an integrated administration and control system for certain Community aid schemes (OJ 1992 L 355/1) and Council Regulation (EEC) No 2075/92 on the common organization of the market in raw tobacco (OJ 1992 L 215/70).

246. See for example Commission Regulation (EEC) No 3887/92 laying down detailed rules for applying the integrated administration and control system for certain Community aid schemes (OJ 1992 L 391/36) and Council Regulation (EC) No 165/94 concerning the co-financing by the Community of remote sensing checks and amending Regulation (EEC) No 3508/92 establishing an integrated administration and control system for certain Community aid schemes (OJ 1994 L 024/6).

247. Council Regulation (EEC) No 4045/89 on scrutiny by Member States of transactions forming part of the system of financing by the Guarantee Section of the European Agricultural Guidance and Guarantee Fund and repealing Directive 77/435/EEC (OJ 1989 L 388/18). See Art. 13, 14 and 15 of this regulation, and see also Commission Regulation (EEC) No 1863/90 laying down detailed rules for the application of Council Regulation (EEC) No 4045/89 on scrutiny by Member States of transactions forming part of the system of financing by the Guarantee Section of the European Agricultural Guidance and Guarantee Fund and repealing Directive 77/435/EEC (OJ 1990 L 170/23).

of the necessary IT equipment for the control agencies which shall supervise the application of the regulation.[248]

Establishing an integrated system of control in parts of the area of agriculture in connection with the 1992 agricultural reform imposed considerable burdens on the administration of Member States, not least because of the requirement for identifying each individual field and the setting up of a database for registering a comprehensive set of data. Article 8 of Regulation 3508/92[249] opened the possibility for Member States to use remote sensing from satellites or aerial photography to determine the area of agricultural parcels, identify crops and verify their status. In Regulations 165/94[250] and 3233/94[251] this was supplemented by authorising the EC to finance part of the Member States' costs for remote sensing. This was by reference to the fact that remote sensing was a new method the use of which involved considerable costs. Community contributions to financing can, as a maximum, take place for five consecutive calendar years and may not exceed 50% of the actual costs. As an alternative to Member States

248. The regulation referred to has been found serviceable and has since been virtually copied in Council Regulation (EEC) No 307/91 on reinforcing the monitoring of certain expenditure chargeable to the Guarantee Section of the European Agricultural Guidance and Guarantee Fund (OJ 1991 L 037/5). According to this, support is given for salaries, personnel training and the expenses of equipment when a Member State increases its control and investigation of fraud and irregularities. Council Regulation (EEC) No 2048/89 laying down general rules on controls in the wine sector (OJ 1989 L 202/32) also contains regulations for Community financing. The regulation lays down comprehensive provisions for co-ordination of controls between Member States and between Member States and the Commission and in Art. 16.1 briefly provides that "The Commission may participate in the financing of the control instruments necessary for the achievement of the objectives of this Regulation."
249. Council Regulation (EEC) No 3508/92 establishing an integrated administration and control system for certain Community aid schemes (OJ 1992 L 355/1).
250. Council Regulation (EC) No 165/94 concerning the co-financing by the Community of remote sensing checks and amending Regulation (EEC) No 3508/92 establishing an integrated administration and control system for certain Community aid schemes (OJ 1994 L 024/6), see also Commission Regulation (EC) No 601/94 for the application of Council Regulation (EC) No 165/94 as regards laying down detailed rules on co-financing by the Community of remote sensing checks on agricultural areas (OJ 1994 L 076/20) and Commission Regulation (EC) No 1008/95 amending Regulation (EC) No 601/94 for the application of Council Regulation (EC) No 165/94 as regards laying down detailed rules on co-financing by the Community of remote sensing checks on agricultural areas (OJ 1995 L 102/4).
251. Council Regulation (EC) No 3233/94 amending Regulation (EEC) No 3508/92 establishing an integrated administration and control system for certain Community aid schemes (OJ 1994 L 338/13).

setting up expensive systems for remote sensing, Regulation 165/94[252] created the possibility of establishing a central image bank in the Commission, from which Member States can borrow images of the holdings to be controlled. Article 2 of the regulation thus provides that "The Commission may acquire the satellite pictures required for the checks ... and supply them free of charge to the control agencies." It also provides that "The Commission shall continue to own the pictures supplied and shall recover them on completion of the work." The provision appears as the basis of a rational use of resources, but it also contains elements of the shift of control form the national level to the EC level. It is apparent that the autonomy of the Member States is weakened as administrative tasks are taken over by the EC. Moreover, the images and Member States requisition of them give the Commission an excellent basis for monitoring national controls.

A special form of financial support results form the fact that an increasing number of secondary laws include stipulations as to the qualifications of national personnel. This has given rise to the need for, and can be justified by the fact that, the EC provides a financial contribution for the training of personnel.[253] Furthermore, the Community[254] has set up a special development programme so that officials in the national finance departments can have an exchange period in other Member States, and the EC arranges cross-national seminars for national officials. The immediate aim with such educational initiatives is naturally to increase the effectiveness of controls, but it must not be overlooked that in the longer term this establishes important contacts and understanding across national borders, which is of decisive importance in achieving effective measures against irregularities.[255]

252. Council Regulation (EC) No 165/94 concerning the co-financing by the Community of remote sensing checks and amending Regulation (EEC) No 3508/92 establishing an integrated administration and control system for certain Community aid schemes (OJ 1994 L 024/6).
253. See for example Council Regulation (EEC) No 4045/89 on scrutiny by Member States of transactions forming part of the system of financing by the Guarantee Section of the European Agricultural Guidance and Guarantee Fund and repealing Directive 77/435/EEC (OJ 1989 L 388/18), Commission Regulation (EEC) No 1863/90 laying down detailed rules for the application of Council Regulation (EEC) No 4045/89 on scrutiny by Member States of transactions forming part of the system of financing by the Guarantee Section of the European Agricultural Guidance and Guarantee Fund and repealing Directive 77/435/EEC (OJ 1990 L 170/23) and Commission Regulation (EEC) No 85/93 concerning control agencies in the tobacco sector (OJ 1993 L 012/9).
254. See Art. 21 in Council Directive 91/496/EEC laying down the principles governing the organization of veterinary checks on animals entering the Community from third countries and amending Directives 89/662/EEC, 90/425/EEC and 90/675/EEC (OJ 1991 L 268/56).
255. Cf. Section 18.1.6.

The characteristic of this form of Community financing is that the Commission only pays for (part of) the expenses during the start-up phase, whereafter the financing shall be borne by the Member States themselves. In this way Community financing is the means for promoting the introduction of specific control measures. But there is also a tendency towards a more comprehensive and enduring Community involvement in controls and their operation which gives the EC a considerable influence on controls.

7.2.3.2.2. Support for the running of control structures

The other category of Community financing of national controls is the set of cases where the EC, on a more or less permanent basis, gives economic support for the running of control structures required in secondary legislation.

In Regulation 2262/84[256] Member States which were olive oil producers were required to set up independent control agencies whose costs were 100% covered by the Community in the first two years, and for which the Community has since paid 50% of the actual costs.[257] The aim in setting up the agencies was to create an effective control system, since the control authorities in the olive oil sector of the Member States concerned had been shown to be inadequate, as was demonstrated by the extent of the irregularities occurring within that sector. As previously referred to, the Community subsequently adopted a common market policy for tobacco, Regulation 2075/92,[258] and introduced another agency which should be fully administratively independent of the Member State, and which the Community financed with 50% of the actual expenses. But in Regulation 1636/98[259] the tobacco agencies were closed down and the financing ended.

With its *de facto* permanent financing of the olive oil control agencies the Commission has established a strong influence on the control. The Commission has no authority to direct how the daily administration of controls shall be

256. Council Regulation (EEC) No 2262/84 laying down special measures in respect of olive oil (OJ 1984 L 208/11).
257. The financing has always been based on grants made for limited periods. In Council Regulation (EEC) No 593/92 amending Regulation (EEC) No 2262/84 laying down special measures in respect of olive oil (OJ 1992 L 064/1) financing was guaranteed through to 1997. After that, financing was guaranteed through to 1999 by Council Regulation (EC) No 533/97 amending Regulation (EEC) No 2262/84 laying down special measures in respect of olive oil (OJ 1997 L 083/1), and Council Regulation (EC) No 2599/97 amending Regulation No 2262/84 laying down special measures in respect of olive oil (OJ 1997 L 351/17).
258. Council Regulation (EEC) No 2075/92 on the common organization of the market in raw tobacco (OJ 1992 L 215/70). See also Commission Regulation (EEC) No 85/93 concerning control agencies in the tobacco sector (OJ 1993 L 012/9).
259. Council Regulation (EC) No 1636/98 amending Regulation (EEC) No 2075/92 on the common organisation of the market in raw tobacco (OJ 1998 L 210/23).

carried out, but for the olive oil agencies (and the tobacco agencies when they existed) it is the case that the financial support is first paid out when the Commission has established that the agency has carried out its task, which means that financing has become a means by which the Commission can secure for itself a significant influence on the daily exercise of control.

7.2.3.2.3. Support for legal proceedings

The third and last category of Community financing of controls exists both in the area of agriculture[260] and the Structural Funds[261] and deals with cases where the Commission can refund a Member State's legal and associated costs when a case is brought on the request of the Commission for the recovery of wrongfully paid supports. This financing is not a direct financing of controls, but it is introduced with a view to relieving Member States of such costs and thereby give Member States the motivation to increase the effectiveness of their controls.

Regulation 595/91[262] allows the Commission to repay a Member State the legal costs associated with the recovery of wrongly paid amounts. However, this upon condition that the Commission has expressly requested the authorities in the Member State to initiate or continue proceedings and that the relevant costs can be documented. The support is not conditional upon the case being won, nor even that the case arrives at a definite conclusion. That there are no such conditions should be seen in conjunction with the fact that the Commission's decision to give support is enabling, and that, among other things, an evaluation of the potential success of the case for the Community can contribute to the Commission's judgment as to whether support shall be paid or not.

From the above it appears that the Community has sought to secure the financial context for combating of irregularities by, on the one hand, making Member States economically responsible for the recovery of wrongfully paid amounts, and on the other, to promote Member States' combating of irregulari-

260. Cf. Art.7.2 in Council Regulation (EEC) No 595/91 concerning irregularities and the recovery of sums wrongly paid in connection with the financing of the common agricultural policy and the organization of an information system in this field and repealing Regulation (EEC) No 283/72 (OJ 1991 L 067/11).

261. Cf. Art. 7 in Commission Regulation (EC) No 1681/94 concerning irregularities and the recovery of sums wrongly paid in connection with the financing of the structural policies and the organization of an information system in this field (OJ 1994 L 178/43) and Art. 7 in Commission Regulation (EC) No 1831/94 concerning irregularities and the recovery of sums wrongly paid in connection with the financing of the Cohesion Fund and the organization of an information system in this field (OJ 1994 L 191/9).

262. Council Regulation (EEC) No 595/91 concerning irregularities and the recovery of sums wrongly paid in connection with the financing of the common agricultural policy and the organization of an information system in this field and repealing Regulation (EEC) No 283/72 (OJ 1991 L 067/11) page 11. See Art.7.2.

ties by providing economic support for establishing and running control structures and for pursuing legal proceedings against irregularities. A pattern develops of the Community contributing to some extent to the financing of national controls, either permanently or on an interim basis, but it is exceptional for the Community will pay for the whole of the expenses.

7.2.4. The right of Member States' to adopt diverging or alternative regulation

When controls are included in EC secondary legislation the natural assumption is that Member States must carry out the controls as prescribed. However, it should be remembered that the regulation of controls is frequently not comprehensive and is expressed in general and vague terms, so that the Members States' room for manoeuvre is correspondingly wide. But even where the EC's regulation of controls is clear and precise, Member States are not prevented from departing from the prescribed regulation for carrying out controls. The European Court confirmed this in cases 89/74, 18 and 19/75,[263] 10-14/75[264] and 64/75,[265] where the question was whether the fact that in a regulation governing the wine sector a particular method of analysis had been prescribed prevented Member States from using another. The Court took the view that Member States have a duty to use effective control methods and stated that the particular analytical method prescribed by the EC regulation was not an end in itself, and that the controls chosen by the Member Sate would be unusable if the EC method were to be used at the expense of the national method. The Member State could therefore use another method of analysis than that prescribed in the Community's secondary legislation.

The judgment referred to was given at a time when the EC's regulation of controls was still in its infancy, so that its value as a precedent must be questioned. On the other hand, the true grounds which lay behind the judgment are still valid, that is to say that it is more important that the control should be effective than that it should follow one particular form. There is thus reason to believe that there is still a certain limited possibility for Member States to use a method of control which departs from that prescribed. However, this can only be the case on condition that the national control is at least as effective as the prescribed control and that it does not otherwise conflict with Community regulation, for example by undermining a co-ordinated system of control, or

263. Procureur Général at the Cour d'Appel Bordeaux v Robert Jean Arnaud and others, joined cases 89-74, 18 and 19-75, [1975] ECR 1023.
264. Procureur de la République at the Cour d'Appel Aix-en-Provence and Fédération Nationale des Producteurs de Vins de Table and Vins de Pays v Paul Louis Lahaille and others, joined cases 10 to 14-75, [1975] ECR 1053
265. Procureur Général at the Cour d' Appel Lyon v Henri Mommessin and others, Case 64-75, [1975] ECR 1599.

conflict with he aim of a uniform system of control across several areas of control, or suchlike.

Another possibility for national use of a control method other than that which is more typically used and provided for in Community regulation, can be allowed for in the Community regulation itself. Such is the case in Regulation 2847/93,[266] which regulates the introduction of control structures under the common fisheries policy. In article 38 it states: "This Regulation shall apply without prejudice to any national control measures which go beyond its minimum requirements, provided that they comply with Community law and are in conformity with the common fisheries policy."[267]

7.3. Conclusions concerning controls carried out by national authorities

During the last 10 to 15 years the combating of irregularities against the Community's finances has become the focus of increasing attention. An important part of this has been Member States' control that Community regulations should be complied with. It has been shown above that the Treaty and the basic legal principles of the Community exercise a considerable influence on the question of controls, and that at the same time EC secondary legislation includes a steadily increasing regulation of controls, both as to their breadth and their depth. The trend towards increased influence by the Community in the exercise of national controls is unmistakable.

266. Council Regulation (EEC) No 2847/93 establishing a control system applicable to the common fisheries policy (OJ 1993 L 261/1).

267. A corresponding possibility for alternative methods of regulation is found in Art. 15 of the predecessor to this regulation, Council Regulation (EEC) No 2241/87 (OJ 1987 L 207/1). Also Art. 27 of Council Directive 92/65/EEC laying down animal health requirements governing trade in and imports into the Community of animals, semen, ova and embryos not subject to animal health requirements laid down in specific Community rules referred to in Annex A (I) to Directive 90/425/EEC (OJ 1992 L 268/54) allows for the possibility of alternative methods of regulation as long as they give guarantees equivalent to those required in the directive.

CHAPTER 8

The Community's control of those subject to the jurisdiction of the Member States

When the Community was set up it was decided that, while laws should be made by the Community, the implementation and administration of Community laws should be the responsibility of the national authorities.

This division of powers has largely been maintained, but there are departures from it. There are occasions where the institutions of the Community have been granted powers of control over those subject to the jurisdiction of the Member States, and this is dealt with here in Section 8.

8.1 Authority for control in the Treaty

Control visits by institutions of the Community to those subject to the jurisdiction of the Member States are assumed to require express authority.[268] Neither the Treaty nor the basic legal principles of the Community contain legal grounds under which the Commission can carry out controls over those subject to the jurisdiction of the Member States. However, there is such an authority for another EC institution; the Court of Auditors.

In Article 248.1 of the Treaty it is stated that "The Court of Auditors shall examine the accounts of all the revenue and expenditure of the Community."[269] This provision gives the Court of Auditors the powers to undertake control over those subject to the jurisdiction of the Member States, to the extent that they use

268. In contrast to this it is assumed that Art. 5 taken together with Art. 155 give the Commission the right to carry out control inspections of national authorities, cf. Molde, Jørgen and others *EF-Karnov*, 1990 p. 34. Comment on this issue has been omitted from later editions of *EU-Karnov*.

269. The examination made is not merely a financial one, but is in fact a review of the administration, since the Court of Auditors not only looks at the lawfulness and formal correctness of the revenues and expenditures, but also looks at whether the financial management has been sound, cf. Art.248.2.

Community finances or are under a duty to contribute to the financing of the Community.

The control exercised by the Court of Auditors is not limited to reviewing submitted accounts, but can also include on-the-spot checks in the Member States, cf. Article 248.3. Here it is expressly stated that "In the Member States the audit shall be carried out in liaison with the national audit bodies or, if these do not have the necessary powers, with the competent national departments. ... These bodies or departments shall inform the Court of Auditors whether they intend to take part in the audit."

Under this last point, the competent national authority "shall inform the Court of Auditors whether they intend to take part in the audit." This could be interpreted as a provision giving the national authority the right to prevent the Court of Auditors from carrying out control. Such an interpretation can hardly be correct, since the basic provision, that the Court of Auditors shall examine the accounts of all the revenue and expenditure of the Community, is so clearly stated. The provision merely enables the national authority to take part in the audit carried out by the Court of Auditors. The attitude of the Member States to this varies: in Denmark the national authorities take part in the audit, whereas in Ireland they do not. But regardless of the approach of the Member States, the provision means that the Member States shall be asked, and that the Member States shall be given reasonable notice in relation to this, in practice six weeks, before the audit is undertaken.

As a consequence of the powers of the Court of Auditors, as given in Article 248.3, the institution can make unannounced inspections of those subject to the jurisdiction of the Member States, as long as prior notice of the inspection has been given to the relevant auditing body in the Member State; there is no requirement to give notice to those subject to the jurisdiction of the Member States.[270]

In recent years more emphasis has been put on the co-operation between the institutions of the Community and national authorities in connection with Community controls of those subject to the jurisdiction of the Member States.

In the Amsterdam Treaty this is seen clearly in the Community's prime source of law. Thus, in Article 248.3 a requirement has been added that "The Court of Auditors and the national audit bodies shall cooperate in a spirit of trust while maintaining their independence."

270. Only the internal control of the EC's other institutions and bodies can be unreported, cf. Art. 87 (originally Art. 81) in the Financial Regulation of 21 December 1977 applicable to the general budget of the European Communities (OJ 1977 L 356/1) and Art. 84,85 and 87 of Council Regulation (Euratom, ECSC, EEC) No 610/90 amending the Financial Regulation of 21 December 1977 applicable to the general budget of the European Communities (OJ 1990 L 070/1).

8.2. Authority for controls in secondary legislation

This section deals with the authority which secondary legislation gives the Community to control those subject to the jurisdiction of the Member States. The first section, 8.2.1, deals with the question of how much independence the Community institutions have in their control of those subject to the jurisdiction of the Member States. The next section, 8.2.2, deals with the content of the regulation of Community controls.

8.2.1. The Community's independence of the Member States in its control over those subject to the jurisdiction of the Member States

8.2.1.1. Co-operation on control

The Community has long wished to be allowed to carry out controls over those subject to the jurisdiction of the Member States. In 1987 the European Parliament acknowledged the Commission wished to be empowered to "undertake independent control in the area concerning its own revenues."[271] This desire has since manifested itself in a large number of instruments of secondary legislation which give EC institutions more or less limited access to carry out controls in the Member States.

An example of the weakest form of Community control over those subject to the jurisdiction of the Member States is found in article 20 of Regulation 2847/93,[272] where inspectors from the Commission can be present at the national control authority's monitoring and inspection, but where the control itself is reserved to the national authorities. There are not many provisions of this kind, which may seem surprising, since such a provision is close to the basic concept that it should be the Member States themselves which should carry out controls. On the other hand, there is no point in involving the Commission in national controls if the Commission is not given any real powers.[273]

Much more frequent is a provision of the kind found in Directive 91/496,[274] which gives the Commission power to undertake controls though only in conjunction with the competent national authorities and to the extent necessary for

271. PE 111.304/final.
272. Council Regulation (EEC) No 2847/93 establishing a control system applicable to the common fisheries policy (OJ 1993 L 261/1).
273. A different situation exists where control is carried out by EC authorities as a control of national authorities cf. Section 9.2 below.
274. Council Directive 91/496/EEC laying down the principles governing the organization of veterinary checks on animals entering the Community from third countries and amending Directives 89/662/EEC, 90/425/EEC and 90/675/EEC (OJ 1991 L 268/56).

uniform application of the requirements of the Directive,[275] or in Directive 91/495,[276] whose article 15 contains a provision which is very like that above, but with the addition that "A Member State in whose territory a check is being carried out shall give all the necessary assistance to the experts carrying out their duties."[277]

Thus, regulations which allow the Commission to carry out controls in co-operation with the national authorities are by no means uncommon.

The same applies correspondingly to the Court of Auditors, which is essentially the external auditing body of the Community, with powers established in the Treaty to examine all the revenue and expenditure of the Community. As far as the expenses of the Community are concerned, the access of the Court of Auditors to carry out controls over those subject to the jurisdiction of the Member States are enshrined in the requirement that "The grant of Community funds to beneficiaries outside the institutions shall be subject to the agreement in writing by the recipients to an audit being carried out by the Court of Auditors on the utilization of the amounts granted."[278]

Co-operation between the Community and the authorities in the Member States has not always been found to be adequate. There has been a need to give the Community even freer access to carry out controls over those subject to the jurisdiction of the Member States. Accordingly, under article 6 of Regulation

275. There are corresponding provisions in Council Directive 92/45/EEC on public health and animal health problems relating to the killing of wild game and the placing on the market of wild-game meat (OJ 1992 L 268/35), Council Directive 91/682/EEC on the marketing of ornamental plant propagating material and ornamental plants (OJ 1991 L 376/21), Council Directive 92/33/EEC on the marketing of vegetable propagating and planting material, other than seed (OJ 1992 L 157/1), Council Directive 92/34/EEC on the marketing of fruit plant propagating material and fruit plants intended for fruit production (OJ 1992 L 157/10) and Council Directive 92/35/EEC laying down control rules and measures to combat African horse sickness (OJ 1992 L 157/19).
276. Council Directive 91/495/EEC concerning public health and animal health problems affecting the production and placing on the market of rabbit meat and farmed game meat (OJ 1991 L 268/41).
277. Art. 9.2 of Council Directive 89/662/EEC concerning veterinary checks in intra-Community trade with a view to the completion of the internal market (OJ 1989 L 395/13) is in line with this; it allows the Commission to carry out on-the-spot checks "in collaboration with the competent authorities." See also Art. 10.2 and 3 of Council Directive 90/425/EEC concerning veterinary and zootechnical checks applicable in intra-Community trade in certain live animals and products with a view to the completion of the internal market (OJ 1990 L 224/29).
278. Cf. Art. 87 in Council Regulation (Euratom, ECSC, EEC) No 610/90 amending the Financial Regulation of 21 December 1977 applicable to the general budget of the European Communities (OJ 1990 L 070/1).

595/91,[279] the Commission may, if it believes that irregularities exist in one or more Member State, give notice of this to the Member State which shall immediately initiate an investigation in which officials from the Commission can take part. The Commission can thus require that controls should be put into operation and participate in them. However, it is still the officials of the Member State which are responsible for the investigation itself, so that "Commission officials may not, on their own initiative, use the powers of inspection conferred on national officials; on the other hand, they shall have access to the same premises and to the same documents as those officials."

In line with this, in competition law there is a clear pattern for controls[280] in accordance with which the Member States' competent authorities "at the request of the Commission ... shall undertake the investigations which the Commission considers to be necessary." Furthermore, it is provided that "the officials of the Commission may assist the officials of such authorities in carrying out their duties."

Directive 92/65[281] also goes further than mere co-operation on controls. It does indeed state that "Experts from the Commission and the Member States shall carry out on-the-spot inspections ...", in other words co-operation on controls, but it also adds that "experts from the Member States responsible for these inspections shall be appointed by the Commission acting on a proposal from the Member States," and it goes further to say that "These inspections shall be made on behalf of the Community, which shall bear the cost of any expenditure in this connection." These last two points in the Directive clearly

279. Council Regulation (EEC) No 595/91 concerning irregularities and the recovery of sums wrongly paid in connection with the financing of the common agricultural policy and the organization of an information system in this field and repealing Regulation (EEC) No 283/72 (OJ 1991 L 067/11).

280. Art. 13 in EEC Council: Regulation No 17: First Regulation implementing Articles 85 and 86 of the Treaty (OJ 1962 L 013/264), Art. 20 in Regulation (EEC) No 1017/68 of the Council applying rules of competition to transport by rail, road and inland waterway (OJ 1968 L 175/1), Art. 17 in Council Regulation (EEC) No 4056/86 laying down detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport (OJ 1986 L 378/4), Art. 10 in Council Regulation (EEC) No 3975/87 laying down the procedure for the application of the rules on competition to undertakings in the air transport sector (OJ 1987 L 374/1) and Art. 12 in Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings (OJ 1989 L 395/1).

281. Council Directive 92/65/EEC laying down animal health requirements governing trade in and imports into the Community of animals, semen, ova and embryos not subject to animal health requirements laid down in specific Community rules referred to in Annex A (I) to Directive 90/425/EEC (OJ 1992 L 268/54).

indicate that it is the Commission which is the leading party in this provision for control.[282]

Against the background of the above, it can be established that it is not unusual for Community provisions to give the Commission authority to co-operate with the authorities of the Member States, and, with a greater or lesser degree of independence and intensity, to undertake controls over those subject to the jurisdiction of the Member States. The examples also show that there are variations in the provisions authorising controls for each case, so that the extent of the Commission's powers depends on an assessment of the case in question. Provisions authorising controls are found in Directives as well as Regulations, and are found in other areas in which it is not immediately possible to point to special circumstances which indicate that the Commission should be empowered to carry out controls.

The above review gives weight to the formal or rule-determined relationship between the Community and the Member States. However it should be borne in mind that there is often also a practical relationship, since the Member State will typically have better qualifications than the EC institutions for assessing how and where it may be relevant to carry out controls. Also, statistics show that the irregularities which involve the greatest sums occur across national borders, both within the Community and involving non-member states, and it is especially here that the more sophisticated irregularities occur. The need for co-operation is thus clear.

With the establishment of UCLAF, and later OLAF, the idea of co-operation has been strengthened and from 1994 onwards the understanding of the need for a more extensive co-operation has given rise to the establishment of the so-called task forces. Task forces are groups consisting of experts from the Member States and the Commission set up in each sector which has wide ranging, complex and organised irregularities. The main function of the groups is the exchange of information between participants, the adoption of a common strategy, and to select, co-ordinate and take part in targeted international operations. The experience of the task forces has been positive.[283]

282. Art. 10 of Council Directive 91/628/EEC on the protection of animals during transport and amending Directives 90/425/EEC and 91/496/EEC (OJ 1991 L 340/17), as amended by Council Directive 95/29/EC amending Directive 90/628/EEC concerning the protection of animals during transport (OJ 1995 L 148/52) gives the Commission powers to carry out on-the-spot checks in co-operation with the national authorities. But it is the Commission itself which carries out the control, as is confirmed by Art. 10.1 which provides that "The Commission shall inform the Member States of the results of these checks."

283. The Commission's Annual Report on Protecting the Community's Financial Interests – The Fight Against Fraud – Annual Report for 1995 COM/96/0173 Final.

A problem which can be caused by the growing duplication of powers is that, to the extent that both the Member States and the EC's institutions have powers and especially where both have a duty to control that a given regulation is complied with, there is a need to co-ordinate the control. This is taken account of in the regulations for the Structural Funds, since in article 23.2 of Regulation 2082/93[284] it provides that "The Commission shall ensure that any checks that it carries out are performed in a coordinated manner so as to avoid repeating checks in respect of the same subject matter during the same period. The Member State concerned and the Commission shall immediately exchange any relevant information concerning the results of the checks carried out."[285] It is the Commission which has the obligation to co-ordinate, so that the Member States may assume that they can carry out the controls they require, whereupon the Commission shall adapt its controls accordingly.

8.2.1.2. Independent control

The most extensive control powers which the Community can be given are that EC officials can undertake controls over those subject to the jurisdiction of the Member States either wholly independently of the national administration or with considerable freedom to arrange and carry out the controls. Member States look upon such powers with some misgivings, since such controls are considered to lie within the competence of the national state.[286]

In relation to its own revenues the Commission has long had the authority to carry out controls over those subject to the jurisdiction of the Member States, in co-operation with the national authorities.[287] With the adoption of Regulation

284. Council Regulation (EEC) No 2082/93 amending Regulation (EEC) No 4253/88 laying down provisions for implementing Regulation (EEC) No 2052/88 as regards coordination of the activities of the different Structural Funds between themselves and with the operations of the European Investment Bank and the other existing financial instruments (OJ 1993 L 193/20). The provision is carried forward in Council Regulation (EEC) No 4253/88, laying down provisions for implementing Regulation (EEC) No 2052/88 as regards coordination of the activities of the different Structural Funds between themselves and with the operations of the European Investment Bank and the other existing financial instruments (OJ 1988 L 374/1).
285. There is corresponding wording in Council Regulation (EC) No 1164/94 establishing a Cohesion Fund (OJ 1991 L 376/21).
286. See Section 18.1.6.
287. Cf. Council Regulation (EEC, Euratom) No 1552/89 implementing Decision 88/376/EEC, Euratom on the system of the Communities' own resources (OJ 1989 L 155/1), which was previously applied in Regulation (EEC, Euratom, ECSC) No 2/71 of the Council implementing the Decision of 21 April 1970 on the replacement of financial contributions from Member States by the Communities' own resources (OJ 1971 L 003/1) and subsequently in Council Regulation (EEC, Euratom, ECSC) No 2891/77 implementing the Decision of 21 April 1970 on the replacement of financial contributions from Member States by the Communities' own resources (OJ 1977 L 336/1).

1552/89[288] the existing provisions for authorising control were supplemented with an authority for the Commission to carry out controls with a considerable degree of independence over those subject to the jurisdiction of the Member States. Article 18.3 provides that "the Commission may itself carry out inspection measures on-the-spot." This authorisation of independent control is, however, modified by the requirement that "in a duly substantiated communication, the Commission shall give notice of this inspection in good time to the Member State in which the inspection measure is to take place. Agents of the Member State concerned shall participate in such inspection measures." Furthermore the provision carries a condition that the Commission's on-the-spot checks shall take place subject to the Member State's own control and any control carried out by the Member State upon the request of the Commission. Given this reservation, the provision can be read as a requirement that the Commission's on-the-spot checks should only be carried out after the other two forms have been tried and, for one reason or another, found insufficient, circumstances which the Commission may be assumed to be required to account for in the ' substantiated communication' referred to.

The wider scope for control given to the Commission under article 18.3, should be seen together with the decision of the European Court in Case 267/78[289] which limited the Community's capacity for control under the then applicable Regulation 2891/77.[290] In this case, which concerned the withholding of considerable sums of agricultural import duties, the Italian court refused to deliver documentary materials to the Commission. This was by reference to the Italian rules under which documents related to criminal cases could not be transferred to other authorities, not even the Commission. In spite of the fact that the Court held that the then existing regulation authorised the Commission to request and to take part in all control measures which the national authorities can carry out, so the situation before the Court must be considered as being covered by the regulation, the Court nevertheless found that the denial of the Commission's request did not contravene the regulation. The reason for this was that "it is not possible to infer from the regulations in question an intention to alter the relations between the administration and the judicial authorities. Rules which the national systems of criminal law prevent the communication to certain persons of documents in the criminal proceedings may therefore be

288. Council Regulation (EEC, Euratom) No 1552/89 implementing Decision 88/376/EEC, Euratom on the system of the Communities' own resources (OJ 1989 L 155/1).
289. Commission of the European Communities v Italian Republic, Case 267/78, [1980] ECR 0031.
290. Council Regulation (EEC, Euratom, ECSC) No 2891/77 implementing the Decision of 21 April 1970 on the replacement of financial contributions from Member States by the Communities' own resources (OJ 1977 L 336/1).

relied upon against the Commission insofar as the same restrictions may be relied upon against other national authorities."[291]

Although Regulation 1552/89[292] does not grant the Commission completely independent powers to carry our controls, the regulation is interesting partly because it demonstrates an important development of the Commission's powers over time, and partly because the provisions of article 18.3 appear to give powers to the Commission to undertake independent controls, which are then modified, which is the opposite of the previously reviewed provisions which first gave the powers to the Member States, and thereafter gave the Commission influence on the exercise of those powers.

In competition law the Commission has been able, since 1962, to exercise control over those subject to the jurisdiction of the Member States.[293] It is provided that "the Commission may undertake all necessary investigations into undertakings and associations of undertakings." This includes the right "to examine the books and other business records; ... to take copies of or extracts from the books and business records; ... to ask for oral explanations on-the-spot; ... to enter any premises, land and means of transport." As for the role of the Member States, it is provided that, before deciding on an investigation, the Commission shall have held "consultation with the competent authority of the Member State in whose territory the investigation is to be made." It also provides that "In good time before the investigation, the Commission shall inform the competent authority of the Member State in whose territory the same is to be made of the investigation and of the identity of the authorised officials." Further, it is provided that "Officials of the competent authority of the Member State in whose territory the investigation is to be made may, at the request of such authority or of the Commission, assist the officials of the Commission in carrying out their duties." This regulation has been repeated almost word for word in a number of competition law regulations.[294] The regulation is interest

291. In this case Advocate-General J.P. Warner came to the opposite conclusion, arguing, among other things, that it would lead to an extraordinary result if the extent to which the Commission were allowed to take part in control procedures in each Member State depended on the extent to which an irregularity being investigated was a punishable transaction, whether in the Member State in question it was regarded as a judicial matter or an administrative matter.
292. Council Regulation (EEC, Euratom) No 1552/89 implementing Decision 88/376/EEC, Euratom on the system of the Communities' own resources (OJ 1989 L 155/1).
293. Art. 14 in EEC Council: Regulation No 17: First Regulation implementing Articles 85 and 86 of the Treaty (OJ 1962 L 013/264).
294. Art. 21 in Regulation (EEC) No 1017/68 of the Council applying rules of competition to transport by rail, road and inland waterway (OJ 1968 L 175/1), Art. 18 in Council Regulation (EEC) No 4056/86 laying down detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport (OJ 1986 L 378/4), Art. 11 in Council Regulation (EEC) No 3975/87 laying down the procedure for the application of the rules

ing, not only because it has remained unchanged for so long, but also because it confirms that the Commission is given controlling powers with considerable independence from the national authorities.

It is naturally of particular interest to note that there is a regulation which gives the Community authority to exercise controls over those subject to the jurisdiction of the Member States, wholly independently of the national authorities.

In the area of the Structural Funds there is also an interesting regulation in this respect. Article 23.2 of Regulation 2082/93[295] states as follows: "Without prejudice to checks carried out by Member States, in accordance with national laws, regulations and administrative provisions and without prejudice to the provisions of Article 206 of the Treaty or to any inspection arranged on the basis of Article 209 (c) of the Treaty, Commission officials or servants may carry out on-the-spot checks, including sample checks, in respect of operations financed by the Structural Funds. ... Before carrying out an on-the-spot check, the Commission shall give notice to the Member State concerned with a view to obtaining all the assistance necessary. If the Commission carries out on-the-spot checks without giving notice, it shall be subject to agreements reached in accordance with the provisions of the Financial Regulation within the framework of the partnership."

The main rule of this regulation is that the Commission shall give prior notice of the control to the Member State. However, in the present context it is interesting that it also opens the possibility of there being controls 'without giving notice' from the Commission to the national authorities. The regulation can be interpreted so that the control may be carried out without notice to those subject to the jurisdiction of the Member States, while the representatives of the Member States shall always be given notice, so there is no power of independent control. But such an interpretation does not fit well with the fact that Art. 23 is otherwise concerned with the question of giving advance notice of controls to

on competition to undertakings in the air transport sector (OJ 1987 L 374/1) and Art. 13 in Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings (OJ 1989 L 395/1).

295. Council Regulation (EEC) No 2082/93 amending Regulation (EEC) No 4253/88 laying down provisions for implementing Regulation (EEC) No 2052/88 as regards coordination of the activities of the different Structural Funds between themselves and with the operations of the European Investment Bank and the other existing financial instruments (OJ 1993 L 193/20). This provision is carried forward in Art. 23 of Council Regulation (EEC) No 4253/88, laying down provisions for implementing Regulation (EEC) No 2052/88 as regards coordination of the activities of the different Structural Funds between themselves and with the operations of the European Investment Bank and the other existing financial instruments (OJ 1988 L 374/1). See also Art. 12.4 with appendix in Council Regulation (EC) No 1164/94 establishing a Cohesion Fund (OJ 1991 L 376/21), which also allows the possibility of control 'without prior warning' as long as there is agreement to this in accordance with the finance regulation.

those subject to the jurisdiction of the Member States. Furthermore, the understanding that it means without notice to the authorities of the Member States fits in well with the point that the provision states the first position, that the Member States shall be given notice, and them states the exception, that the Member State need not necessarily be given notice. Added to this, the last paragraph of Art.23.2 is as follows: "The Commission shall ensure that any checks that it carries out are performed in a coordinated manner so as to avoid repeating checks in respect of the same subject matter during the same period. The Member State concerned and the Commission shall immediately exchange any relevant information concerning the results of the checks carried out." The content of this last seems only to have relevance if the Commission can carry out controls without the participation of the Member States. When consideration is given to the immediacy of the obligation to exchange information, the wording can hardly refer just to those cases where the Member State itself chooses not to take part in the Commissions control.

However, the assumption of the regulation is that control undertaken 'without giving notice' shall be subject to agreements reached "within the framework of the partnership." The partnership referred to is a particular concept for interventions connected with the Structural Funds. It is thus a pre-condition that support from the Structural Funds shall be given in such a way that there is a link between that support and corresponding national support. This is ensured through consultations between the Commission, the Member State in question, and authorities at regional, local or other level, such as the Member State may appoint, since these all act as partners "in pursuit of a common goal". It is this consultation which is referred to as a partnership. The partnership contributes to the preparation, financing, following up and evaluating of the activities.[296] In practice this takes place by the partnership preparing a so-called operational programme, containing the goals, strategy and criteria for selection of projects, financing etc. On the basis of this support is given to actual projects.

It is thus a condition for independent control exercised by the Commission that an agreement is made about it within the framework of the partnership. However, such agreements are not made, and the national authorities, at least in Denmark, are disinclined to satisfy the wishes of the Commission on this point.[297]

296. For more detailed information on the partnership referred to, see Art. 4 Council Regulation (EEC) No 2052/88 on the tasks of the Structural Funds and their effectiveness and on coordination of their activities between themselves and with the operations of the European Investment Bank and the other existing financial instruments (OJ 1988 L 185/9).

297. Erhvervsfremmestyrelsen (The Business Development Commission) has given information by telephone that this provision has not been used in practice and that the Commission has not made any request for its operation.

Regardless of the reservation set out above about the approval of the partnership, the regulation is the closest that Community law comes to a truly independent control, since Commission on-the-spot controls without prior notice do not presuppose the adoption of new Community legislation in the form of a regulation, directive or similar. The assumption is only that the possibility is allowed for in connection with an operational programme established with the support of the Structural Funds.

When the regulations reviewed above on the Community's own revenues, competition law and the Structural Funds are taken together with the important horizontal Regulation 2988/95,[298] it is possible to deduce some overarching Community law trends governing the power to exercise independent control.

To ensure that "Community budget resources are used for their intended purpose", Art. 9.1 of Regulation 2988/95,[299] the Commission has a responsibility to have checks carried out on "the existence of the necessary substantiating documents and their concordance with the Community's revenue and expenditure" and "the circumstances in which such financial transactions are carried out." It must be assumed that the passages quoted require the Commission to exercise control over those subject to the jurisdiction of the Member States. This is supported by Art. 9.2 which provides that "In addition, it may carry out checks and inspections on-the-spot under the conditions laid down in the sectoral rules. Before carrying out such checks and inspections, in accordance with the rules in force, the Commission shall inform the Member State concerned accordingly in order to obtain any assistance necessary."

Regulation 2988/95[300] further assumed that general provisions would be adopted for checks and inspections on-the-spot. This happened with Regulation 2185/96,[301] in accordance with which the preparation and execution of control by the Commission should take place in close co-operation with the competent authorities of the Member States, which among other things necessarily requires that there should be reasonable prior notice given to the Member States. In continuation of this assumption of co-operation, officials of the Member States shall have the opportunity to take part in the control. Thus, it is only if the national authorities positively choose not to take part that the Commission can

298. Council Regulation (EC, Euratom) No 2988/95 on the protection of the European Communities financial interests (OJ 1995 L 312/1).
299. Council Regulation (EC, Euratom) No 2988/95 on the protection of the European Communities financial interests (OJ 1995 L 312/1).
300. Council Regulation (EC, Euratom) No 2988/95 on the protection of the European Communities financial interests (OJ 1995 L 312/1).
301. Council Regulation (Euratom, EC) No 2185/96 concerning on-the-spot checks and inspections carried out by the Commission in order to protect the European Communities' financial interests against fraud and other irregularities (OJ 1996 L 292/2)

carry out controls independently of the national authorities of the Member States.

Regulation 2988/95,[302] with its broad horizontal area of application and character of a framework regulation, is interesting because it confirms the Community's wishes about powers to exercise controls over those subject to the jurisdiction of the Member States. At the same time it retains the two important elements from the regulation of the Community's own revenues, competition law and the Structural Funds, namely, that the Commission shall give national authorities prior notice of the control and that the national authorities shall be able to take part in the control. Against this background it can today be regarded as an established part of Community law that the institutions of the Community may not, in secondary legislation, be given powers to exercise control over those subject to the jurisdiction of the Member States completely independently of the national authorities. Exceptions to this can only be made if there is an unequivocal basis for it in the regulation in question. On the other hand, it is noted that in Regulation 2988/95[303] the Community has chosen not to exclude the possibility; on the contrary, Art. 9.2 states that controls in individual sectors shall be under the conditions laid down in the sectoral rules.

As appears from the two sections in the review of the Community's independence of the Member States in exercising control over those subject to the jurisdiction of the Member States, secondary legislation covers a broad range of regulatory approaches, starting with the assumption that the Commission has no powers to exercise control, which is the case unless otherwise expressly provided for, and extending to co-operation on controls between the Commission and the Member State where the powers of the Commission can vary, including the right of the Commission to take the initiative on controls, and circumstances in which the Commission can itself carry out controls, subject always to giving prior notice to the national authorities. There are examples where the Commission is empowered to undertake controls over those subject to the jurisdiction of the Member States, wholly independently of the national authorities. In general the tendency is towards greater co-operation on controls.

8.2.2. Regulation of controls

The purpose of this section is to explain the regulation of the content of the powers in those cases where the Community is empowered by secondary legislation to exercise controls over those subject to the jurisdiction of the Member States.

302. Council Regulation (EC, Euratom) No 2988/95 on the protection of the European Communities financial interests (OJ 1995 L 312/1).
303. Council Regulation (EC, Euratom) No 2988/95 on the protection of the European Communities financial interests (OJ 1995 L 312/1).

Frequently the regulation is merely limited to stating the powers of the Community in wording such as " the Commission may, in conjunction with the competent authorities, make on-the-spot checks",[304] and possibly those who can take the initiative for controls, either the Member State acting alone or the Member State acting with the Commission.

This incomplete or limited regulation has meant that for a long time there was a considerable legal vacuum in relation to the Community's exercise of the powers of control. It was first with the important Regulation on the protection of the EC's financial interests[305] that the problem was presumed to be solved, since according to Art. 10 "Additional general provisions relating to checks and inspections on-the-spot shall be adopted." This promise was fulfilled in the winter of 1996, with the adoption of Regulation 2185/96.[306] According to Art. 1.2 this regulation has a broad horizontal application, since it provides that "this Regulation shall apply to all areas of the Communities' activity",[307] and it must

304. See Art. 19.2 in Council Directive 91/496/EEC of 15 July 1991 laying down the principles governing the organization of veterinary checks on animals entering the Community from third countries and amending Directives 89/662/EEC, 90/425/EEC and 90/675/EEC (OJ 1991 L 268/56). For other examples see Section 8.2.1.1. above.
305. Council Regulation (EC, Euratom) No 2988/95 on the protection of the European Communities financial interests (OJ 1995 L 312/1).
306. Council Regulation (Euratom, EC) No 2185/96 concerning on-the-spot checks and inspections carried out by the Commission in order to protect the European Communities' financial interests against fraud and other irregularities (OJ 1996 L 292/2).
307. As the regulation was adopted under the authority of Art. 235 of the EC Treaty and Art. 203 of the Euratom Treaty it applies to the whole of the Union's first pillar, with the exception of the co-operation on coal and steel. However, while the scope of the regulation is, in the first instance, broad, it does contain three limitations. First, it provides that the regulation shall apply "without prejudice to the provisions of the Community sectoral rules." In other words, where a sectoral regulation and Regulation 2185/96 deal with the same question, then the sectoral regulation takes precedence. This reservation in favour of sectoral regulation is followed up with an obligation on the Commission when carrying out on the spot checks, to "ensure that similar checks are not being carried out at the same time in respect of the same facts with regard to the economic operators concerned on the basis of Community sectoral regulations." It is thus first and foremost the duty of the Commission to observe the reservation in favour of sectoral regulation. Secondly, the regulation states that it does not affect Member States' powers to prosecute criminal offences or the rules governing mutual assistance in criminal matters between Member States. The third restriction to the complete horizontal application of the regulation is in relation to national control, since the Commission shall take into account any inspections into the same set of circumstances which Member States have already carried out or are in the process of carrying out with regard to the economic operators on the basis of national laws. The regulation does not include a requirement that, in this situation, the Commission shall refrain from making checks, merely that it shall take account of the national control. These three limitations to the scope of application of the regulation are not extensive.

be assumed that with Regulation 2185/96[308] a regime has been established which will have great significance for the practical implementation of on-the-spot controls and, over time, for the legal principles of future regulation.

8.2.2.1. The content of the duty to co-operate

As early as in Regulation 2/71[309] and again in Regulation 2891/77[310] a duty was contained for Member States to adopt measures to ease the participation of the Commission in national controls. Just as in the provisions under which the Commission and the national authorities shall co-operate on controls, this provision is far from being unique in secondary legislation, but it gives little guidance on the form of the co-operation.

Art. 4 in Regulation 2185/96[311] adopts a more comprehensive provision. In this it is provided that "On-the-spot checks and inspections shall be prepared and conducted by the Commission in close cooperation with the competent authorities of the Member State concerned, which shall be notified in good time of the object, purpose and legal basis of the checks and inspections, so that they can provide all the requisite help. To that end, the officials of the Member State concerned may participate in the on-the-spot checks and inspections. In addition, if the Member State concerned so wishes, the on-the-spot checks and inspections may be carried out jointly by the Commission and the Member State's competent authorities." Although the regulation implies that the Commission has the right to initiate controls and that it can otherwise decide on the implementation of controls, Art. 4 expresses the expectation that there will be a close co-operation between the national authorities and the Commission on controls, in which the national authorities are obliged to assist the Commission's work, whether by providing materials, facilities or otherwise.[312] The aim is to achieve a partnership between the two, built on the full involvement of the

308. Council Regulation (Euratom, EC) No 2185/96 concerning on-the-spot checks and inspections carried out by the Commission in order to protect the European Communities' financial interests against fraud and other irregularities (OJ 1996 L 292/2).
309. Regulation (EEC, Euratom, ECSC) No 2/71 implementing the Decision of 21 April 1970 on the replacement of financial contributions from Member States by the Communities' own resources (OJ 1971 L 3/1).
310. Council Regulation (EEC, Euratom, ECSC) No 2891/77 implementing the Decision of 21 April 1970 on the replacement of financial contributions from Member States by the Communities' own resources (OJ 1977 L 336/1).
311. Council Regulation (Euratom, EC) No 2185/96 concerning on-the-spot checks and inspections carried out by the Commission in order to protect the European Communities' financial interests against fraud and other irregularities (OJ 1996 L 292/2).
312. See EU-note E43, the Danish Parliament's European Committee, 28th June 1996.

inspectors of the Commission and the Member State in the checks and inspections on-the-spot.[313]

This broad understanding of the duty to co-operate naturally applies within the area of the horizontal application of the regulation, and it is also applicable in cases where sectoral secondary legislation is silent on the question of the content of the controls carried out by EC institutions and Member States together, but where it merely allows for Community to carry out on-the-spot controls, and where this is expressed in vague terms. It is not impossible that the principles laid down in Art. 4 of the regulation will also be more widely applicable, partly because of the wider influence of the regulation and partly because of the natural extension of Art. 10 and Art. 280.3 of the Treaty.

As a consequence of this it could be argued that regulations in secondary legislation which do not expressly exclude the Commission from initiating control but which, for example, merely provide for control in co-operation, can be interpreted so that the Commission can require controls to be set in motion.

8.2.2.2. The Commission's control powers

Cases in which the Commission is empowered to undertake on-the-spot controls in accordance with Regulation 2185/96[314] can be divided into three categories:

(i) The first, and simplest, is where a Member State requests it.

(ii) The second category covers three different situations: control with a view to investigating serious irregularities, cross border irregularities or irregularities where the implicated decision makers operate from several Member States. In the first case, that of serious irregularities, the Commission is presumably given competence because practical experience shows that the authorities in the Member States can have a problem dealing with such cases because of their extent. This applies particularly in countries which have inquisitorial magistrates, such as Italy. In the other two cases there are obvious practical reasons to give the Commission powers to exercise controls because it is precisely when there are cross-border irregularities that the controls of Member States will be insufficient.

(iii) The third and last category of cases in which the Commission can undertake on-the-spot checks and inspections is if the situation in a Member State requires it for a more effective protection of the financial interests in special cases, and thus to ensure the same degree of protection throughout the whole Community. Although this is not directly expressed, this provi-

313. In support of this see the Commission's Annual Report on Protecting the Community's financial interests – the fight against fraud, Annual Report 1995 (COM/96/173 Final).

314. Council Regulation (Euratom, EC) No 2185/96 concerning on-the-spot checks and inspections carried out by the Commission in order to protect the European Communities' financial interests against fraud and other irregularities (OJ 1996 L 292/2).

sion seems to be aimed at cases where a Member State's own controls are inadequate.

If there are cases in one of the three categories in which the Commission is empowered to undertake controls, according to Art. 5 of the regulation, this power can only be exercised if there are grounds for believing that irregularities exist. There must be suspicion of irregularities. This seems to be a new provision in the otherwise existing regulation of Community control over those subject to the jurisdiction of the Member States, which can typically be set in motion from a more general standpoint.[315]

In the Commission's 1995 Annual Report on the fight against fraud,[316] it is argued that the regulation will be significant for initiating and implementing targeted special investigations with a view to combating fraud. It says that this is especially so in those cases where the limits to an individual country's capacity to act have been reached, in particular in complex cases and cases involving more than one country.

In addition to the powers to carry out controls given in Regulation 2185/96[317] the Commission has powers to carry out on-the-spot checks in a large number of cases where this is provided for in the sectoral regulations. Among other things, this includes the areas of agriculture, the Structural Funds, controls connected with the Community's own revenues and in connection with competition law.

8.2.2.3. Those subject to controls

As for those over whom the Commission can exercise control, according to Art. 5 of Regulation 2185/96[318] controls can be carried out on economic operators to whom the administrative measures and penalties of Art. 7 of Regulation 2988/95[319] apply; in other words, legal and natural persons in the Member States and other bodies which have legal capacity under national laws, as well as persons who have contributed to or have responsibility for preventing irregu-

315. See EU-note E43, the Danish Parliament's European Committee, 28th June 1996.
316. The Commission's Annual Report on Protecting the Community's financial interests – the fight against fraud, Annual Report 1995 (COM/96/173 Final).
317. Council Regulation (Euratom, EC) No 2185/96 concerning on-the-spot checks and inspections carried out by the Commission in order to protect the European Communities' financial interests against fraud and other irregularities (OJ 1996 L 292/2).
318. Council Regulation (Euratom, EC) No 2185/96 concerning on-the-spot checks and inspections carried out by the Commission in order to protect the European Communities' financial interests against fraud and other irregularities (OJ 1996 L 292/2).
319. Council Regulation (EC, Euratom) No 2988/95 on the protection of the European Communities financial interests (OJ 1995 L 312/1).

larities. The reference to Regulation 2988/95[320] ensures that there is harmonisation between those who are subject to controls and those who can be subject to penalties. Furthermore, it adds that when it is strictly necessary, in order to establish whether an irregularity exists, the Commission may carry out inspections on others than those who are under suspicion of having been responsible for irregularities, provided that the inspection is made in order to obtain access to relevant information which the person concerned possesses and which relates to the circumstances which give rise to inspection. On the basis of the Commission's 1995 Annual Report on the fight against fraud,[321] it must be assumed that controls carried out in accordance with the regulation can only be directed against those subject to the jurisdiction of the Member States, and not against the national authorities.

The question of who is subject to control is only seldom dealt with in the sectoral regulations, so that the rules reviewed above must be assumed to have universality.

8.2.2.4. Implementation of controls

Art. 7 of Regulation 2185/96[322] provides that "Commission inspectors shall have access, under the same conditions as national administrative inspectors and in compliance with national legislation, to all the information and documentation ... which are required for the proper conduct of the on-the-spot checks and inspections." It follows from this provision that there is an equality between national administration of controls and Community control, which must be considered a considerable gain for Community control since, in previous secondary legislation, the Commission's inspectors have been given a more subordinate role.

Art. 7 also provides that the Commission can use the same inspection facilities as inspectors from national administrations, including taking copies of relevant documents. It is not entirely clear what the term 'inspection facilities' covers, but an indication of it is given in a comprehensive list of what on-the-spot checks and inspections may concern: "professional books and documents such as invoices, lists of terms and conditions, pay slips, statements of materials used and work done, and bank statements held by economic operators, computer data, production, packaging and dispatching systems and methods, physical checks as to the nature and quantity of goods or completed operations, the

320. Council Regulation (EC, Euratom) No 2988/95 on the protection of the European Communities financial interests (OJ 1995 L 312/1).
321. The Commission's Annual Report on Protecting the Community's financial interests – the fight against fraud, Annual Report 1995 (COM/96/173 Final).
322. Council Regulation (Euratom, EC) No 2185/96 concerning on-the-spot checks and inspections carried out by the Commission in order to protect the European Communities' financial interests against fraud and other irregularities (OJ 1996 L 292/2).

taking and checking of samples, the progress of works and investments for which financing has been provided, and the use made of completed investments, budgetary and accounting documents, the financial and technical implementation of subsidized projects." This list, which, according to the regulation, is not exhaustive points to a number of control methods and a number of subjects for control which therefore lie within the powers of the Commission, on the assumption that they also lie within the powers of the national authorities.

It is naturally important for the implementation of control that the Commission does in fact have access to the relevant facilities. Under Art. 5, the economic operators that are subject to control shall allow the Commission access to premises, land, means of transport or other areas used for business purposes. If those subject to control resist the Commission, the national authorities shall, in accordance with national rules, give the Commission such help as is necessary in order to carry out the inspection, cf. Art. 9. Moreover, the national authorities shall use the appropriate precautionary measures under national law if the Commission requests, cf. Art. 7.2. This is particularly relevant for safeguarding evidence. This regulation seeks to strike a balance between, on the one hand, the Commission's access to undertake controls, and, on the other hand, the Member States' monopoly of the exercise of power. This is achieved by giving the Commission wide powers to carry out controls and on-the-spot inspections, while reserving to Member States the exercise of power, but on the basis that they must act on requests from the Commission.[323]

Since it is overwhelmingly the case that secondary legislation does not contain provisions as to how controls shall be implemented, the provisions reviewed above will be important in a great number of cases, because of the wide area of application of the regulation. If it is true that Regulation 2185/96[324]

323. The regulation referred to presumably takes its inspiration from competition law, so that, as provided for in Regulation 17/62 First Regulation implementing Articles 85 and 86 of the Treaty (OJ 1962 L 13/204), Regulation (EEC) No 1017/68 applying rules of competition to transport by rail, road and inland waterway (OJ 1968 L 175/1), Council Regulation (EEC) No 4056/86 laying down detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport (OJ 1986 L 378/4), Council Regulation (EEC) No 3975/87 laying down the procedure for the application of the rules on competition to undertakings in the air transport sector (OJ 1987 L 374/1), and Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings (OJ 1989 L 395/1) those subject to the jurisdiction of the Member States must submit to the control inspections which the Commission decides. If anyone subject to the jurisdiction of the Member States resists the control it is provided that the Member State in question shall give the authorised representatives of the Commission the help necessary for carrying out their tasks.

324. Council Regulation (Euratom, EC) No 2185/96 concerning on-the-spot checks and inspections carried out by the Commission in order to protect the European Communities' financial interests against fraud and other irregularities (OJ 1996 L 292/2).

does not express rules for the implementation of controls in every case, this is because, as already noted, where there are different provisions in secondary legislation for use in specific circumstances, such provisions apply. Similarly, the regulation is only applicable within the limits set out in Art.2 of the regulation.[325] However, there is reason to believe that the regulation will be more widely applicable, both because of its broad scope and because it will exercise a certain influence on developments. Art. 10 in the Treaty can be seen as supporting this.

8.2.2.5. Personal competence

In practice, on-the-spot controls are carried out for the Commission by its officials or other empowered employees, cf. Art. 6 in Regulation 2185/96.[326] With the agreement of the Member State in which the control takes place, the Commission may also call on outside bodies to provide technical help.[327] Regardless of whether the control is carried out by the Commission's own officials or by outside bodies, it is the Commission which has the responsibility. This means, among other things, that the Commission shall ensure that the personnel or bodies carrying out the control meet the relevant requirements as to technical competence, independence and confidentiality.

In connection with the control, the Commission's inspectors shall show written authorisation, including their identity and position, together with documentation indicating the purpose of the inspection.

Subject to the agreement of the Member State concerned, the Commission can request the presence of officials from other Member States to act as observers.

8.2.2.6. Use of the results of controls

When the Commission has carried out an on-the-spot inspection, it shall inform the Member State of the result. If the control reveals irregularities, or gives grounds for suspecting that there are irregularities, the Commission shall report

325. Cf. Section 8.2.2.2

326. Council Regulation (Euratom, EC) No 2185/96 concerning on-the-spot checks and inspections carried out by the Commission in order to protect the European Communities' financial interests against fraud and other irregularities (OJ 1996 L 292/2).

327. The requirement for agreement of the Member State's to the use of external help was a key point in the political discussion of the regulation, since the French had fearful visions of controls being carried out by English accountancy firms. In the interview research, the person interviewed as the representative for the French Assembly expressed the view as follows; "The members of assembly were afraid that Commission representatives would be accountants from the large English accountancy firms such as Ernst & Young, so they insisted that any inspectors coming to France should be the Commission's own officials, not accountants and especially not English accountants."

this as soon as possible to the competent authority in the Member State in which the on-the-spot check or inspection has taken place, cf. Art. 8.2 of Regulation 2185/96.[328] This obligation is a step in the realisation of the aim of Art. 280.3 in the Treaty, and the support which the Commission shall provide Member States in connection with the protection of the Community's financial interests.[329]

In order that the results of the Commission's controls shall be useable, the reports must take account of the relevant administrative and criminal procedures in the Member States. In Regulation 2185/96[330] this is covered by the requirement that the "Commission's inspectors shall ensure that in drawing up their reports account is taken of the procedural requirements laid down in the national law of the Member State concerned," cf. Art. 8.3. Since this obligation on the Commission's officials cannot in itself guarantee that the report can in fact be used in national procedures, the regulation also provides that reports drawn up by the Commission's inspectors shall "constitute admissible evidence in administrative or judicial proceedings of the Member State in which their use proves necessary" in the same way and on the same terms as administrative reports prepared by officials of the Member State. Just as in regard to the Commission's access to carrying out controls, so it is with the use of the results of controls which the Commission carries out, that there is an equality between the Community's controls and national controls. As previously stated, it is necessary to make a reservation, more theoretical than practical, in favour of secondary legislation in individual sectors.

8.3. Conclusion

It is a characteristic of controls carried out by the Community in Member States that, apart from controls made by the Court of Auditors, the Treaty contains no reference to them. A considerable body of regulation of the question has developed through secondary legislation, beginning with some tentative encouragement of co-operation between the Commission and the national authorities of Member States, and growing through time to a position where the Commission has been given a considerable degree of independence. The decisive step was

328. Council Regulation (Euratom, EC) No 2185/96 concerning on-the-spot checks and inspections carried out by the Commission in order to protect the European Communities' financial interests against fraud and other irregularities (OJ 1996 L 292/2).
329. The Commission's Annual Report on Protecting the Community's financial interests – the fight against fraud, Annual Report 1995 (COM/96/173 Final).
330. Council Regulation (Euratom, EC) No 2185/96 concerning on-the-spot checks and inspections carried out by the Commission in order to protect the European Communities' financial interests against fraud and other irregularities (OJ 1996 L 292/2).

taken with Regulation 2185/96,[331] which filled out a pre-existing legal vacuum. The key words in the regulation are partnership and the equal status of national and Community controls. Because of its broad horizontal area of application, the regulation should form the basis for controls in many different situations, and in addition to this it is to be expected that it will have a 'contagious' effect on future regulation and on the interpretation of existing regulations. However, the regulation does make reservations in favour of sectoral regulations, so these must always be taken into consideration when evaluating actual cases.

331. Council Regulation (Euratom, EC) No 2185/96 concerning on-the-spot checks and inspections carried out by the Commission in order to protect the European Communities' financial interests against fraud and other irregularities (OJ 1996 L 292/2).

CHAPTER 9

The Community's control of national authorities

There is considerable regulation of Community control over the national authorities both in the treaty and in secondary Community law. It this regulation which is dealt with in this section.

9.1 The Treaty's authority for controls

The Community's treaty-based control of national authorities can best be considered according to which institution undertakes the control, in other words whether it is the Commission, the Court of Auditors or the European Parliament.

The Commission's source of authority is to be found in Article 10 of the EC Treaty, taken together with Article 211. From Article 10 comes the duty, previously referred to, that Member States shall facilitate the Commission in the achievement of its tasks, which includes a requirement that Member States shall inform the Commission of measures they have adopted to fulfil their obligations and faithfully make available such information as the Commission may request, cf. Case 240/86.[332] Article 211 of the EC Treaty requires the Commission to ensure that Community regulations are properly applied. A pre-condition for enabling the Commission to ensure of the application of EC law is that information is made available to it. It is assumed[333] that under Article 10 of the EC Treaty, taken together with Article 211, the Commission has on the one hand a right to make visits to national authorities to obtain information, and on the

332. Commission of the European Communities v Hellenic Republic, [1988] ECR 1835. See also Case C-33/90, Commission of the European Communities v Italian Republic [1991] ECR I-5987, where Italy was found to have infringed against Article 10 of the EC Treaty by failing to forward information to the Commission when requested.

333. Molde, Jørgen, et al.; EF-Karnov, 1990 p.30. The discussion of this topic was omitted from Molde, Jørgen, et al.; EU-Karnov, 1993 and Due, Ole, et al.; EU-Karnov 1996.

other to demand such information when infringements have been shown to exist, as well as information on the extent of resources used, cf. Case 240/86.[334]

It has been argued[335] that the Commission already possesses the powers to carry out such controls as it finds necessary, through its responsibility for the Community budget. The consequence of such a legal position would be the empowering of the Commission to carry out controls of Member State authorities in every area that is affected by EC financing. Such a view is hardly in accordance with the division of powers and is not supported in the way the law is enforced in practice, so the view cannot be accepted.

The Court of Auditors can also exercise control over national authorities. The powers of the Court of Auditors are based on Articles 246 and 248 of the EC Treaty, in accordance with which the Court of Auditors shall examine the accounts of all revenue and expenditure of the Community. Among other things this involves the Court of Auditors having access to audit central, regional and local authorities in Member States.

However, the control of Member States' authorities is not unfettered. Article 248.3 of the EC Treaty does indeed state that the audit shall be based on records and, if necessary, shall be performed on the spot, but at the same time it is laid down that "the audit shall be carried out in liaison with national audit bodies or, if these do not have the necessary powers, with the competent national departments. The Court of Auditors and the national audit bodies of the Member States shall cooperate in a spirit of trust while maintaining their independence." If the national institutes or authorities do not wish to take part in the audit, the Court of Auditors may carry out an audit on its own, which is the legal position in relation to the Court of Auditor's control of those who are subject to the law of the Member States.

With regard to the gathering of documents or other information, it is laid down that the Court of Auditors has a right to these, to the extent that it is necessary for it to be able to carry out its tasks, and that they shall be gathered via the national audit bodies or other relevant authorities.

The control of Member States' authorities by the Court of Auditors is thus based on the co-operation between the Court of Auditors and the national audit bodies.

The final EC institution that has a treaty based authority to undertake control of national authorities is the European Parliament. By Article G, No. 41 of the Treaty on European Union, the European Parliament was given powers to set up a temporary Committee of Inquiry. The provision is included in Article 193

334. Commission of the European Communities v Hellenic Republic, [1988] ECR 1835. Before this judgment there was an near corresponding power to require information, among others in Regulation 107/83, Article 9.

335. Vervaele, J.A.E: Fraud against the Community, 1992.

of the EC Treaty and provides that "the European Parliament may, at the request of a quarter of its members, set up a temporary Committee of Inquiry to investigate ... alleged contraventions or maladministration in the implementation of Community law."

The more detailed conditions for the exercise of the powers of investigation are laid down in an agreement entered into between the European Parliament, the Council and the Commission in 1995.[336] As a consequence of this, among other things, an investigation of alleged irregularities can take place regardless of whether they are committed by a Community institution or Community body or, which is more interesting in this context, whether they are committed by "a public authority in a Member State."[337] Thus, the European Parliament is given wide ranging powers to investigate Member States' adherence to Community law.

The only thing that is required for an investigation to be initiated is that there are "alleged contraventions or maladministration in the implementation of Community law",[338] and that a quarter of the members of the European Parliament request the setting up of a temporary Committee of Inquiry. In reality this means that if enough members of the European Parliament agree to it, a Committee of Inquiry is set up.

The European Parliament is given two instruments of control to carry out its wide powers to investigate Member States' compliance with Community law. These are to summon witnesses and to require written material to be submitted.

With regard to the written material, the assumption is that Member States' authorities as well as the Community's institutions and bodies shall provide the Committee of Inquiry with all documents that are necessary for the committee to carry out its tasks. However, a significant reservation applies in cases where delivery of written material is prevented by reasons of secrecy or public or national security arising out of national or Community legislation or rules. In addition to this, there is a requirement that the delivery of documents "shall be

336. Cf. The decision of the European Parliament, the Council and the Commission of 19 April 1995 on the detailed provisions governing the exercise of the European Parliament's right of inquiry, (OJ 1995 L 113/2). The use of this form of regulation is provided for in EC Treaty Art. 193.

337. In contrast to this, Article 193 does not allow for the possibility of investigating alleged contraventions or maladministration committed by natural or legal persons in Member States. However investigations can be instituted of "persons empowered by Community law to implement that law." This addition presumably relates only to natural or legal persons who have be given special powers under Community to law to exercise a function which is comparable to the functions of national authorities in implementing Community law.

338. Cf. EC Treaty Article 193 and the similarly phrased Article 2 of The decision of the European Parliament, the Council and the Commission on the detailed provisions governing the exercise of the European Parliament's right of inquiry, (OJ 1995 L 113/2).

without prejudice to any other provisions of the Member States which prohibit officials from appearing or documents from being forwarded." In other words, an authority in a Member State is not obliged to deliver documents to the Committee of Inquiry if this would conflict with national regulations. Thus only in relation to documents which exist in EC institutions or bodies is there a truly unconditional duty to submit documents. But even this is not entirely unconditional, since, insofar as the relevant documents in the possession of the Community originate in a Member State, that Member State must agree to their delivery.

The other source of information for the Committee of Inquiry is witnesses. The committee can request national governments and Community institutions or bodies to allow their members to take part in the work of the committee. The group of people referred to, according to the wording of the provision, includes ministers, commissioners etc., but since it is, in practice, unlikely that such people, especially national ministers, could spare time for the work of the committee, the wording must be understood otherwise and ambiguously, partly as a political signal that the Committee of Inquiry must be considered as important, and partly that the EC institutions and bodies as well as the Member States should, upon the justified request from the Committee of Inquiry, appoint an official or employee who is empowered to attend on the committee.[339] The persons in question shall speak on behalf of or on the instructions of their government or institution, and exemptions from the duty to give oral evidence apply to the same extent as in relation documentary evidence. In addition to this, the Committee of Inquiry can request any other person to give evidence, if necessary to the work of the committee. In this connection it is important that there is not an obligation to testify, but only to give evidence upon the 'request' of the committee. Finally, it follows from the rules of procedure of the European Parliament that any person who gives evidence to a temporary Committee of Inquiry can claim the rights which that person would have as a witness in legal proceedings in his own country. The rules of procedure states that the person in question shall be informed of these rights before giving evidence to the temporary Committee of Inquiry. The conclusion is that the European Parliament has wide ranging powers to initiate investigations, but at the same time, the Parliament is highly dependant on the regulations of the Member States for the gathering of information.

Article 193 provides that if the circumstances to be investigated are subject to legal proceedings, these must be concluded before a Committee of Inquiry can be set up to investigate the alleged contraventions or maladministration.

339. Article 3.3 in The decision of the European Parliament, the Council and the Commission of 19 April 1995 on the detailed provisions governing the exercise of the European Parliament's right of inquiry, (OJ 1995 L 113/2).

There is no doubt that the European Court is also covered by the term 'legal proceedings'. But proceedings in national courts can also prevent the setting up of a Committee of Inquiry. The legal proceedings should presumably be proper proceedings before a court, and not just proceedings before national bodies of a judicial character. The provision is formulated so that the requirements is that the alleged contraventions, maladministration or infringement of Community law 'is' subject to legal proceedings, if a temporary Committee of Inquiry is to be prevented from investigating the circumstances. This must mean that if legal proceedings are started after the setting up of a Committee of Inquiry, the committee will not be required to cease activity. This interpretation is also supported by the requirement of legal policy that Member States should not be able to obstruct investigations which they may consider embarrassing by instituting long drawn out national legal proceedings which, due to the temporary nature of the Committee of Inquiry, could effectively make the committee impotent.

If, after the setting up of a temporary Committee of Inquiry, the Commission notifies the European Parliament that a matter to be examined by a temporary committee of inquiry is the subject of a Community pre-litigation procedure, the temporary committee of inquiry "shall take all necessary steps to enable the Commission fully to exercise the powers conferred on it by the Treaties." What is proposed here is not that one investigation should exclude the other, but rather that they should run in parallel.

Apart from its designation, the temporary nature of a temporary Committee of Inquiry is apparent in the provision in Article 193.2 of the EC Treaty that "the Temporary Committee of Inquiry shall cease to exist on submission of its report." In addition to this, the agreement referred to above, between the European Parliament, the Council and the Commission[340] provides that a temporary Committee of Inquiry shall cease to exist 12 months at the latest after it has been set up,[341] and at the expiry of an election period. However, the 12 month period can be extended twice for up to 3 months.

340. Cf. Article 4 in The decision of the European Parliament, the Council and the Commission of 19 April 1995 on the detailed provisions governing the exercise of the European Parliament's right of inquiry, (OJ 1995 L 113/2).

341. It seems that what is decisive in connection with setting the time limit is the date when European Parliament's setting up of the committee, and not the publication of the decision to do so in the Official Journal, cf. Article 4.1 taken together with Article 2.3 in The decision of the European Parliament, the Council and the Commission of 19 April 1995 on the detailed provisions governing the exercise of the European Parliament's right of inquiry, (OJ 1995 L 113/2). Meanwhile it can be noted that the time limit for the presentation of a report in connection with the Committee of Inquiry which the European Parliament set up in December 1995 (B4-1571/95), is set at 12 months from the publication of the decision in the Official Journal.

Until now the European Parliament has only used its powers to set up a temporary Committee of Inquiry three times.[342] The task of the first committee, which was set up in the December 1995 session, was to investigate "the nature and origin of ... fraud or maladministration by the competent national authorities ... in connection with transit procedures". The background to this was that both the Commission and the Court of Auditors had pointed out the significant irregularities in connection with the transport of goods[343] and laid down that it was the national administrations that were responsible for the standards of administrative control and conduct of the arrangements.[344] The committee which was set up had seventeen members, and to ensure the progress of the work a secretariat was appointed with three case officers with one official from DG II, one from the secretariat of the Transport Committee and one from the Finance Control Committee. It is clear that this first temporary Committee of Inquiry will have considerable influence on the future use of this form of investigation. There is thus no doubt that the European Parliament chose the topic for investigation with great care. The work of the committee was completed on 19th December 1996 with the delivery of the final report and recommendations of the Committee of Inquiry into the Community Transit System,[345] which should be characterised as significant report. The Committee of Inquiry revealed a whole range of procedures and mechanisms connected with irregularities in transit systems, and in general it found there was a need to establish a European legal "clearing house", among other things to combat irregularities arising out of organised criminality. According to the report, legal co-operation exists in theory, but not in practice, due to the very different administrative and legal structures of the Member States. In particular, diverging standards of evidence mean that circumstances which are established in one Member State cannot be accepted as evidence in another. These differences are exploited by organised criminals. In time, the European Parliament's temporary Committees

342. For the first committee refer to B4-1571/95. The second temporary Committee of Inquiry was set up by the European Parliament's Decision of 17 July 1996, (OJ 1996 C 239/1), and it concerned the implementation of Community law relating to BSE.
343. In the Communication from the Commission – Fraud in the transit procedure, Solutions foreseen and perspectives for the future, COM/95/108 Final, the Commission estimated that, from 1990 to 1994, the extent of customs and tax evasion under the Community's transit procedures was about 750 million ECU.
344. Section 4.2 of the Commission's Annual Report 1994 – Protecting the Community's financial interests – The fight against fraud, and Point 1,48 of the 1994 Annual Report of the Court of Auditors.
345. PE 220.895/DEF. The report consists of four volumes: Volume I contains the final report and recommendations (192 pages), Volume II contains the oral evidence (382 pages), Volume III contains the written submissions (379 pages), and Volume IV contains the submissions from the EU institutions (241 pages). Altogether the report contains 1194 pages.

of Inquiry could develop into a significant instrument in the Community's control over national authorities.

9.2. Regulation in secondary legislation

As previously stated, the EC is based on a division of responsibilities where Community institutions adopt rules and budgets, and Member States are responsible for their administration. This means that the Community only has limited direct insight into the use of resources and the effectiveness of regulation. Therefore the legal structure of the EC necessitates that the Community is able to control the Member States, or otherwise obtain information on the application of rules and resources in practice, to ensure that the rules are adhered to and to determine whether there is a need to change or adapt them, or, if change is necessary, which approach will be most suitable.

Despite the obvious need for Community control of national authorities, the establishment of such control has not been straightforward. In part this has been because the Member States' regard for their sovereignty has hindered it, and in part because the EC does not have the very considerable resources that a proper control would require.

It is against this background that there has been an important supplement to and partial substitute for control carried out by the EC institutions. Secondary legislation has been used to develop the obligations of Member States to give information to Community institutions about their administration of Community provisions, including information on the controls they carry out and the irregularities they identify.[346]

In the following there is first a review of the regulation of the reporting requirements established in secondary legislation and thereafter a review of the regulation of the EC's powers to carry out its own controls of the national authorities.

9.2.1. Reporting requirements

The obligation to report arose quite early on in connection with agriculture. Thus, Regulation 729/70[347] contains an obligation for Member States to inform the Commission of the measures taken to ensure that transactions financed by

346. The European Parliament has several times pointed to the need for the Community, or more precisely the Commission, to obtain better information on cases of irregularities, see for example the report prepared by the European Parliament Committee on Budgetary Control on strengthening measures against fraud directed at the EC budget, PE 111.304/DEF, of 16th March 1987.

347. On the financing of the common agricultural policy, (OJ 1970 L 94/13).

the Community are actually carried out and are executed correctly, and to prevent and deal with irregularities and recover sums lost as a result of irregularities or negligence. The wording gave Member States a certain room for manoeuvre which meant that the obligation to report was not effective, so a tightening up of the obligation was needed just 2 years later.

Thus Regulation 283/72[348] introduced a proper information system in the area of agriculture. In particular Article 3 of the Regulation had a widespread effect since it required Member States to give the Commission quarterly reports about which provisions had been infringed, the nature and amount of expenditures, the common market programme and the product or products concerned, the period during which or the moment when the irregularity was committed, the practices adopted in committing the irregularity, the manner in which the irregularity was discovered, the national authorities or bodies which recorded the irregularity, the financial consequences and the possibility of recovery.

It was almost 20 years before this reporting obligation was revised. It happened with Regulation 595/91[349] which repeated the provisions of Article 3 noted above and supplemented it with further requirements for information on the date and source of the first information leading to suspicion that an irregularity existed, as well as the date on which the irregularity was discovered, and whether other Member States and third countries were involved, as well as the identity of the natural and legal persons involved. In addition to this Regulation 595/91[350] Article 5[351] gives very specific requirements for Member States to report on judicial procedures instituted following the irregularities notified, so that information must be given on the amounts which have been, or are expected to be, recovered, on the precautionary action taken by Member States to safeguard recovery of sums wrongly paid, on the judicial and administrative procedures instituted with a view to recovering sums wrongly paid and applying sanctions, on the reasons for any abandonment of recovery procedures and on

348. Concerning irregularities and the recovery of sums wrongly paid in connection with the financing of the common agricultural policy and the organization of an information system in this field, (OJ 1972 L 36/1).
349. Concerning irregularities and the recovery of sums wrongly paid in connection with the financing of the common agricultural policy and the organization of an information system in this field and repealing Regulation (EEC) No 283/72, (OJ 1991 L 67/11).
350. Concerning irregularities and the recovery of sums wrongly paid in connection with the financing of the common agricultural policy and the organization of an information system in this field and repealing Regulation (EEC) No 283/72, (OJ 1991 L 67/11).
351. A similar, though nowhere near as wide-ranging, provision is found in Article 5 of Regulation 283/72. Here the requirement was that Member States "Shall supply the Commission with any information which is relevant in this respect."

any abandonment of criminal prosecutions. Furthermore, Regulation 595/91[352] contains a requirement, just as did Regulation 283/72,[353] that the information requested shall be given during the two months following the end of each quarter.[354]

It must be assumed that reporting from the Member States to the Commission which meets the stated requirements would give the Commission an in depth insight into the national administration and control of the relevant regulations as well as a basis for making appropriate proposals for controls and sanctions, since the information given will put the Commission in a position where it can carry out an analysis of where and how the irregularities occur, as well as the Member States' pursuit of them.[355] At the same time the information given will give the Commission a better basis for carrying out its own control functions, both in relation to the Member States and those who are subject to the laws of the Member States.[356]

352. Concerning irregularities and the recovery of sums wrongly paid in connection with the financing of the common agricultural policy and the organization of an information system in this field and repealing Regulation (EEC) No 283/72, (OJ 1991 L 67/11).
353. Concerning irregularities and the recovery of sums wrongly paid in connection with the financing of the common agricultural policy and the organization of an information system in this field, (OJ 1972 L 36/1).
354. In Special report No 7/93 concerning controls of irregularities and fraud in the agricultural area (implementation of Council Regulation (EEC) No 4045/89 and Council Regulation (EEC) No 595/91 accompanied by the replies of the Commission (OJ 1994 C 53/1) the Court of Auditors expressed considerable criticism of the Member States for not making reports within the time limits set, and for such reports as were made the information given was incomplete and imprecise. It was not only the Member States that were criticised. The Commission's Directorate General for Agriculture (DG VI) which received information from the Member States, was criticised for not co-operating satisfactorily with UCLAF, which was therefore not in a position to carry out its functions in managing and co-ordinating the information received.
355. There is a statistical overview of the irregularities referred to in the Regulation in Section 17.1.1 if this book. It has also been noted that there are great differences between the number of irregularities reported by each Member States, and the their monetary value, which has given the Commission the impression that the Member States only report some but not all of the irregularities they discover.
356. There are other examples of the reporting requirements in the area of agriculture. One of the more recent is in Regulation 1469/95 on measures to be taken with regard to certain beneficiaries of operations financed by the Guarantee Section of the EAGGF (OJ 1995 L 145/1) with Regulation 745/96 laying down detailed rules for the application of Council Regulation (EC) No 1469/95 on measures to be taken with regard to certain beneficiaries of operations financed by the Guarantee Section of the EAGGF (OJ 1996 L 102/15). The cornerstone of the reporting requirement is that Member States shall give the Commission information on operators who, on the basis of experience, have "a risk of non-reliability in connection with tendering procedures, export refunds and sales at reduced prices or intervention products, financed by the Guarantee Section of the EAGGF." Such information shall be forwarded by the Commission to other Member

In the Community's other great area of expenditure, the Structural Funds, there is also confirmation of the Community's growing attention to the importance of receiving information on the implementation of regulations in practice and the consequent need to establish a reporting obligation for Member States. For the three oldest Structural Funds, the European Regional Development Fund, the European Agricultural Guidance and Guarantee Fund and the European Social Fund, the reporting requirements which were in Regulation 4253/88,[357] and were tightened in Article 23 of Regulation 2082/93,[358] have been further tightened and specified in Regulation 1681/94.[359] The reporting requirements for Member States have been thoroughly regulated both with regard to the information which shall be given, when it shall be given, and the frequency with which it shall be given. Since this makes considerable demands on the resources of the national authorities, it has been established that where the irregularities relate to sums of less than ECU 4,000 charged to the Community budget, Member States shall not forward information to the Commission, unless the Commission expressly requests it.

States so that they can take the necessary care, including instigating extra controls. Furthermore, the Commission shall itself use such information to exclude the operators in question from taking part in tenders offered by the Commission. It is noted that the Commission takes a central co-ordinating role, first and foremost as a recipient and forwarder of the information given, but also as a line of communication if a Member State requires further information, since this is to be dealt with by the Member State in question referring to the Commission which in turn shall obtain the information from the Member State which gave the original information.

357. Laying down provisions for implementing Regulation (EEC) No 2052/88 as regards coordination of the activities of the different Structural Funds between themselves and with the operations of the European Investment Bank and the other existing financial instruments, (OJ 1988 L 374/1). There was further clarification of this reporting requirement in Regulation 4253/88 which the Commission made in a Code of conduct with regard to the application of Article 23.1 in Regulation 4253/88, relating to irregularities and the implementation of a system for the exchange of information on irregularities, (OJ 1990 C 200/3). This code of conduct was annulled by the European Court in Case C-303/90, [1991] ECR 5315. The substantive part of the annulled code of conduct is now to be found in Regulation 1681/94 concerning irregularities and the recovery of sums wrongly paid in connection with the financing of the structural policies and the organization of an information system in this field, (OJ 1994 L 178/43).
358. Amending Regulation (EEC) No 4253/88 laying down provisions for implementing Regulation (EEC) No 2052/88 as regards coordination of the activities of the different Structural Funds between themselves and with the operations of the European Investment Bank and the other existing financial instruments, (OJ 1993 L 193/20).
359. Concerning irregularities and the recovery of sums wrongly paid in connection with the financing of the structural policies and the organization of an information system in this field, (OJ 1994 L 178/43).

With regard to the newest established Structural Fund, the Cohesion Fund,[360] the requirements for reporting are found in Regulation 1831/94,[361] which is practically a word for word repetition of Regulation 1681/94.[362]

Thus, the reporting requirements which have been established in the area of Structural Funds correspond so closely to those for agriculture which are in Regulation 595/91[363] that the latter must be assumed to have been the model for them. This is an assumption which is confirmed by the Commission's annual report Protecting the Community's Financial Interests – The Fight Against Fraud – Annual Report 1994.[364] Against this background it can be suggested that this has established a model for regulating the reporting requirements of Member States which will be used in future.

The Community's interest in receiving information not only concerns irregularities in relation to the expenses of the Community, but equally concerns the income of the Community.

In the area of income it has been sought to ensure the establishment of a reporting system by having each Member State prepare an annual summary account accompanied by a report on the controls established for its own resources, and this shall be sent to the Commission before July 1st of the following year, cf. Regulation 2891/77.[365] This is supplemented by a provision under which, "Each Member State shall inform the Commission, at the latter's request ... of the names of the departments or agencies responsible for establishing their own resources and, where appropriate, their status ... of the general provisions laid down by law regulation or administrative action and those relating to accounting procedure concerning the establishment of own resources and their being made available to the Commission." The central reporting duty concerning irregularities with the Community's own resources is found in Article 6 of Regulation 1552/89,[366] as amended by Regulation 1355/96[367] and is as follows: "As from 1 July 1996, each Member State shall send the Commission a descrip-

360. Regulation 1164/94 establishing a Cohesion Fund, (OJ 1994 L 130/1).
361. Concerning irregularities and the recovery of sums wrongly paid in connection with the financing of the Cohesion Fund and the organization of an information system in this field, (OJ 1994 L 191/9).
362. Concerning irregularities and the recovery of sums wrongly paid in connection with the financing of the structural policies and the organization of an information system in this field, (OJ 1994 L 178/43).
363. Concerning irregularities and the recovery of sums wrongly paid in connection with the financing of the common agricultural policy and the organization of an information system in this field and repealing Regulation (EEC) No 283/72, (OJ 1991 L 92/43).
364. COM/95/98 Final
365. Implementing the Decision of 21 April 1970 on the replacement of financial contributions from Member States by the Communities' own resources, (OJ 1977 L 336/1).
366. Decision 88/376 on the system of the Communities' own resources, (OJ 1989 L 155/1).
367. Regulation 1552/89 implementing Decision 88/376 on the Communities' own resources.

tion of cases of fraud and irregularities detected involving entitlements of over ECU 10000. As far as possible, the Member State shall provide the following details: type of fraud and/pr irregularity (designation, custom procedure concerned), amount of own resources evaded or presumed order of magnitude, goods involved (tariff heading, origin, place from which they come), concise description of fraud mechanism, type of check that led to discovery, national department or agencies which detected the fraud or irregularity, stage reached in procedure, including the stage of recovery, with reference to the establishment if already made, reference of notification of case under Council Regulation (EEC) No 1468/81 of 19 May 1981 on mutual assistance between the administrative authorities of the Member States and co-operation between the latter and the Commission to ensure the correct application of the law on customs or agricultural matters, if appropriate, the Member States involved, - measures taken or envisaged to prevent the recurrence of the case of fraud or irregularity already detected. Together with each quarterly statement pursuant to the first subparagraph, each Member State shall give details of the position concerning cases of fraud and irregularities already reported to the Commission whose recovery, cancellation or non-recovery was not indicated earlier ...." Furthermore, Article 17.3 of Regulation 1355/96[368] obliges Member States "to inform the Commission, by means of annual reports, of the details and results of their inspection and of the overall data and questions of principle concerning the most important problems arising out of the application of this regulation and, in particular, matters in dispute."[369]

These regulations give the Commission in depth insight into the character of the irregularities that arise and the control carried out by the Member States.

9.2.1.1 The use of the information

The Community's use of the information received presupposes that the reports are of a high quality and submitted regularly. This is something which the Community is aware of[370] and which, as indicated above, it seeks to secure through secondary legislation.

368. Regulation 1552/89 implementing Decision 88/376 on the Communities' own resources.
369. In dealing with the obligation to give information on the Community's own resources, reference can also be made to Regulation 1468/81 on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs or agricultural matters, (OJ 1981 L 144/1) as amended Regulation 945/87 amending Regulation (EEC) No 1468/81 on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs or agricultural matters, (OJ 1987 L 90/3).
370. See also The Commission's Annual Report 1993, Protecting the Community's financial interests – The fight against fraud.

Furthermore, the Community has acknowledged that the obligation to report is of only limited value in itself. To maximise the usefulness of this it is necessary that a considerable body of information is made operational and systematised. This takes place by structuring the information gathered and combining the various information sources by means of information technology. An important element in this is the setting up of various databases within the EC. Probably the best known database is IRENE which has been going since 1992, and which covers agriculture, the Community's own resources, mutual support and Structural Funds. At the end of 1993 the database contained over 11,500 reported cases of irregularities, with 8,200 concerning the EAGGF, 2,900 concerning own resources and 60 concerning Structural Funds. By the end of 1997 these figures had grown to over 25,500 cases with 14,300 concerning the EAGGF, 9,500 concerning own resources, 900 concerning mutual assistance and 800 concerning Structural Funds.[371] Apart from the IRENE database there are a number of other databases, for example Pre-IRENE,[372] DAF,[373] SCENT[374] and SID.[375] With a view to promoting the capacity for integration between the

371. Cf. the Special Report of the Court of Auditors No 8/98 on the Commission's services specifically involved in the fight against fraud, notably the 'unité de coordination de la lutte anti- fraude' (UCLAF) together with the Commission's replies (OJ 1998 C 230/1).
372. In principle, the Pre IRENE database contains information on (presumed) irregularities which UCLAF (now OLAF) are investigating, and which Member States have not yet given official information on. The database contains not only a description of the case in relation to the land, the money involved, the nature of the irregularity etc., but also information on the method used in connection with the case of fraud or irregularity in question and pending cases. By ensuring the internal co-ordination of the information, it will be possible to improve the work of UCLAF (now OLAF), especially its preventive work will be strengthened. Pre-IRENE became operational on a test basis in 1994. In 1997 the database held information on over 750 cases.
373. The general database for combating fraud. Information can be obtained through the DAF project on the controls and systems for combating fraud which the Member States have introduced in relation to the various financial arrangements in different areas of income and expenditure. The system should make it possible to draw up a picture of the administrative and criminal sanctions that are in use in a given area.
374. SCENT (Systems Customs Enforcement NeTwork) is a customs information system. The system operates as an information service where it is possible to obtain information on persons, means of transport, goods, etc. There are over 300 terminals installed connecting import and export customs offices in the Union, and they make it possible to communicate with the central national authorities and the Commission's service branch 24 hours a day 7 days a week.
375. SID is a database for customs information that will, in time, cover all areas connected with customs co-operation both within the EC and outside the EC area of operation (e.g. illegal drugs etc.). The system is based on a number of terminals that link import and export customs offices in the Community as well as linking them with the central adminstrations of the Member States and the Commission's service branch. By the end of 1992 there were 70 terminals in the Member States linked to SID, but one year later the figure was up to 250.

various information sources the Commission has developed a database called IRENE 95.

As has been seen, the Community has established a thoroughgoing obligation for Member States to report. In addition, since the beginning of the 90's there has been a trend towards uniformity in the regulations. Furthermore there is a clear aim to systematise the information and make it useable. This means that today the obligation to report operates as a supplement to or substitute for a true control over national authorities and besides this it gives the Commission a better basis on which to carry its own direct control functions. At the same time, the information gathered means that the Community has a basis for evaluating the need for adapting or changing existing regulations.[376]

In more recent years there has also been a tendency for the reporting obligations to be used in a new connection, to give the Community greater influence over the actual administration of EC rules by national authorities.

A good illustration of this can be seen in Regulation 2262/84,[377] as amended by Regulation 593/92,[378] on the special measures in the olive oil sector. As previously referred to, the regulations required Member States to set up a special, administratively independent agency to undertake a number of control duties. Under Article 1.4, representatives of the Commission can, at any time, observe the work carried out by the agency. Thus, the agency shall send regular reports on its activities to the Commission and an overview of the measures and sanctions that are put in place in connection with cases that are revealed by the controls. Regulation 27/85,[379] as amended by Regulation 3602/92,[380] is associated with this, and it goes into more detail on the obligations referred to. Among other things, it provides that the agency shall, by the 15th day of each month at the latest, send the Commission its work programme for the following month to enable the Commission to follow the work of the agency.[381] This prior reporting gives the Commission a strong and direct connection with the national control.

376. The Commission's Annual Report 1995, Protecting the Community's financial interests – The fight against fraud, COM/96/0173 Final.
377. Laying down special measures in respect of olive oil, (OJ 1984 L 208/11).
378. Amending Regulation (EEC) No 2262/84 laying down special measures in respect of olive oil, (OJ 1992 L 64/1).
379. Laying down detailed rules for the application of Regulation (EEC) No 2262/84 laying down special measures in respect of olive oil, (OJ 1985 L 4/5).
380. Amending Regulation (EEC) No 27/85 laying down detailed rules for the application of Regulation (EEC) No 2262/84 laying down special measures in respect of olive oil, (OJ 1992 L 366/31).
381. There is corresponding regulation of the tobacco sector in Regulation 2075/92 on the common organization of the market in raw tobacco, (OJ 1992 L 215/70), with the implementation provisions of Regulation 85/93 concerning control agencies in the tobacco sector, (OJ 1993 L 12/9).

In the area of the Structural Funds[382] it is also possible to see a clear trend towards the use of the reporting requirements to secure greater influence for the Community over the administration by the Member States. Thus, the Commission plays an important role in the co-ordination and planning of the fight against irregularities, not least in the development of strategies. Among other things it has been decided that the Commission shall arrange briefing meetings at Community level for representatives of the Member States and, on the basis of the information given by the Member States, to draw conclusions with regard to the irregularities, preventive measures and follow up.

A third example is Regulation 4045/89,[383] as amended by Regulation 3094/94,[384] which includes a provision that each Member State shall put in place a programme for the control which it shall carry out. This programme shall be sent to the Commission, which has eight weeks in which to make any comments on it; if there are no comments the programme enters into force, as proposed by the Member State. However, the Commission may at any time require that a particular type of activity shall be included in the Member State's programme. In this way, the Commission not only obtains advance knowledge of Member States' controls, but it is also in reality given power to intervene at any time in the controls arranged by the Member States. The object of these reports is not to obtain a basis for adjustments of the regulations, but rather to obtain influence over the national administration of the control obligations.[385]

382. See Article 8 in Regulation 1831/94 concerning irregularities and the recovery of sums wrongly paid in connection with the financing of the Cohesion Fund and the organization of an information system in this field, (OJ 1994 L 191/9) and Article 8 in Regulation 1681/94 concerning irregularities and the recovery of sums wrongly paid in connection with the financing of the structural policies and the organization of an information system in this field, (OJ 1994 L 178/43).
383. On scrutiny by Member States of transactions forming part of the system of financing by the Guarantee Section of the European Agricultural Guidance and Guarantee Fund and repealing Directive 77/435/EEC, (OJ 1989 L 388/18).
384. Amending Regulation (EEC) No 4045/89 on scrutiny by Member States of transactions forming part of the system of financing by the Guarantee Section of the European Agricultural Guidance and Guarantee Fund, (OJ 1994 L 328/1).
385. Refer also to the example of Regulation 2048/89 Laying down general rules on controls in the wine sector, (OJ 1989 202/32) which includes a rule requiring annual meetings between the Commission and Member States to establish the application of the Regulation and exhaustive provisions for mutual assistance and co-ordination of control between the Commission and the Member States. See also Regulation 3122/94 laying down criteria for risk analysis as regards agricultural products receiving refunds, (OJ 1994 L 330/31), which lays down a number of criteria which can be taken into account in risk analysis in relation to the Regulation, and in extension of this provides that Member States shall give the Commission information on the steps taken with a view to the use of risk analysis. It provides that "The Member States and the Commission shall jointly assess the reliability and relevance of these criteria [for risk analysis]on the basis of experience acquired in order to make – in case of need – any necessary adjustments to

In the course of the next few years it will be seen whether the Community will be able to use the reporting system further, in the organisation of a co-ordinated strategy for the fight against irregularities.

In extension of this review of the reporting obligations, it is appropriate to refer briefly to the free-call telephone line set up by the Commission. The principle is that in all Member States a call can be made to a telephone number, without charge where information can be given, if necessary anonymously, about irregularities against the Community.[386]

The system was inaugurated in November 1994. During the first year the Commission received more than 4000 calls, of which 200 led to a more detailed investigation, while in another of other cases the Commission was able to cross-check information which had already been obtained by other means. In 1996 nearly 4000 calls were received, of which 42, which primarily related to the Community's own resources and the Structural Funds, gave rise to further investigation.[387] The telephone line has been an important source of information on irregularities.

9.2.2. Controls

As in a number of other circumstances relating to controls and sanctions in EC law, the scope of the Community to exercise control over national authorities has also grown over the years through secondary legislation and regulation which began tentatively has since grown in strength.

It seems that the area in which the Community was first given powers to control national authorities was that of fisheries.[388] Today there is comprehen

the system and selection parameters to make physical checks more effective and improve targeting." The Commission is thus given by the Regulation in part influence over the national administrations, and in part a basis for evaluating where there should be any amendment to the regulations. See also Article 8 in Regulation 2392/86 establishing a Community vineyard register, (OJ 1986 L 208/1), which establishes an interplay between the Commission and the Member States in connection with the reporting requirements and the administration of the rules.

386. For further information on this telephone system see The Commission's Annual Report 1994, Protecting the Community's financial interests – The fight against fraud, COM/95/98 Final, page 27.

387. See The Commission's Annual Report 1996, Protecting the Community's financial interests – The fight against fraud, COM/97/200 Final, page 15.

388. Regulation 2057/82 establishing certain control measures for fishing activities by vessels of the Member States (OJ 1982 L 220/1) which, "To ensure that Member States comply with this Regulation" in Article 12.3 autohorises the Commission to "verify on the spot the implementation thereof, in liaison with the competent national departments." This power is limited in Article 12.4 where it is specified that the Commission's authorised officials "shall be entitled to be present ... at inspections carried out by national departments," and that "the commander of the vessel or aircraft shall be in sole charge of the operations" and that "Commission officials participating in such operations shall abide

sive regulation of fisheries in Regulation 2847/93[389] establishing a control system applicable to the common fisheries policy. Article 29.1 of this Regulation thus contains a provision giving the Commission power to verify the implementation of the Regulation by examining documents and by conducting on-the-spot visits, which can take place without prior notice. In addition to this, under Article 29.3 the Commission may request Member States to notify it of the detailed inspection and control programme planned by the competent national authorities, whereupon the Commission may carry out independent inspections in order to verify the implementation of that programme by the competent authorities of a Member State. By this Regulation the Commission is effectively given unconditional powers to control national authorities. In particular, the power of the Commission to carry out on-the-spot controls of national authorities should be noted.

The fact that it was the area of fisheries which should be the pioneer for such controls is presumably because both foreign and domestic fishing vessels operate in the territorial waters of the Member States, which could tempt the Member States primarily to control the foreign vessels.

But also on land, in the area of agriculture, there is now authority for Community control of national authorities. Under Article 11.2 of Regulation 3508/92[390] officials of the Commission may carry out any examination or control relating to the body of measures taken in order to establish the integrated system and to the eligibility of expenditure declared under the Community co-financing provided for in the Regulation. Where Member States have delegated the tasks under the Regulation to specialised agencies or operators, the Commission may also control them. The Commission is allowed considerable freedom with regard to the form of the control undertaken, since the provision allows the Commission's officials to undertake "any examination or control."

by the rules and practices laid down by the commander" and that finally. "Commission officials shall not have rights of enforcement against private citizens, but shall accompany national inspectors who shall remains at all times responsible for the operations which are carried out." The Commission's relatively restricted role in the control is natural, since its primary function is not to control those who are subject to the laws of the Member States, but rather to ensure that the Member States comply with the Regulation. Later, Regulation 2241/87 establishing certain control measures for fishing activities (OJ 1987 L 207/1) was adopted.

389. Regulation 2847/93 establishing a control system applicable to the common fisheries policy (OJ 1993 L 261/1).

390. Establishing an integrated administration and control system for certain Community aid schemes (OJ 1992 L 355/1).

Furthermore, it may be recalled that Regulation 165/94[391] contains authority for the EC to support national controls by establishing a register of satellite pictures which Member States may borrow with a view to controlling those subject to their jurisdiction. Such a register will also give the Commission a basis for control by virtue of its content, as well as by registering Member States' use of it, which seems to be permitted by the prevailing regulations. Regarded in this light, the provision gives the impression of establishing an effective control of Member States.

To complete the picture it is also necessary to note that the Commission shall give notice to the competent authority "in good time" before undertaking the control, and that officials of the Member State can take part in the control measures. In other words, those who are to be controlled are given good notice that a control will be carried out, which naturally tends to weaken considerably the effectiveness of the control.[392]

In Article 11 of Regulation 1553/89[393] on the Community's own resources, it is provided that in relation to VAT "the Commission's controls shall be carried out with the competent authorities in the Member States",[394] and in furtherance of this it is laid down that "the Commission shall ensure, in particu-

391. Concerning the co-financing by the Community of remote sensing checks and amending Regulation (EEC) No 3508/92 establishing an integrated administration and control system for certain Community aid schemes (OJ 1994 L 24/6). On satellite monitoring see also Article 3 in Regulation 2847/93 establishing a control system applicable to the common fisheries policy (OJ 1993 L 261/1), as well as the follow up to this in Regulation 2489/96 amending Regulation (EEC) No 2847/93 as regards the deadline for a Council decision on a continuous position monitoring system using satellite communications for Community fishing vessels (OJ 1996 L 338/12) and Regulation 686/97 amending Regulation (EEC) No 2847/93 establishing a control system applicable to the common fisheries policy (OJ 1997 L 102/1) and Regulation 1489/97 laying down detailed rules for the application of Council Regulation (EEC) No 2847/93 as regards satellite-based vessel monitoring systems (OJ 1997 L 202/18).
392. There is another example of the Commission being given power to control national authorities in the area of agriculture in Article 16 of Directive 92/35 which states that "Experts from the Commission may ... by inspecting a representative percentage of holdings, verify whether the competent authorities are monitoring compliance with the provisions of this Directive." There are two things about this provision that should be noted. First, the Commission is given powers to control those subject to the laws of a Member State with a view to monitoring the controls carried out by Member States. Secondly, a parameter is set for the extent of the control, namely, the representative percent.
393. On the definitive uniform arrangements for the collection of own resources accruing from value added tax (OJ 1989 L 155/9).
394. The same provision existed earlier in Regulation 2892/77 implementing in respect of own resources accruing from value added tax the Decision of 21 April 1970 on the replacement of financial contributions from Member States by the Communities' own resources (OJ 1977 L 336/8).

lar, that the operations to centralize the assessment base and to determine ... the total net value added tax collected have been performed correctly." Thus the Regulation contains unambiguous authority to control national authorities, and also specifies what control shall be undertaken.

The Regulations referred to confirm the tendency of secondary legislation to allow the Commission to carry out controls over national authorities. However, this regulation is still in its infancy. Thus it is noted that the regulation of the Structural Funds only includes very limited powers for EC control of national authorities.[395] Also regulation of controls has clearly developed sporadically, and its substantive content varies considerably from area to area. Such progress towards harmonisation as has taken place in relation to the reporting requirements, as reviewed above, has not been duplicated in the matter of regulating controls.

However, it can be seen that, while such regulation originally was particularly based on concrete situations, as for example with fisheries, these days such provisions are included in secondary regulation, without there being special circumstances to require it.

However, the decisive breakthrough in Community control of national authorities occurred with the important general and horizontal Regulation 2988/95.[396] In this Regulation it is provided that the Commission has a responsibility to check that the administrative practices of the Member States conform to Community rules, that the necessary documentation exists and is in concordance with the Communities' revenue and expenditure, as well as the circumstances in which such financial transactions are carried out and checked. These provisions establish a duty for the Commission to carry out controls of Member States' authorities, whose aim, according to the preamble of the Regulation, is to emphasise that Community law requires the Commission to control that the Community's means are used for their appointed purposes.

When it is considered that Regulation 2988/95[397] is a framework Regulation which is intended to point the way for future regulation, and which to a large

395. An example of regulation of the type described is to be found in the special part of the Structural Fund area dealing with fisheries. In Article 15 of Regulation 3699/93 laying down the criteria and arrangements regarding Community structural assistance in the fisheries and aquaculture sector and the processing and marketing of its products (OJ 1993 L 346/1) it is laid down that "When requesting payment of each annual aid instalment, Member States shall certify that compliance with the conditions governing assistance set out in this Regulation has been verified." If a Member State does not comply with this obligation "the Commission shall carry out a suitable examination of the circumstances in the framework of the partnership, in particular asking the Member State or the authorities appointed by it for implementation of the measure to submit their comments within a given period."

396. On the protection of the European Communities financial interests (OJ 1995 L 312/1).

397. On the protection of the European Communities financial interests (OJ 1995 L 312/1).

degree presupposes the use of subsequent sectoral regulation, and when the aim of the of the Regulation is considered, it is natural to assume that the Regulation should be interpreted as containing a general duty on the Commission to undertake control of the national authorities of Member States, and that this is required to ensure that the Community's means are used correctly. But the concrete application of the law requires the observance of the regulations in the different sectors.

The fact that the Community gives more weight to the reporting requirements rather than the actual control of national authorities is due to the expressed desire for a partnership between the Commission and the Member States in the fight against irregularities, and is in line with the growing body of regulation which authorises co-operation between the Commission and the Member States on control of those who are subject to the laws of the Member States, as well as being in line with the more active role for OLAF.

9.3. Conclusion

The Community needs to exercise control over the national authorities to a wider extent than provided for under Articles 10 and 211 of the Treaty and other provisions. A broader degree of control has primarily been established by assigning to national authorities comprehensive reporting obligations. The right of the Commission to receive and to gather information, based on Articles 10 and 211 of the EC Treaty as well as on secondary legislation, has largely been replaced by a duty on Member States to give information. This is a significant development, but it has also become increasingly usual for secondary legislation to give the Commission powers to carry out controls, not just over the national authorities, but as a direct control over those subject to the laws of the Member States, with a view to monitoring the control of national authorities.

CHAPTER 10

Co-operation on controls between Member States

This section deals with the Community regulation of the co-operation on controls between Member States (section 10.1) and the extent to which Member States may carry out controls on one another under the authority of EC law (section 10.2)

10.1. Co-operation on controls between Member States

One of the structural problems in connection with the fight against irregularities against the EC's budget is that the Member States' authorities apply and administer EC regulations, including undertaking controls and applying sanctions, within the boundaries of their own national area, while businesses and persons are not correspondingly limited. Those who are responsible for irregularities can operate across national boundaries and can find themselves in an almost lawless vacuum where the risk of discovery is slight and the danger of penalties is almost non-existent. To combat this it is not enough to have a harmonised regulation of controls and sanctions in 15 Member States. If the fight against irregularities is to be effective it is a pre-requisite that the authorities co-operate, receive information from one another and have the powers to promote investigations, controls etc. across national boundaries.

This has long been acknowledged, and even before there was any regulation of the co-operation of Member States by the Community, a number of Member States signed a treaty for co-operation with regard to enforcing customs regulations.[398] This agreement, which is an ordinary treaty under international law, is mentioned because, among other things, it is declared to be entered into in order to prevent breaches of customs rules which would endanger the aims of the

398. Agreement on Mutual Assistance between the respective customs authorities, with supplementary protocol, 7th September 1967.

Community. But it was also, among other things, by reference to this and to the close co-operation between the administrative authorities of the individual Member States for the implementation of the customs union and agriculture policy so these could function effectively, that the Community took up the threads in 1981 with Regulation 1468/81.[399]

The Regulation creates a comprehensive obligation to co-operate. The starting point is that, when requested, the authorities in a Member State have a duty to inform the authorities in any other Member States about "all information likely to enable the [the requesting authority] to ensure compliance with the provisions laid down by the law on customs or agricultural matters." This is a duty which is backed up by a requirement of equal treatment, in accordance with which the authority which is to obtain the information "shall proceed as though it were acting on its own account or at the request of another authority in its own country." When requested by an authority in another Member State, the authority receiving the request must, as far as possible, keep a special watch or arrange for a special watch to be kept on persons, places, movements of goods and means of transport, if there are reasonable grounds for believing that they are in breach of the law on customs or agricultural matters. There is a duty to carry out investigations upon request. It should be noted that the Regulation concerns relations between the authorities in the individual Member States, so that it is not a matter of co-operation between states *per se*, but between authorities within states; this emphasises the integrated nature of the co-operation.

Apart from the duty to co-operate upon request, the Regulation also contains some less comprehensive obligations to provide support without being requested, in the form of forwarding information on transactions which appear to be in conflict with the law on customs or agricultural matters.

The role which was assigned to the Commission in applying the Regulation was very small. This was changed in 1987 by Regulation 945/87,[400] which increased the obligations of the Member States to report to the Commission, and gave it a certain co-ordinating role in following up the irregularities dealt with. The basic duty contained in the Regulation for the comprehensive co-

399. On mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs or agricultural matters (OJ 1981 L 144/1).

400. Amending Regulation (EEC) No 1468/81 on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs or agricultural matters (OJ 1987 L 90/3).

operation between Member States has been maintained without challenge, even after the amendments in 1987.[401]

There is another example of the duty to co-operate across national boundaries in Regulation 3094/94.[402] A business can be established in one Member State, but receive a subsidy from or be obliged to make payments to another Member State. To control this it is necessary for Member States to co-operate. Article 7 of the Regulation provides that Member States shall assist each other for the purposes of carrying out the scrutiny provided for when the place of establishment of an undertaking and the place of payment to or from the business are in two different Member States, as well as in the cases where the documents and information which are necessary for the required control are not present in the Member State which shall carry out the control. The Regulation is structured so that during the first three months following the EAGGF financial year end, the country in which the payments to or from are made sends a list to each of the other Member States relating to the undertakings which are established there. Thereafter, the country where the undertaking is established is responsible for carrying out controls in accordance with the Regulation. This does not mean that all the undertakings named on the list shall be controlled,[403] but that the undertakings must be included as potential subjects for control, on the same footing as undertakings that are both established in and make payment to or receive payments from the same country.

401. Further to the review of this topic reference can be made to Directive 76/308 on mutual assistance for the recovery of claims resulting from operations forming part of the system of financing the European Agricultural Guidance and Guarantee Fund, and of the agricultural levies and customs duties (OJ 1976 L 73/18). This Directive, which both concerns agriculture and customs, authorises the collection of wrongly paid expenses and uncollected revenues by means of cross-border co-operation between Member States. The authorities in one Member State are thus, when requested by the authorities of another Member State, obliged to assist with information for the collection of the outstanding amounts and in communicating the claim to the person from whom the payment is due, and to undertake the collection. This obligation is not unconditional, but it nevertheless is an important element in the duty to co-operate between Member States, and it supplements the traditional co-operation under Community law.
402. Amending Regulation 4045/89 on scrutiny by Member States of transactions forming part of the system of financing by the Guarantee Section of the European Agricultural Guidance and Guarantee Fund (OJ 1994 L 328/1).
403. Cf. Article 2 in Regulation 4045/89 on scrutiny by Member States of transactions forming part of the system of financing by the Guarantee Section of the European Agricultural Guidance and Guarantee Fund and repealing Directive 77/435/EEC (OJ 1989 L 388/18) with later amendments in Regulation 3094/94 amending Regulation (EEC) No 4045/89 on scrutiny by Member States of transactions forming part of the system of financing by the Guarantee Section of the European Agricultural Guidance and Guarantee Fund (OJ 1994 L 328/1).

It is thus the aim of the control regulations to neutralise the fact that there is a cross-border element. Recognising that it can be a complicated business, it is provided that the Member States from which payment is made or to which payment is made, can request the Member State in which the undertaking is established to undertake the control. There is a duty to reply to such a request but not a duty to comply with it. In this way the basic structure is preserved, that it is the Member State where the undertaking is established which has the final say over controls, just as it has over national undertakings, but at the same time the Member State involved in payments in or out can point to undertakings if it believes that there are reasons to be specially vigilant.

It is a different matter where payment in or out takes place in the same Member State as that where the undertaking is established, but where, in order to carry out the control, there is a need for information which is situated in another Member State; here the first Member State can make a reasoned request for control. Such a request must be complied with within six months by the Member State receiving it. There is thus a duty to provide information, regardless of national regulations on providing or linking of information.

According to the Regulation, the Commission is given only a peripheral function since it shall merely receive copies of lists, requests etc.[404]

In cannot be assumed that the Commission in general has a role to play in the co-operation on controls between Member States. There are several examples to the contrary in secondary regulation. For example, this is the case with Regulation 2048/89.[405] Under this Regulation each Member State has a duty, upon the request of another Member State, to provide information and undertake monitoring and control as if it acted on behalf of or upon the request of an authority in its own country. A Member State that requests control to be carried

404. There is a third example in Article 4 of Regulation 595/91 concerning irregularities and the recovery of sums wrongly paid in connection with the financing of the common agricultural policy and the organization of an information system in this field and repealing Regulation (EEC) No 283/72 (OJ 1991 L 67/11), in accordance with which each Member State shall communicate to the other Member States and to the Commission any irregularities that can have effects outside its territory, and the Member States, together with the Commission, shall arrange meetings to discuss the development of the fight against fraud. In Special report No 7/93 concerning controls of irregularities and fraud in the agricultural area (implementation of Council Regulation (EEC) No 4045/89 and Council Regulation (EEC) No 595/91 accompanied by the replies of the Commission (OJ 1994 C 53/1), the Court of Auditors noted that neither at the Commission nor in any of the Member States visited is there a system for the administration of reports between Member States in accordance with Article 4.

405. Laying down general rules on controls in the wine sector (OJ 1989 L 202/32). See also the predecessor to this, Regulation 359/79 on direct cooperation between the bodies designated by Member States to verify compliance with Community and national provisions in the wine sector (OJ 1979 L 54/136).

out by another Member State in this way, has a right to take part in it, with the agreement of the responsible body in the controlling Member State. However, the responsibility for the control tasks lies entirely with the responsible body in the controlling Member State.[406]

The main characteristic of the Member States' duty to co-operate, as it has been developed in secondary legislation, is that Member States are obliged to gather and forward information when requested, but there also are occasions when information shall be given without being requested.

As a general rule the Commission has had a relatively limited role. This is something that the Treaty on European Union has changed. The Treaty obliges Member States to co-operate on controls.[407] In particular, Article 280.3 of the EC Treaty[408] provides "Without prejudice to the other provisions of this Treaty, the Member States shall coordinate their action aimed at protecting the financial interests of the Community against fraud. To this end they shall organise, together with the Commission, close and regular cooperation between the competent authorities." By this, a duty to co-operate is created which is in line with that existing in secondary legislation as set out above, but where the co-ordinating role of the Commission is stressed. The fact that the provision is on the basis that it is to protect "the financial interests of the Community" is only a slight narrowing of its applicability, since, as argued at the start of this thesis, this covers a very wide area. As for the argument that the Member States only

406. Another example is Regulation 386/90 on the monitoring carried out at the time of export of agricultural products receiving refunds or other amounts (OJ 1990 L 42/6) which deals with controls in connection with agricultural products which receive export subsidies. In Article 5 it states that "Member States shall take steps to coordinate the controls imposed on individual operators and combine the verifications provided for in Articles 3 and 4 and in Regulation (EEC) No 4045/89." As for control over compliance with the common fisheries policy, it is required that Member States shall coordinate their control activities in order to ensure that inspection is as effective and economical as possible, cf. Article 2.4 in Regulation 2847/93 establishing a control system applicable to the common fisheries policy (OJ 1993 L 261/1), which positively requires the setting up of joint inspection programmes and regular exchange of experience gained. Further, Article 13.7 contains a requirement for the co-operation of control activities which specifically involves surveillance of the movement of merchandise which may have been drawn to their attention as possibly being the subject of operations contrary to Community Regulations. Finally it is provided that a Member State, in which a vessel is registered or whose flag it flies, can request another Member State for data on landings, offers for sale or transhipments of fishery products carried out by that vessel in territory under its jurisdiction. Such a request shall be complied with, and the Regulation contains more specific requirements as to the information that shall be given, cf. Article 16.
407. Temple Lang, J: Community Constitutional Law: Article 5 EEC Treaty, Common Market Law Review, 1990 p. 645.
408. This is called the co-operation principle. On the naming of this principle refer to the report: Protection of the Community's financial interests, Synthesis Document, published in Brussels, 13th November, 1995.

have a duty when the matter concerns protection against "fraud", reference is made to section 7.1.2 above.

Article 280.3 thus serves first and foremost to establish the duty to co-operate under the guidance of the Commission. This is something which for some time the Commission itself has seen as necessary, if the fight against irregularities is to be effective. For example, the Commission has stated that the fight against fraud requires a close and constructive partnership between the Member States and the Commission. Such a partnership should be based on the provisions of Article 209A [now Article 280].[409] This statement of principle, among other things, led the Commission in 1994 to request a number of Member States to urge their national authorities to follow up on a suspicion that a network had been set up with a view to misuse EC finances in connection with tourism.[410]

Finally, there can be grounds to suggest that even though Article 280.3 of the EC Treaty refers to action to protect the financial interests of the Community against fraud, there is no doubt that the means available to the Community for this are not limited to what is stated in the Article, so regulation in secondary legislation will still be relevant.

10.2 Member States' control of other Member States

It is a fundamental principle of international law that each state is exclusively competent to exercise authority on its own territory, and that no state can exercise authority on another state's territory.[411] This principle is maintained under EC law in the sense that a Member State cannot undertake control of other Member States on their territory.

This international law principle does not mean that a Member State is prevented from investigating on its own territory whether other Member States have fulfilled their Community law obligations to exercise control.

However, Community law does set certain limits to this, for example in Article 28 of the EC Treaty.

In only very few instances are Member States given powers in secondary legislation to carry out controls of one another. This applies particularly in connection with veterinary controls of health issues when animals or agricul-

409. Protecting of the Community's financial interests – the fight against fraud, The Commission's strategy for the fight against fraud, Work programme for 1994.

410. See the Commission's annual report: Protecting of the Community's financial interests – the fight against fraud, Annual Report for 1994, COM/95/98 Final.

411. See Martin Dixon; Textbook on International Law, 2nd Edition 1993 and Claus Gulmann, John Bernard and Tyge Lehmann; Folkeret, DJØF, 1989.

tural products cross borders.[412] Regulation 2048/89[413] provides authority for officials from one Member State to collect information on the implementation of the Regulation and the control which is carried out in another Member State. This shall take place by agreement, but nevertheless the provision takes the form of one Member State being given authority to control another.

Even though control between Member States does occur, it can be stated that it is not and will probably not become a central element in the Community's regulatory controls.

412. See for example Article 20 in Directive 91/496 laying down the principles governing the organization of veterinary checks on animals entering the Community from third countries and amending Directives 89/662/EEC, 90/425/EEC and 90/675/EEC (OJ 1991 L 268/56), and Articles 5 to 9 in Directive 90/425 concerning veterinary and zootechnical checks applicable in intra-Community trade in certain live animals and products with a view to the completion of the internal market (OJ 1990 L 224/29).
413. Laying down general rules on controls in the wine sector (OJ 1989 L 202/32). See also the predecessor to this, Regulation 359/79 on direct cooperation between the bodies designated by Member States to verify compliance with Community and national provisions in the wine sector (OJ 1979 L 54/136).

CHAPTER 11

Conclusion to the section on controls

The fight against irregularities against the EC's budget has been greatly strengthened in recent years. Control of compliance with the prevailing regulations has been central to this.

Considerable demands have been and still are made on the Member States' control of compliance with Community regulations. These demands are made in the Treaty as well as in the basic legal principles and secondary Community law.

The powers of the Community to carry out controls over those who are subject to the laws of the Member States and over the national authorities of the Member States themselves has grown. In both of these aspects the growth of the legal apparatus has been principally via secondary legislation. The tendency is to seek partnership or co-operation between the Community and the national authorities. The need for an actual control of national authorities by the Community is sought to be minimised by means of comprehensive reporting requirements.

CHAPTER 12

Sanctions

This section deals with the concept of sanctions under Community law. This includes a division between the different categories of sanctions and the powers of the Community in relation to each category. In the succeeding sections there are reviews of the Community penalties which national authorities apply to those subject to the laws of the Member States (section 13), of the regulations for penalties applied by the Community to those subject to the laws of the Member States (section 14) and finally a review of the regulations for penalties applied by the Community to the Member States themselves (section 15). In other words, there is a systematic approach corresponding to that used in relation to controls.

12.1. The tripartite division of Community law's regulation of sanctions

The EC Treaty does not include an overall regulation of sanctions, nor a definition of the concept. This is not to say that the question of sanctions is not referred to, as seen for example in Article 229 which states that Regulations may include provisions for penalties, or Article 83 under which the Commission can make decisions on fines and penalty payments, and Article 228.2 which gives the Court authority to exact a lump sum or penalty payment from Member States. In addition to this there are a large number of Treaty provisions and legal principles which, without directly naming sanctions, are nevertheless of importance for their regulation and application.

Considerable regulation of sanctions has been brought about through secondary legislation, though even here there is no single conceptual source. In Community law there is not a system of law corresponding to national criminal laws.

In the same way as in many other areas of Community law, the regulation of sanctions, and the conceptual structure which can be deduced therefrom, has been developed gradually over time through the practice of the Court of Justice and through the growth of secondary legislation.

Today it can be asserted that the Community law on sanctions operates with a tripartite distinction between administrative measures, administrative penalties and criminal penalties.

The distinction between administrative penalties and criminal penalties has had a long development in Community law. Against this it seems that the introduction of a tripartite distinction is relatively new, and is first given the force of law in Regulation 1469/95,[414] and subsequently in the important Regulation 2988/95,[415] in which a number of rules and principles for the protection of the Community's financial interests were set up with general and horizontal effect.

Particular emphasis is put on the adoption of the tripartite distinction in Regulation 2988/95[416] because the principles and rules contained in the Regulation are intended to create a framework for future Community regulation of sanctions.

In Article 4 of the Regulation a number of rules are laid down for administrative measures, while Article 5 concerns administrative penalties. As for criminal law, it follows from Article 2.4 and Article 5.2, taken together with the preamble, that this is not affected by the Regulation, which is in accordance with the limits set to the powers of Community law in this respect.

The regulation gives three levels of distinction between the three categories of sanctions: difference by definition, difference by the legal facts, and difference by legal consequences.

With regard to the difference by definition, under Regulation 2988/95[417] it follows that administrative measures are, by definition, not penalties, cf. Article 4.4, while administrative penalties are obviously penalties, but, cf. Article 5.2, they are not equivalent to criminal penalties.

Apart from the difference by definition, there is a difference based on legal facts, where it is a prime characteristic that any irregularity can be met with

414. On measures to be taken with regard to certain beneficiaries of operations financed by the Guarantee Section of the EAGGF (OJ 1995 L 145/1).
415. On the protection of the European Communities financial interests (OJ 1995 L 312/1).
416. On the protection of the European Communities financial interests (OJ 1995 L 312/1).
417. On the protection of the European Communities financial interests (OJ 1995 L 312/1).

administrative measures, but only irregularities which are the result of negligence or a deliberate act can lead to administrative penalties.

The third level of distinction is that of the legal consequences. It is this parameter that will be used as an approach in the following review of the development of the concept. Taking the legal consequences as the starting point there will be a consideration of where the boundaries lie between administrative measures and administrative penalties, and between administrative penalties and criminal penalties.

By way of introduction it should be remarked that the Community has been guided in its distinction between criminal penalties and administrative penalties by the national legal systems. However, it is not possible to refer back to any of the individual national legal systems that have such a distinction, for example the German, French or Greek, in order to understand the Community distinction, since these countries do not draw the same legal distinction between what is administrative and what is criminal. In addition to this, there are a number of national legal systems, for example the English, the Irish and the Danish, in which the distinction is unknown. In other words the distinction and the concept are peculiar to Community law.

12.1.1. Administrative measures

The measures that can be described as administrative measures can consist of paying money due, repayment of money wrongfully received, or loss in whole or in part of security provided.

Administrative measures are the legal consequences of irregularities which are characterised by the withdrawal of an advantage wrongfully obtained, possibly with the addition of interest, calculated on a flat-rate basis.

As previously stated, administrative measures are, by definition, not penalties. Categorising them outside the scope of penalties has the advantage in practice that the recipient is not entitled to receive the amount in question but that the recipient does not suffer any penalty when the amount is paid (or repaid) or the security is forfeited. With regard to any addition of interest, there is admittedly a nominal payment or repayment of more than there has been paid out or received, which might argue for the definition of the measure as a penalty. But the addition of interest is merely an expression of the payment of the added value associated with the possession of the principal sum; since the principal is not due to the recipient, nor is the added value. Seen from the point of view of the authorities, any addition of interest compensates for the loss suffered from not being able to make use of the money. To the extent that the money is paid directly from the Community, the requirement to pay interest merely represents the protection of the Community's economic interests, as required of Commission with its responsibility for the budget.

Since the administrative measures do not go further than the withdrawal of a wrongly obtained advantage, it is not a problem that in such cases, under Regulation 2988/95,[418] there is no requirement for there to be any fault in the form of intention or negligence.

One practical and important difference between administrative measures and penalties in relation to Regulation 2988/95[419] is that the Regulation's administrative penalties constitute an framework which, for their specific application, depend on follow-up provisions in sectoral regulations, which is hardly the case for the administrative measures.

Administrative measures are, by definition, not penalties, just as they are distinguished from penalties with regard to the question of fault. Also, the legal consequences of the measures suggest that they should be regarded differently from penalties. In other words, it can be asserted that administrative measures are to be placed below the lower limit of administrative penalties.

12.1.1.1. Paying amounts due or repaying amounts wrongly received

The view that measures which are limited to full or partial repayment of a wrongly received advantage are not to be considered as penalties is first given express legal form in Article 4 of the Proposal for a Council Regulation on the checks and penalties applicable under the common agricultural and fisheries policies,[420] which the Commission put forward in 1990. Since then this view has been given effective force in the area of agriculture by Article 14 of Regulation 3887/92,[421] which provides that the recipient of support will be required to reimburse the amount in question plus interest for the period between the payment and the reimbursement. The provision does not expressly deal with the issue of whether or not it is a penalty, but the Regulation is structured so that this provision is placed apart from the provisions which deal with penalties, which are in Articles 9 and 10. But in the important horizontal and general Regulation 2988/95,[422] Article 4 on administrative measures provides that the withdrawal of a wrongly obtained advantage, including the obligation to pay amounts due or repay amounts wrongly received, including interest which may

418. On the protection of the European Communities financial interests (OJ 1995 L 312/1).
419. On the protection of the European Communities financial interests (OJ 1995 L 312/1).
420. OJ 1990 C 137/10.
421. Laying down detailed rules for applying the integrated administration and control system for certain Community aid schemes (OJ 1992 L 391/36). For subsequent amendments of this see Regulation 1648/95 amending Regulation (EEC) No 3887/92 laying down detailed rules for applying the integrated administration and control system for certain Community aid schemes (OJ 1995 L 156/27) and Regulation 1678/98 amending Regulation (EEC) No 3887/92 laying down detailed rules for applying the integrated administration and control system for certain Community aid schemes (OJ 1998 L 212/23).
422. On the protection of the European Communities financial interests (OJ 1995 L 312/1).

be determined on a flat-rate basis, is not a penalty. With this the legal status of this point under Community law must be regarded as established.

The Court of Justice has, on several occasions, established the duty of Member States to seek to recover wrongly paid payments from those who have received them. In Case 54/81[423] the Court thus stated that the duty to seek repayment that was part of the regulation dealt with in the case "does no more than confirm expressly an obligation already incumbent on the Member States by virtue of the principle of co-operation enunciated in Article 5 of the Treaty [now Article 10]." Member States are thus bound by the Treaty to try to recover wrongly paid out support. Further, it can be pointed out that if, in connection with the discovery of irregularities, there were no associated duty for Member States to collect payments which have been evaded or to recover wrongly paid out amounts, then much of the fight against irregularities, including the carrying out of controls, would lose its value.

The collection of moneys and repayments shall take place within the terms of the national legal systems, and are subject to the procedural and substantive provisions which apply to these systems, cf. Cases 205-215/82.[424] However, it is a pre-requisite that the use of national law may not affect the scope or effectiveness of Community law, so that the recovery of amounts that have been wrongly paid out can be made possible in practice. The recovery sought must not be subject to terms or conditions which are less advantageous than those which apply to equivalent national measures, and, in their handling of such cases, the national authorities must show the same care as is shown in carrying out corresponding national regulations.[425] In accordance with the established principles the Court has accepted that the protection of justified expectation and the principle of legal certainty can exclude recovery. For example, consideration can be given to the fact that there may have been a long period between the payment of support and the putting forward of a demand for repayment, or that the wrongly received advantage has been passed further to others in the trading chain, against whom there is no valid recourse. Consideration can also

423. Firma Wilhelm Fromme v Bundesanstalt für landwirtschaftliche Marktordnung, Case 54/81, [1982] ECR 1449. See also the joined cases 205 to 215/82, Deutsche Milchkontor GmbH and others v Federal Republic of Germany, [1983] ECR 2633.
424. Deutsche Milchkontor GmbH and others v Federal Republic of Germany, [1983] ECR 2633.
425. Cf. Firma Wilhelm Fromme v Bundesanstalt für landwirtschaftliche Marktordnung, Case 54/81, [1982] ECR 1449 and the joined cases 205 to 215/82, Deutsche Milchkontor GmbH and others v Federal Republic of Germany, [1983] ECR 2633. Refer in particular to premiss 30 and Case C-290/91, Johannes Peter v Hauptzollamt Regensburg, [1993] ECR 2981.

be taken of the conduct of the national authorities, including whether the controls carried out have been sufficient.[426]

Finally, in Case C-366/95[427] and Case C-298/96,[428] the Court has stressed that recovery can be excluded only if it can be shown that the recipient of support has acted in good faith. The judgment of whether or not there was good faith is made by the national authorities.

Parallel with and in harmony with the legal position that has been created by the practice of the Court, in Regulation 2988/95[429] the Community has established that any irregularity shall in general lead to a recovery of the wrongly obtained advantage, including payment of amounts due or repayment of amounts wrongly received.

In its annual report for 1992 on the fight against fraud,[430] the Commission expressed dissatisfaction with the fact that cases for recovery of payment normally took several years, though it acknowledged that the main cause of this was of a procedural nature, and that it was impossible to change this at the Community level at that time. However, this situation was presumably a contributory factor to the Community choosing to undertake more detailed regulation in secondary legislation of the duty of Member States to recover money. Contrary to the judgment referred to above, this is a power which the Community has. Regulation 595/91[431] specifies the Member States' duty to recover sums wrongly paid in connection with the financing of the common agricultural policy and gives detailed procedures for co-operation between the Member States and the Commission and between the Member States themselves. According to Article 5 of the Regulation, Member States shall give the Commission quarterly reports on the judicial and administrative procedures instituted with a view to recovering sums wrongly paid, and the Commission shall be informed of any abandonment of recovery procedures.

426. Joined cases 205 to 215/82, Deutsche Milchkontor GmbH and others v Federal Republic of Germany, [1983] ECR 2633, in particular premiss 30. Case C-366/95, Landbrugsministeriet – EF-Direktoratet v Steff-Houlberg Export I/S, Nowaco A/S, Nowaco Holding A/S and SMC af 31/12-1989 A/S, [1998] ECR I-2661 and Case C-298/96, Oelmühle Hamburg AG and Jb. Schmidt Söhne GmbH & Co. KG v Bundesanstalt für Landwirtschaft und Ernährung, [1998] ECR I-4767.
427. Landbrugsministeriet – EF-Direktoratet v Steff-Houlberg Export I/S, Nowaco A/S, Nowaco Holding A/S and SMC af 31/12-1989 A/S, [1998] ECR I-2661.
428. Oelmühle Hamburg AG and Jb. Schmidt Söhne GmbH & Co. KG v Bundesanstalt für Landwirtschaft und Ernährung, [1998] ECR I-4767.
429. On the protection of the European Communities financial interests (OJ 1995 L 312/1).
430. The Commission's annual report on the fight against fraud, 1992, page 25.
431. Regulation 595/91 concerning irregularities and the recovery of sums wrongly paid in connection with the financing of the common agricultural policy and the organization of an information system in this field and repealing Regulation (EEC) No 283/72 (OJ 1991 L 67/11).

12.1.1.2. Total or partial loss of security provided

Total or partial loss of security provided in support of a request for an advantage or at the time of the receipt of an advance is, according to Regulation 2988/95[432] an administrative measure and is, under the Regulation, expressly limited to the withdrawal of an advantage.

12.1.2. Administrative penalties

In neither its primary nor its secondary law does Community law contain a general definition of administrative penalties. The closest it gets is in Article 7.1 of the Commission's proposal[433] for Regulation 2988/95.[434] Here it was said that administrative penalties shall be understood as "all enforcement measures provided by Community legislation to [fight irregularities] ... which entail unfavourable financial or economic consequences for natural or legal persons to whom [they apply]".[435] Even though this provision did not survive the Community's process for making laws, it does indicate that the emphasis should be put on the idea that there shall be unfavourable economic consequences. In other words, as argued in connection with the administrative measures, a withdrawal of a wrongly obtained advantage with the addition of interest does not constitute an administrative penalty. Furthermore, this proposal supports the idea that administrative penalties will not include imprisonment of any kind. Thus both an upper and a lower limit to administrative penalties is set.

While it is not possible to give an authoritative general definition of administrative penalties, administrative penalties are considered in relation to the following legal consequences: fines, penalty payments, exclusion for a certain period or for a period without limit, loss of a security or deposit, removal of an advantage, payment of control costs, payment of fees and other similar penalties.

12.1.2.1. Fines

Fines are not an unknown phenomenon under EC law. But, apart from the area of competition law fines are relatively seldom mentioned explicitly in second-

432. On the protection of the European Communities financial interests (OJ 1995 L 312/1).
433. Proposal for the Council Regulation on the protection of the Communities' financial interests, COM/94/214 Final. On this point the European Parliament supported the Commissions proposal, cf. Legislative resolution embodying Parliament' s opinion on the proposal for a Council Regulation (EC, Euratom) on protection of the Communities' financial interests (COM(94) 0214 – C4-0155/94 – 94/0146(CNS)), (OJ 1995 C 89/83).Official Journal C 089 , 10/04/1995 p. 0083.
434. On the protection of the European Communities financial interests (OJ 1995 L 312/1).
435. See also the proposal for a Council Regulation (EEC) on the checks and penalties applicable under the common agricultural and fisheries policies, (OJ 1990 C 137/10), with subsequent amendments in the proposal in COM/90/125.

ary legislation as a form of penalty which Member States can apply to those subject to their jurisdiction who infringe Community laws.

This is presumably because when the Community regulates for sanctions it is often to prescribe a form of sanction, which may not normally exist in the Member States, or to prescribe sanctions that are specially formulated for or adapted to EC regulations and thus serve a specific purpose.

These circumstances seldom apply to fines. On the contrary, fines are a frequent penalty in most Member States' administrative and legal systems and they are often the Member States' own choice of penalty in their implementation of regulations where the EC law is silent on the question of sanctions.

The fact that fines are not frequently prescribed as penalties is thus not an expression that the Community does not wish to see this form of penalty used.[436]

In those cases where secondary legislation does prescribe the use of a fine, it often is of the nature of a confirmatory indication of a possibility, rather than giving formal expression to a requirement. An example of this can be found in Regulation in Regulation 2847/93,[437] which in Article 31.3 refers to fines as one among several listed penalties, but otherwise leaves the choice to the Member States since the introduction to the provision states that the penalties "can" include the listed possibilities.

In its proposal[438] made by the Commission for the important general and horizontal Regulation 2988/95,[439] fines were not named among the administrative penalties. But in Article 5.1.(a) of the final Regulation it is stated that the payment of an 'administrative fine' is an administrative penalty. The fact the Community has chosen to use the term 'administrative fine' rather than simply 'fine' is presumably intended to stress the fact that it is not a criminal penalty.[440]

436. Cf. Article 15 in Regulation 17/62, First Regulation implementing Articles 85 and 86 of the Treaty (OJ 1962 L 13/204), Article 22 in Regulation 1017/68 applying rules of competition to transport by rail, road and inland waterway (OJ 1968 L 175/1), Article 19 in Regulation 4056/86 laying down detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport (OJ 1986 L 378/4), Article 12 in Regulation 3975/87 laying down the procedure for the application of the rules on competition to undertakings in the air transport sector (OJ 1987 L 374/1), Article 14 in Regulation 4064/89 on the control of concentrations between undertakings (OJ 1989 L 395/1).
437. Establishing a control system applicable to the common fisheries policy (OJ 1993 L 261/1).
438. Commission proposal for the Council Regulation on the protection of the Communities' financial interests, COM/94/214 Final (OJ 1994 C 216/14).
439. On the protection of the European Communities financial interests (OJ 1995 L 312/1).
440. In Case 11/70, Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel [1970] ECR 1125 it is stated that "a system of fines imposed *a posteriori* would involve comnsiderable administrative and legal complications at the stage of decision and execution." In this opinion of the Court it is implicit that the European Court can introduce penalties in the form of fines handed down by the Courts.

Apart from the administrative fines, Regulation 2988/95[441] also makes "payment of an amount greater than the amounts wrongly received or evaded, plus interest where appropriate" an administrative penalty. The competence of the Community in relation to this form of penalty was confirmed in the area of agriculture in Case C-240/90,[442] and was found, for example in Regulation 2262/84.[443] But with Regulation 2988/95[444] it is made into a general administrative penalty.

According to its character, and for those subject to the law who are required to pay a fine, it is hard to distinguish this form of penalty from other fines, so that in a systematic categorisation, it is reasonable to place it together with this form of penalty. As for the supplementary amounts, it is provided that they shall be determined in accordance with a percentage to be set in special rules, and that the amount may not exceed the level strictly necessary to constitute a deterrent.

12.1.2.2. Penalty payments

Penalty payments differ from ordinary fines in that their purpose is not solely the imposition of a penalty in relation to a given infringement. Penalty payments aim primarily, through a predetermined system of fines, to enforce a certain form of behaviour through applying pressure.

It can hardly be doubted that the Community is empowered to lay down rules on penalty payments because any other conclusion would be illogical, given its powers in relation to fines, and because its residual provisions on administrative penalties in Article 5.1.(g), Regulation 2988/95[445] provide that the Community can lay down other penalties than those specifically named, as long as these penalties are exclusively of an economic nature and have a scope and effect corresponding to the penalties listed, as would be the case with penalty payments.

However the decisive argument is that under Article 228.2 of the EC Treaty the Community has authority to impose penalty payments on Member States, and competition law contains a number of examples of authority to impose

441. On the protection of the European Communities financial interests (OJ 1995 L 312/1), cf. Article 5.1.(b).
442. Federal Republic of Germany v Commission of the European Communities [1992] ECR I-5383.
443. Laying down special measures in respect of olive oil, (OJ 1984 L 208/11). Official Journal L 208 , 03/08/1984 p. 0011 – 0013.
444. On the protection of the European Communities financial interests (OJ 1995 L 312/1), cf. Article 5.1.(b).
445. On the protection of the European Communities financial interests (OJ 1995 L 312/1).

penalty payments on those who are subject to the law of the Member States,[446] both of which circumstances confirm penalty payments as belonging in the range of administrative penalties.

12.1.2.3. Exclusion from advantages for a set period or until further notice

Exclusion from or withdrawal of an advantage for a period following an irregularity is a practical form of penalty in EC law.

Penalties in the form of exclusion have existed in secondary legislation for a number of years. There is an example of this in Regulation 3887/92,[447] as amended by Regulation 1648/95,[448] which in Article 9 lays down that if a farmer intentionally declares an area entitled to aid as being greater than it is in fact, he shall be excluded from the aid scheme not just for the calendar year in question, but also for the following year. Under Article 10 the same applies correspondingly if a farmer intentionally reports the number of animals entitled to aid as being higher than is in fact the case. Such an exclusion is a penalty with considerable consequences for a farmer who gives wrong information, and in practice it could very well lead to him giving up his farm.

The Court of Justice had an opportunity to express its opinion on this form of penalty in Case C-240/90,[449] in which the German government argued that exclusion is an expression of a negative moral judgment and a criminal penalty, which the Community is not entitled to introduce. The Court rejected the idea that it is a criminal penalty and referred to the fact that the Community unquestionably has the power to lay down penalties which require the payment of an amount over and above the repayment of amounts paid out with the addition of interest, and that there is no fundamental difference between such a penalty and an exclusion since "in both cases the person concerned suffers a financial loss greater than the mere reimbursement, perhaps with interest, of the aid improperly received." The Court argued further that an exclusion is an administrative

446. Cf. Article 16 in Regulation 17/62, First Regulation implementing Articles 85 and 86 of the Treaty (OJ 1962 L 13/204), Article 23 in Regulation 1017/68 applying rules of competition to transport by rail, road and inland waterway (OJ 1968 L 175/1), Article 20 in Regulation 4056/86 laying down detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport (OJ 1986 L 378/4), Article 13 in Regulation 3975/87 laying down the procedure for the application of the rules on competition to undertakings in the air transport sector (OJ 1987 L 374/1), Article 15 in Regulation 4064/89 on the control of concentrations between undertakings (OJ 1989 L 395/1).
447. Laying down detailed rules for applying the integrated administration and control system for certain Community aid schemes (OJ 1992 L 391/36).
448. Amending Regulation (EEC) No 3887/92 laying down detailed rules for applying the integrated administration and control system for certain Community aid schemes (OJ 1995 L 156/27).
449. Federal Republic of Germany v Commission of the European Communities [1992] ECR I-5383.

penalty because it presupposes that the person concerned has already received a right.

"Since that right relates to a scheme of Community aid paid out of public funds and based on the notion of solidarity, it must be subject to the condition that the beneficiary offers all guarantees of probity and trustworthiness. From that point of view the contested penalty constitutes a specific administrative instrument forming an integral part of the scheme of aid and intended to ensure the sound financial management of the Community public funds."

Against this background the Court held that "The Community must accordingly be regarded as having competence to order such exclusions."

The political seal of approval of a penalty in the form of exclusion occurred with the adoption of the general and horizontal Regulation 2988/95,[450] which listed "exclusion from, or withdrawal of, the advantage for a period subsequent to that of the irregularity," among other administrative penalties that can in future be included in sectoral regulations.[451]

12.1.2.4. Loss of security or deposit

The provision of security is often required in EC law. For a number of agricultural products a licence is required for each import to or export from the Community. The issuance of the licence is conditional on the provision of security to ensure that the product is in fact imported or exported within the period during which the licence is valid. If this does not occur, or occurs only partially, the security can be forfeited. This ensures that the imports and exports for which licences are issued do in fact take place and that the competent authorities can properly exercise their intervention powers. Another category of cases in which the system of providing security is used is in connection with supports given for the private stockholding of agricultural products. Contracts are entered into between the intervention bodies and those holding stocks in which the obligations of those holding stocks are laid down. Security is given to ensure that these obligations are met, and this can be forfeited in whole or in part if the contractual obligations are not fulfilled. Provision of security is also used when products are sold at reduced prices from intervention stocks, or where subsidies are paid on certain products. Here security is given to ensure that the market price is not distorted, and that requirements are met as to the use of the products and their treatment, for example making them unfit for human consumption.

450. On the protection of the European Communities financial interests (OJ 1995 L 312/1).

451. Also within Denmark, exclusion for a certain period is accepted as an administrative penalty which can be laid down in Community regulation, cf. the general note for use in negotiations on EU initiatives with a view to the protection of the Community's financial interests and the fight against fraud. The Legislation Department of Ministry of Justice, j. no. 1994-610/21-0078 of 17th January 1995.

The security given can be forfeited in whole or in part if the requirements are not met.

In Case 11/70[452] the Court pointed out that the provision of security must be seen in the context that a request for a licence is voluntary, and that, compared to other methods, it has the advantage of being both simple and effective. In extension of this it was argued that a system of fines imposed *a posteriori* would involve considerable administrative and legal complications at the point of decision and execution. The Court concluded that "the system of deposits ... cannot be equated with a penal sanction, since it is merely the guarantee that an undertaking voluntarily assumed will be carried out." The European Court has since interpreted the word 'penalty' as meaning 'criminal penalty' in Case 137/85[453] and in the same case it also laid down that loss of a security or deposit "is not criminal in nature."

It has been established that the loss of a security or deposit is not a criminal penalty. On the other hand it has been uncertain whether the loss of a deposit is a penalty at all, or whether it is merely an administrative measure.

The starting point for considering this question is Regulation 3665/87[454] which, in Article 23 contains rules to the effect that where an advance paid out on an export subsidy is larger than the amount which should in fact be paid, the exporter shall repay the difference plus 15%. In practice this occurs by making an adjustment against the deposit which the exporter has previously made. It can be argued that this is a penalty since the 15% can be considered as an additional sum which shall be paid only because the licence has not been used in accordance with its terms. However, this is not the view of the Court. In Case 137/85[455] and Case 288/85[456] the Court has pointed out that the purpose of the additional payment is to prevent the exporter receiving a wrongful advantage in cases where there has not been justification for providing the subsidy in question. This accords with the development of the concepts of administrative penalties and administrative measures, where it is not a penalty as long as there is merely the withdrawal of a wrongly obtained advantage, as was the case here. This was also the basis of the Commission's proposal for controls and sanctions

452. Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratstelle für Getreide und Futtermittel [1970] ECR 235.
453. Maizena Gesellschaft mbH and others v Bundesanstalt für landwirtschaftliche Marktordnung (BALM) [1987] ECR 4587.
454. Laying down common detailed rules for the application of the system of export refunds on agricultural products (OJ 1987 L 351/1).
455. Maizena Gesellschaft mbH and others v Bundesanstalt für landwirtschaftliche Marktordnung (BALM) [1987] ECR 4587.
456. Hauptzollamt Hamburg-Jonas v Plange Kraftfutterwerke GmbH & Co. [1987] ECR 611 Case 288/85.

in connection with the common agricultural and fisheries policies.[457] By way of introduction, the proposals suggested that penalties are measures which entail unfavourable financial or economic consequences for an operator who obtains wrongful benefit from an advantage or who has wrongfully avoided an obligation, and the proposal went on to suggest that penalties should not be considered as including measures the effects of which are limited to the loss of a security which is provided in connection with an application for an advantage or the payment of an advance. There is thus no doubt that the loss of security can be an administrative measure.

In Case 181/84[458] the Court found that there was a disproportion between the amount of the security forfeited and the couple of hours delay in filing the relevant papers. It is implicit in the decision of the Court that the forfeiture of security can be an administrative penalty. In accordance with this, in Case 137/85[459] the Court held that it is clear that when an undertaking has not been complied with, the provision of fresh security in the place of security that has been released "ceases to be a guarantee and becomes a penalty." And in Case C-199/90[460] that concerned the forfeiture of security given in connection with the distillation of wine because evidence was not provided within the period allowed that the distillation had taken place, the Court stated in its premiss 10 that "it is well-established by decisions of the Court that the forfeiture of a security intended to ensure the performance of a certain obligation, which occurs if the trader has not submitted within the period allowed proof that the operation that what he has undertaken to effect has in fact been effected, must be regarded as a penalty." The Court leaves no doubt that the forfeiture of security in this situation shall be regarded as an administrative penalty.

With the adoption of the important general and horizontal framework Regulation 2988/95[461] the Community has followed the practice of the Court reviewed above and has rejected the idea that the loss of security is either always or never an administrative penalty. The Regulation thus expresses the accepted state of the law when in Article 4 it provides that "the total or partial loss of security provided in support of the request for an advantage granted or at the time of the receipt of an advance" is an administrative measure. However, this is on the assumption that there is merely the withdrawal of an advantage obtained, with

457. Proposal for a Council Regulation (EEC) on the checks and penalties applicable under the common agricultural and fisheries policies, COM/90/126 Final (OJ 1990 C 137/10).
458. The Queen, ex parte E. D. & F. Man (Sugar) Ltd v Intervention Board for Agricultural Produce (IBAP) [1985] ECR 2889.
459. Maizena Gesellschaft mbH and others v Bundesanstalt für landwirtschaftliche Marktordnung (BALM) [1987] ECR 4587.
460. Italtrade SpA v Azienda di Stato per gli interventi nel mercato agricolo (AIMA) [1991] ECR 5545.
461. On the protection of the European Communities financial interests (OJ 1995 L 312/1).

the possible addition of interest. Under the Regulation, the interest can be determined on a flat-rate basis, without it thereby becoming an administrative penalty, which is in accordance with the decisions in Case 137/85,[462] Case 288/85[463] and Case C-199/90.[464] On the other hand, Article 5 of the Regulation provides that the loss of security provided "for the purpose of complying with the conditions laid down by rules or the replenishment of the amount of a security wrongly released" is an administrative penalty. This derives from the principles which the Court has expressed in Case 181/84[465] and 137/85[466].

Whether the forfeiture of security is an administrative measure or an administrative penalty thus depends upon the actual situation. However, it is certain that it is not a criminal penalty.

12.1.2.5. Removal of an advantage

Among the administrative penalties which the Community may make use of is the total or partial removal of an advantage granted by Community rules.

In practice this will most frequently mean the reduction of subsidy. A good example of this is in Regulation 3887/92,[467] as amended by Regulation 1648/95[468]. Article 9 of the Regulation deals with cases where the farmer seeks support for an area greater than the area actually determined. If the excess area is more than 3% or 2 hectares, but a maximum of 20%, of the actual area, the support shall be reduced by twice the difference found. Correspondingly, Article 10 deals with cases where support is applied for in relation to more animals than there are in fact. With an excess of more than 5%, but a maximum of 20%, the reduction shall correspond to twice the excess. In relation to both area and animals, if the excess is over 20%, no support shall be granted. Article 8 in the same Regulation provides for penalties for late applications for support, so that the entitlement to support is reduced by 1% for every working day by which the application is late. If the deadline for an application is exceeded by

462. Maizena Gesellschaft mbH and others v Bundesanstalt für landwirtschaftliche Marktordnung (BALM) [1987] ECR 4587.
463. Hauptzollamt Hamburg-Jonas v Plange Kraftfutterwerke GmbH & Co. [1987] ECR 611.
464. Italtrade SpA v Azienda di Stato per gli interventi nel mercato agricolo (AIMA) [1991] ECR 5545.
465. The Queen, ex parte E. D. & F. Man (Sugar) Ltd v Intervention Board for Agricultural Produce (IBAP) [1985] ECR 2889.
466. Maizena Gesellschaft mbH and others v Bundesanstalt für landwirtschaftliche Marktordnung (BALM) [1987] ECR 4587.
467. Laying down detailed rules for applying the integrated administration and control system for certain Community aid schemes (OJ 1992 L 391/36).
468. Amending Regulation (EEC) No 3887/92 laying down detailed rules for applying the integrated administration and control system for certain Community aid schemes (OJ 1995 L 156/27).

25 working days,[469] the right to payment of support shall be lost. In contrast to Articles 9 and 10, Article 8 indicates that the failure to comply with a formality in EC regulations shall be penalised with a reduction of support, or ultimately the loss of right to any support in the year in question.

Another form of loss of an advantage is the temporary withdrawal of the approval or recognition necessary for participation in a Community aid scheme, cf. Article 5.1.(e) in Regulation 2988/95.[470] To the extent that the withdrawal extends over a period typically of the year in which the irregularity takes place, there will be a penalty in the form of an exclusion as referred to above in section 12.1.2.3.

The third and last form of removal of an advantage is found, for example, in Directives 91/682,[471] 92/33[472] and 92/34[473] which, in particular in Article 19 provides that the Member State in question can prohibit the marketing and sale of products (propagating material) which do not meet the requirements of the Directives.

The legislation referred to has not been chosen at random. In the first instance, under Regulation 3887/92[474] as amended by Regulation 1648/95[475] there is no doubt that those to whom the penalty is applied lose more than just the wrongly obtained advantage. This will typically, though not necessarily, be the case with the temporary removal approval or recognition under Regulation 2988/95.[476] In contrast to this, a prohibition against the marketing and sale such as is contained in the Directives, is instituted to ensure confidence in the goods in question, and does not go further than the withdrawal of a wrongly obtained advantage.

Thus, some of these provisions should be seen as administrative measures and not administrative penalties. However, Regulation 2988/95.[477] expressly

469. Regulation 3887/92 provided for 20 days, but by Regulation 1648/95 amending Regulation (EEC) No 3887/92 laying down detailed rules for applying the integrated administration and control system for certain Community aid schemes (OJ 1995 L 156/27) the limit was increased to 25 days.
470. On the protection of the European Communities financial interests (OJ 1995 L 312/1).
471. On the marketing of ornamental plant propagating material and ornamental plants (OJ 1991 L 376/21).
472. On the marketing of vegetable propagating and planting material, other than seed (OJ 1992 L 157/1).
473. On the marketing of fruit plant propagating material and fruit plants intended for fruit production (OJ 1992 L 157/10).
474. Laying down detailed rules for applying the integrated administration and control system for certain Community aid schemes (OJ 1992 L 391/36).
475. Amending Regulation (EEC) No 3887/92 laying down detailed rules for applying the integrated administration and control system for certain Community aid schemes (OJ 1995 L 156/27).
476. On the protection of the European Communities financial interests (OJ 1995 L 312/1).
477. On the protection of the European Communities financial interests (OJ 1995 L 312/1).

states that action taken under Article 5.1.(c) is of the nature of an administrative penalty. The provision clearly states that "total or partial removal of an advantage granted by Community rules, even if the operator wrongly benefited from only a part of that advantage" shall be considered an administrative penalty.

According to its formulation, this form of penalty can be used where the operator in question has been wholly or partially entitled to the advantage, but also where the operator has been wholly unentitled. This last appears entirely reasonable, but it is nevertheless a breach of the systematic approach established, because it refers to the withdrawal of a wrongly obtained advantage, which is otherwise considered to be an administrative measure and not an administrative penalty. The reason for this breach of the systematic approach may be that it can in practice be difficult to calculate the value of an unentitled advantage, and therefore how far reaching the measures shall be to withdraw it, so that the demands for legal certainty point to its categorisation as an administrative penalty. For example, it can be difficult to generalise on the advantage to a farmer to submit his application for support after the deadline, and therefore impossible to establish with certainty whether the reduction of 1% in such a case will be harsher than a mere withdrawal. Regardless of the reason, it should be noted that Community law classifies the removal of an advantage as an administrative penalty, even though the legal consequences are not necessarily harsher than the withdrawal of a wrongly obtained advantage. Instead of this breach with the systematic approach, it would have been more appropriate to distinguish between those actions taken in connection with the forfeiture of security.

12.1.2.6. Other penalties

The general and horizontal Regulation 2988/95[478] ends its review of the various administrative penalties with the residual provisions of Article 5.1.(g) in which it is laid down that, apart from the named penalties, administrative penalties will also include "other penalties of a purely economic type, equivalent in nature and scope, provided for in the sectoral rules ... in the light of the specific requirements of the sectors." Together with the administrative penalties reviewed above, this provision confirms a number of important conditions.

First, administrative penalties are of an economic character, which means, among other things, that they cannot include imprisonment.

Second, they shall be "equivalent in nature and scope" to the penalties specifically listed in the provision. In this it is possible to see a lower limit, according to which penalties shall as a general principle, be more far reaching than a mere withdrawal of a wrongly obtained advantage. It is doubtful if it is also possible to derive an upper limit to administrative penalties. As has been noted above,

478. On the protection of the European Communities financial interests (OJ 1995 L 312/1).

administrative penalties can be wide ranging and can, among other things, include exclusion from support programmes, withdrawal of approval etc. which in practice can mean that the person subject to such a penalty can be forced to give up his business. Against this background it is hard to deduce a general upper limit to penalties, other than that already noted, that imprisonment is excluded as an administrative penalty.

The third important element of the provision is that other administrative penalties, other than those expressly referred to, shall be " provided for ... in the light of the specific requirements of the sectors." This implies that in adopting penalties, regard shall be had for the actual circumstances that apply in the individual sector.

An example of such a special administrative penalty is confiscation. Confiscation is generally undertaken as part of investigation and control. This is also the case in EC law where, for example Regulation 4045/89[479] authorises the confiscation of business documents as part of controls carried out to prevent or reveal irregularities in the area of agriculture. But EC law also uses confiscation as a penalty. Among possible sanctions, in addition to fines and the withdrawals of fisheries licences, Article 31.3 of Regulation 2847/93[480] refers to confiscation, which may only be temporary. Another example of measures which, according to the circumstances, could be considered to be administrative penalties are charges for controls, fees and suchlike, provided that their rate exceeds the actual costs connected with the control etc.

12.1.3. Criminal penalties

As referred to above, it is difficult to draw a precise upper limit for administrative penalties, and thus define the boundary between administrative and criminal penalties.

A criminal penalty is characterised as bring a measure of a personal or economic nature against a person who is culpable of an illegal act. Generally the severity of the measure will depend on the grossness of the illegality committed. Furthermore, the measure aims to be have a deterrent effect towards others.

479. On scrutiny by Member States of transactions forming part of the system of financing by the Guarantee Section of the European Agricultural Guidance and Guarantee Fund and repealing Directive 77/435/EEC (OJ 1989 L 388/18).
480. Establishing a control system applicable to the common fisheries policy (OJ 1993 L 261/1).

These characteristics also apply to administrative penalties under Community law, with exception of measures of a personal nature, in other words imprisonment, so that a distinction on this basis is not possible.

In Article 5.2 of Regulation 2988/95[481] it is emphasised that administrative penalties are "not equivalent to a criminal penalty." The distinction between administrative and criminal penalties is thus first and foremost a question of definition.

12.1.3.1. Imprisonment

In Article 5 in Regulation 2988/95[482] the Community has listed the administrative penalties that can be imposed in relation to irregularities. None of these includes imprisonment. On the contrary, Article 5.1.(g) provides that, apart from the specifically named penalties, "other penalties of a purely economic type" can be imposed. From this the converse can be deduced, that imprisonment is not an administrative penalty. Naturally such a conclusion cannot be authoritative for the whole of EC law, coming as it does from secondary legislation such as a Regulation. However, it is a reasonable assertion since Regulation 2988/95[483] aims to be a framework regulation for future regulation of penalties.

It follows from this that imprisonment lies outside those penalties which the Community is able to apply to the infringement of EC law, since, as set out below, the Community is not empowered to apply penalties that are more far reaching than administrative penalties. It should also be noted that in all Member States imprisonment is not applicable to administrative infringements.[484] Imprisonment is a criminal penalty.

12.1.4. The principles of the distinction

Following the review undertaken of administrative penalties, and the borders between them and criminal penalties and administrative measures respectively, it can be stated that when the distinction is made on the basis of the legal consequences, penalties are distinguished from administrative measures by going further than the mere withdrawal of a wrongfully obtained advantage in the vast majority of cases. The upwards distinction, in other words in relation to criminal penalties, is present at least in cases where there is imprisonment.

481. On the protection of the European Communities financial interests (OJ 1995 L 312/1).
482. On the protection of the European Communities financial interests (OJ 1995 L 312/1).
483. On the protection of the European Communities financial interests (OJ 1995 L 312/1).
484. Summary report and study of the systems of administrative and criminal penalties of the Member States and on the general principles applicable to the Community penalties, SEC/93/1172.

The distinction between administrative measures, administrative penalties and criminal penalties can also be made on other grounds, as previously stated, including on the basis of definition in EC law, and on the basis of the legal facts.

The differences on the basis of the definition of the three categories does not give any guidance on the content of the distinction since it is merely limited to stating that administrative measures are not penalties, and that administrative penalties and criminal penalties are different.

The distinction on the basis of legal facts between administrative penalties and criminal penalties has been touched on in several cases. In Case 137/85[485] the question was whether the obligation to provide a guarantee which would certainly be forfeited, was a penalty of a criminal kind. The Court pointed out that the original provision of security had been a voluntary decision of the operator, made out of regard for his economic interests, and that the penalty had been imposed without regard for whether or not the operator had committed any fault, and therefore the Court found that it was not a criminal penalty. As criteria for what are administrative penalties or criminal penalties, the Court seemed in this case to give emphasis to the certainty with which the penalty would follow a breach of the regulations. This interpretation is given further weight by the fact that in his submission the Advocate-General in the case, Jean Mischo, pointed out that the personal circumstances of the operator were irrelevant, so that consideration should not be given to whether this was a repeat offence, or whether there were aggravating or mitigating circumstances, so that for these reasons the penalty was not criminal. But for Mischco it seems that the decisive matter was that there was no question of moral condemnation.

These criteria were also considered in Case C-240/90.[486] Here Germany argued that the exclusion from a subsidy programme was a criminal penalty which neither the Council not the Commission had powers to impose. Without reviewing its reasons in detail, the Court held that this was not so. Thus the opportunity was lost to follow up the arguments for the distinction between criminal penalties and other penalties which the Advocate-General had given in his submission. The Advocate-General argued that the preventive element is common to both kinds of penalty, but that for criminal penalties there is also an element of stigma as a result of society's disapproval or moral condemnation. In the view of the Advocate-General this meant that the extent of criminal penalties often depends on how much the behaviour is condemned, rather than more pragmatic circumstances. With non-criminal penalties the condemnation

485. Maizena Gesellschaft mbH and others v Bundesanstalt für landwirtschaftliche Marktordnung (BALM) [1987] ECR 4587.

486. Federal Republic of Germany v Commission of the European Communities [1992] ECR I-5383.

of a fault can also be a necessary pre-condition, but it is not usually the purpose of the penalty. Thus, it seems that in relation to the legal facts, the important distinction is whether or not there is a moral condemnation. According to Jean Mischo, this is a circumstance which, among other things, is expressed by the person in question receiving a criminal record.

As said previously, it is also possible to suggest other distinguishing parameters than the legal facts and the legal consequences. In practice, an important criterion for distinguishing between administrative penalties and criminal penalties is that the former are imposed by administrative authorities, whereupon it is up to the person subject to the penalty to take the initiative for any trial of the penalty before the courts.[487]

The source of this division between administrative penalties and criminal penalties is to be found in national legal systems,[488] and even though the development of the concept in Community law may be regarded as *sui generis*, a certain light can be cast on the division by looking at them.

On this basis, and on the way in which Community law has developed until now, any distinction will emphasise the legal consequences, and especially whether they involve more than the withdrawal of a wrongfully obtained advantage, and whether there is the possibility for imprisonment; though it should be remarked that, depending on the circumstances, administrative penalties can have quite extensive legal consequences. Furthermore, it will be relevant to consider the certainty with which a penalty will follow a breach of regulations, including the relevance of the personal circumstances of the person in question, as well as the purpose of the penalty, such as whether the penalty marks out the circumstances as being morally objectionable. Finally the identity of the authority which imposes the penalty can be significant, and whether the penalty provided for is typically to be found in national criminal laws.

It appears from this that there is considerable scope for discretion, where it depends on the facts of the case whether the penalty is to be characterised as administrative or criminal. This vague definition also means that the area of the EC powers to regulate in this area will change over time, for example as the result of wider interpretation by the Court.

487. In concordance with this, see the Annual Report from the Commission on the fight against fraud – 1992 Report and Action Programme for 1993 COM/93/141 Final.

488. Cf. the Commission; Summary report and study of the systems of administrative and criminal penalties of the Member States and on the general principles applicable to the Community penalties, SEC/93/1172.

12.2. The EC's powers to impose penalties

12.2.1. Administrative penalties

To the extent that the Community has competence to regulate or administer in a given area, as is the case for example with agriculture, it is assumed that this also includes competence relating to administrative penalties and measures in connection with the area in question. Whether the Community has the relevant competence thus depends on a general legal evaluation.

As will appear from the following section the treaty and the basic legal principles, as well as secondary legislation, provide examples of regulation of national authorities' penalties over those subject to their laws, as well as penalties imposed by Community institutions on Member States and those subject to their laws.

12.2.2 Criminal penalties

Originally the Community was not so attentive to the question of penalties. The Community put the emphasis on substantive regulation and left questions of implementation, including penalties, to the Member States. This led to a general assumption that the Community was without powers under criminal law.

This is a view which still has broad support in the Member States which regard criminal law as being *par excellence* a national matter.[489]

Community institutions have several times expressed a similar view. In 1976 the European Parliament said that criminal law is a question which in particular is subject to national sovereignty. In 1991 Jacques Delors replied to a Parliamentary question on behalf of the Commission to the effect that the nature of penalties applied under criminal law by Member States is a matter for their exclusive competence, and any harmonisation or uniformity of such provisions would require the full agreement of the Member States. In other words, the Commission had no powers or right to make initiatives in this area.[490] This was the view which the Commission repeated almost word for word in putting forward its proposal[491] for Regulation 2988/95.[492]

489. Cf. the review of the attitudes of the Member States on the basis of the interview research, section 19.1.6. This view is also shared to a certain extent by legal writers, e.g. see Vervaele, John A E: Fraud against the Community, 1992, and Greve, Vagn: Forholdet mellem EU-strafferet og national strafferet, Nordisk Tidsskrift for Kriminalvidenskab, 1994, p. 231 et seq.
490. Answer given by Jacques Delors on behalf of the Commission answer to written question No. 2761/90 by Mr Yves VERWAERDE. Standardization of national anti-drug policies (OJ 1991 C 227/4).
491. Inaugural speech by F de Angelis, Director-General of financial control, Revue de science Criminelle, 1995 p.6.
492. On the protection of the European Communities financial interests (OJ 1995 L 312/1).

The Court of Justice has also had the opportunity to express its view on the criminal law powers of the Community. In Case 1/78[493] the Court was requested by Belgium to give its opinion on the powers of the Member States and the Community respectively with regard to entering into an international agreement. The Treaty in question subjected the Member States to a number of obligations, among other things that the infringement of certain provisions should be punishable under national criminal law. The question was whether the Community could or should be a signatory to the treaty. Since the treaty also contained elements of a criminal law character, the issue indirectly raised the question of the Community's relationship to criminal law. The Court held that "There is no dispute with regard to the provisions of the draft convention relating to criminal prosecution and extradition; it is quite clear that the articles in question relate to matters falling within the jurisdiction of the states." With this answer the Court hinted at its acceptance of the divisions of powers referred to, but at the same time omitted to state its opinion on whether the Community can require Member States to make certain situation punishable under national criminal law. In the later Case 203/80[494] the Court gave its opinion that "in principle, criminal legislation and the rules of criminal procedure are matters for which the Member States are responsible." Here too there is a confirmation of the position of criminal law as being a matter for Member States, but the door is held open for subsequent developments of the legal position.

It is thus not wrong to argue that, as an initial position, criminal law is under the exclusive competence of the Member States. However, in recent years there has been a tendency towards a certain softening of this view.

The Community has been more or less directly involved in a number of regulative measures which have criminal law significance. This has taken place by co-operation within the traditional scope of international law as well as within the third pillar since the Maastricht Treaty.[495]

493. Ruling delivered pursuant to the third paragraph of Article 103 of the EAEC Treaty. [1978] ECR 2151

494. Criminal proceedings against Guerrino Casati. [1981] ECR 2595.

495. Convention drawn up on the basis of Article K.3 of the Treaty on the European Union, on simplified extradition procedure between the Member States of the European Union (Brussels, 10th March, 1995), Convention drawn up on the basis of Article K.3 of the Treaty on the European Union, on the establishment of a European Police Office (Europol Convention) (Brussels, 26th July 1995), Convention drawn up on the basis of Article K.3 of the Treaty on the European Union, on the use of information technology for customs purposes (Brussels, 26th July 1995), Convention drawn up on the basis of Article K.3 of the Treaty on the European Union, on the protection of the European Communities' financial interests (Brussels, 26th July 1995), Proposal for a Council Act drawing up the additional Protocol to the Convention on the Protection of the European Communities' Financial Interests COM(95)693. Common to all these initiatives under the third pillar is that they require the ratification of all Member States before they can

These criminal law initiatives unquestionably point to two circumstances. First, the realisation of this co-operation is extremely slow moving, since none of the proposals has yet entered into force. Co-operation on criminal law has yet to show itself to be of operational utility in the fight against irregularities. Secondly, the initiatives show that both the Member States and the Community acknowledge the need for co-operation on criminal law.

These circumstances have meant that there has been an increased demand for some form of Community regulation of criminal law in the first pillar of the EU, just as there has in fact been a softening of the initial point of view.

In a resolution of 24th October 1991 on strengthening the European Parliament' s powers of budgetary control in the context of its strategy for European Union, Parliament expressed the view that, in those areas which lie within the competence of the European Community, the Treaties already give law-making powers on criminal law matters which can be exercised through Directives (under then Article 100 but now Article 94 of the EC Treaty) and Regulations (under then Article 235 but now Article 308 of the EC Treaty).[496] Furthermore, the European Parliament has pointed out that Member States must work together in the area of criminal law, and that the Commission should put forward proposals in this area, which is in accordance with discussions held on the Schengen agreement. It suggested that as a step in the direction of a European supranational criminal law process, with penalties, the Commission ought (under then Article 87 but now Article 83 of the EC Treaty) to have the power to impose fines and periodic penalty payments on those who commit fraud.[497]

The Court of Justice, in particular, has modified its initial view on the powers of the Community, with legally binding effect. Quite early on the Court established that criminal law is also subject to the influence of EC law. In Case 82/71[498] Italy asserted that the Court was prevented from considering a question that concerned the interpretation of Community law in connection with national criminal cases. The Court rejected this. In practice many cases are brought before the Court for preliminary rulings on issues originating in national criminal cases. This is typically because the interpretation of Community rules is

enter into force, which is the reason why none of those that have been adopted have yet entered into force.

496. (OJ 1991 C 305/103) See also Case C-326/88, Anklagemyndigheden v Hansen & Søn I/S [1990] ECR 1-2911.

497. A2-0020/89/B.

498. Ministère public de la Italian Republic v Società agricola industria latte (SAIL). [1972] ECR 119

decisive for whether the substance of the offence has been committed or not, and therefore whether there is criminal responsibility.[499]

But criminal law is also affected by Community law to a wider extent. It follows from the practice of the Court that Member States cannot claim national regulations, including criminal law provisions, as a reason for not fulfilling the requirements of Community law. The principle of priority prevents this. It is unthinkable that the effectiveness of Community law should depend on which national regulations it affects, and so criminal law must give way. In Case 186/87[500] the Court held that "Although in principle criminal legislation and the rules of criminal procedure, among which the national provision in issue is to be found, are matters for which the Member States are responsible, the Court has consistently held ... that Community law sets certain limits to their power," see the corresponding Case 299/86.[501]

The effect of the Community on criminal law and criminal procedure is not only negative, in the sense that national law may not conflict with Community law, but also positive, since Community law makes demands on national criminal law, as will be seen below, based among other things on Article 10 of the EC Treaty. In Case C-240/90[502] Advocate General F.G. Jacobs gave the view that Community law had not at its then state of development given the Commission, the Court of First Instance nor the Court of Justice functions appropriate to a criminal court. He went on to suggest that this did not prevent the Community from exercising powers, for example with a view to the harmonisation of the criminal law of the Member States, should this be necessary for achieving the aims of the Community. The Advocate General was perhaps a little too enthusiastic, as the Court at least did not go this far.

499. As an example, reference can be made to Case 406/85, Procureur de la République v Daniel Gofette and Alfred Gilliard. [1987] ECR 2525, in which the question for preliminary ruling arose from a French criminal case, in which a car bought in Belgium was imported to France; there the accused was charged with having used his car on the road in France with a false registration plate and without being in possession of the required authorizations or administrative documents. During the case the accused claimed that the requirement for the registration of his car in France was against Article 30 of the Treaty; this question was brought before the Court of Justice for its decision.
500. Ian William Cowan v Trésor public. [1989] ECR 195.
501. Criminal proceedings against Rainer Drexl. [1988] ECR 1213.
502. Federal Republic of Germany v Commission of the European Communities. Opinion of Mr Advocate General Jacobs. [1992] ECR I-5383.

In secondary legislation there are examples of Community law directly requiring the application of national criminal law,[503] and there is a long list of secondary legislative acts which contain reservations on criminal law. Article 1 in Regulation 595/91[504] states that "This Regulation shall not affect the application, in the Member States, of rules relating to criminal proceedings or mutual assistance between Member States at judicial level in criminal matters.[505]" Also, the preamble taken together with Article 2.4 of Regulation 2988/95[506] makes it clear that the Regulation applies "without prejudice to the application of the Member States' criminal law." Regulation 2185/96[507] on Commission on-the-spot checks and inspections states that "This Regulation shall not affect Member States' powers regarding the prosecution of criminal offences or the rules governing mutual assistance in criminal matters between Member States." These reservations concern first and foremost the criminal law procedure of the Member States, which thereby remain unaffected by Community law. However, if it were absolutely clear that the Community is without criminal law powers within the first pillar, these reservations would be unnecessary. Regulations of

503. Regulation 2847/93 establishing a control system applicable to the common fisheries policy (OJ 1993 L 261/1). Article 31.1 of the regulation states that "Member States shall ensure that the appropriate measures be taken, including of administrative action or criminal proceedings in conformity with their national law, against the natural or legal persons responsible where common fisheries policy have not been respected, in particular following a monitoring or inspection carried out pursuant to this Regulation." See also Regulation 2846/98 amending Regulation (EEC) No 2847/93 establishing a control system applicable to the common fisheries policy, Article 31.2a. (OJ 1998 L 358/5).
504. Concerning irregularities and the recovery of sums wrongly paid in connection with the financing of the common agricultural policy and the organization of an information system in this field and repealing Regulation (EEC) No 283/72 (OJ 1972 L 67/11).
505. There are corresponding provisions in Regulation 1681/94 concerning irregularities and the recovery of sums wrongly paid in connection with the financing of the structural policies and the organization of an information system in this field (OJ 1994 L 178/43), Regulation 1831/94 concerning irregularities and the recovery of sums wrongly paid in connection with the financing of the Cohesion Fund and the organization of an information system in this field (OJ 1994 L 191/9), and Regulation 1469/95 on measures to be taken with regard to certain beneficiaries of operations financed by the Guarantee Section of the EAGGF (OJ 1995 L 145/1). Regulation 3508/92 establishing an integrated administration and control system for certain Community aid schemes (OJ 1992 L 355/1) establishes a system of controls through comprehensive regulation, by which it is stated that "The aforementioned powers to check shall not affect the application of national criminal law provisions which reserve certain acts for officials specifically designated by national law. Commission officials shall in particular not participate in home visits to or the formal interrogation of suspects under the criminal law of the Member State. They shall, however, have access to the information obtained thereby."
506. On the protection of the European Communities financial interests (OJ 1995 L 312/1).
507. Concerning on-the-spot checks and inspections carried out by the Commission in order to protect the European Communities' financial interests against fraud and other irregularities (OJ 1996 L 292/2).

this kind state that the measure under discussion does not affect Member States' criminal laws, but at the same time lay down a marker that it cannot be taken for granted that the Community is excluded from taking such measures.

The development referred to in the direction of a softening of the position that criminal law is under the exclusive competence of the Member States must, however, be assumed to have been checked by the section in the Maastricht Treaty on Justice and Home Affairs. In particular the then applicable Article K.1, subsections 7 and 9 quite clearly placed criminal law matters outside the first pillar. With the Amsterdam Treaty criminal law matters are still placed in the EU Treaty third pillar, as expressed in Article 29, so that "the Union's objective shall be to provide citizens with a high level of safety within an area of freedom, security and justice by developing common action among the Member States in the fields of police and judicial cooperation in criminal matters ... This objective shall be achieved by preventing and combating crime ... though ... approximation, where necessary, of rules on criminal matters in the Member States."

Against this background, it must be considered that there is no place for true criminal law regulation within the first pillar. On the other hand there is no doubt that, even within the first pillar, the Community does have influence on national criminal law.

Thus, the EC has very limited criminal law powers, but full competence on matters of administrative penalties.

The Community has used its powers in relation to administrative penalties in order, step by step, to make increasingly comprehensive regulation of penalties. As in the area of controls, this has primarily taken place through the inclusion of provisions for penalties in substantive regulations. In this way the regulation of penalties has largely taken place under the authority of Article 36 EC (EC Treaty Article 42) and Article 37 EC (EC Treaty Article 43) but also, among others, Articles 149, 150, 161, 162, 209 and 279 EC respectively (EC Treaty Articles 126, 127, 130d, 130e, 153 and 209) have been used. Gradually, as the question of sanctions has had a more independent importance, this structure has no longer been appropriate so that Article 308 EC (EC Treaty Article 235) has been used to supplement it, along with the latest independent authorising provisions, the two most important of which are Regulation 2988/95[508] and Regulation 2185/96.[509]

In this way it has been possible both to maintain criminal law as a matter of national responsibility, and to give the Community the required powers to

508. On the protection of the European Communities financial interests (OJ 1995 L 312/1).
509. Regulation 2185/96 concerning on-the-spot checks and inspections carried out by the Commission in order to protect the European Communities' financial interests against fraud and other irregularities (OJ 1996 L 292/2).

impose penalties, where the shifting boundaries between administrative penalties and criminal penalties give the Community the necessary flexibility to achieve its regulatory aims.

12.3. Conclusion

The EC has comprehensive powers in connection with administrative penalties, and by the adoption of Regulation 2988/95[510] the way is open for the introduction of administrative penalties in widespread areas under EC law. In contrast with this, the Community's criminal law powers are strictly limited.

It has been argued[511] that the Community operates with a distinction between administrative and criminal penalties because each has a separate function. The administrative penalties ensure a proper administration of the Community's financial interests, while the criminal penalties are used to punish serious infringements.

It is the writer's opinion that the triple division, particularly the division between administrative and criminal penalties, serves to cut the Gordian knot for the Community, since it has succeeded in giving the EC powers to regulate penalties, without it being necessary to take the much more contentious step of making supranational criminal law, which would have caused problems both politically and practically.

However there are grounds for believing that the Community has postponed rather than solved the problem. Even though the two categories of penalties can be categorised well enough, they cannot be distinguished by drawing any precise boundary. In other words a grey area has been created about authority on this subject, and as matters develop, sooner or later Community regulations will reach the limit of what can reasonably be called administrative penalties, and the question of criminal law powers will again raise its head.

510. On the protection of the European Communities financial interests (OJ 1995 L 312/1).
511. Cf. the Commission's report; Protection of the Community's financial interests, delivered on 13th November 1995.

CHAPTER 13

Sanctions imposed by national authorities on those subject to the laws of the Member States

The initial legal position is that the substantive norms are regulated by the Community, while each Member State is responsible for the applying of the regulations as well as the penalties for infringement of Community law, in accordance with its national principles and traditions. As early as Case 50/76[512] the Court of Justice thus acknowledged the principle that Member States are free to penalise infringements of EC law.

The division of powers between the Member States and the Community has most recently been confirmed in the general and horizontal regulation on the protection of the Community's financial interests.[513] Here, in the section headed "General principles" it states that "Subject to the Community law applicable, the procedures for the application of Community checks, measures and penalties shall be governed by the laws of the Member States."

The regulation includes a proviso that Community law can determine the nature and scope of the administrative measures and penalties. This proviso is frequently used both in secondary legislation and in the practice of the Court of Justice. Thus, in Case C-290/91[514] the Court held that "in so far as Community law, including its general principles, does not contain common rules in that respect, national authorities, when implementing Community legislation, follow the procedural and substantive rules of their own national law." In agreement with this see the Joined Cases 205-215/82.[515]

512. Amsterdam Bulb BV v Produktschap voor Siergewassen, [1977] ECR 137. See also Case 54/81, Firma Wilhelm Fromme v Bundesanstalt für landwirtschaftliche Marktordnung [1982] ECR 1449.
513. On the protection of the European Communities financial interests (OJ 1995 L 312/1).
514. Johannes Peter v Hauptzollamt Regensburg [1993] ECR I-2981.
515. Deutsche Milchkontor GmbH and others v Federal Republic of Germany, [1983] ECR 2633.

In reality the Community has, to a wide extent, exercised influence on national sanctioning of infringements of EC law, thus modifying the initial legal position. This influence can both be negative, in the sense that the Member States must amend or repeal parts of their national criminal regulations because of EC law, and positive in the sense that EC law obliges Member States to adopt some given provision. These obligations arise from the Treaty, from the basic legal principles and from secondary legislation.

It is this influence of EC law on the national authorities' sanctioning of those subject to the laws of the Member States which is reviewed in this section. Further, the review to some extent deals with the developments in Community law in this area.

13.1 The regulation of sanctions in the EC Treaty and the basic legal principles

The Treaty contains no express provisions concerning the sanctions imposed by Member States on those subject to their laws.[516] However, this does not mean that the Treaty and the basic legal principles are without relevance to this.

There are thus several examples of situations in which the Treaty or the basic legal principles require the Member States either to amend or repeal national provisions for penalties, or the way in which they are applied (negative influence). In Case 299/86[517] the Court stated that "a system of penalties should not have the effect of jeopardizing the freedoms provided for by the EEC Treaty," and in relation to the basic legal principles in Case 186/87[518] the Court said, of national legislative provisions that they "may not discriminate against persons to whom Community law gives the right to equal treatment or restrict the fundamental freedoms guaranteed by Community law.[519]" In Case 8/77[520] the Court stated that "the national authorities should not impose penalties for disregard of a provision which is incompatible with Community law." It is clear that national regulations of administrative methods that conflict with the Treaty or basic legal principles cannot be maintained without there being a breach of

516. In this connection it is noted that both EC Treaty Article 87.2 (now Article 83.2) and Article 172 (now Article 229) deal only with penalties that are laid down and applied directly by the Community's own institutions, cf. premiss 34 in Case C-240/90, Federal Republic of Germany v Commission of the European Communities, [1992] ECR I-5383.
517. Criminal proceedings against Rainer Drexl, [1988] ECR 1213.
518. Ian William Cowan v Trésor public, [1989] ECR 195.
519. See also Case C-290/91 Johannes Peter v Hauptzollamt Regensburg [1993] ECR I-2981 and the Joined Cases 205-215/82, Deutsche Milchkontor GmbH and others v Federal Republic of Germany, [1983] ECR 2633.
520. Concetta Sagulo, Gennaro Brenca et Addelmadjid Bakhouche, [1977] ECR 1495.

EC law. The regulation of sanctions, including national criminal law, does not have any special status in this respect. This means that national regulation of sanctions must take account of the aims and provisions of the Treaty, and must not breach them. See also Case 118/75,[521] Case 41/76[522] and Case 52/77,[523] which also originated with criminal cases in Member States.

There are also examples of instances when the Treaty or the basic legal principles require Member States to adopt a given provision for penalties, or a specific administration of such a provision. For example, the Court has interpreted EC Treaty Article 5 (now Article 10) as containing a requirement that in Certain situations the Member States shall impose penalties for infringement of Community rules. Even though, under the division of powers set out above, the question of penalties is first and foremost a national matter, nevertheless from the division itself there arises a duty for the Member States to pursue and punish breaches of EC laws. In the Joined Cases 146, 192 and 193/81[524] the Court of Justice stated that the "distribution of powers is consistent with the general approach on which the common organization of agricultural markets is based ... [and] is subject to common rules, uniformly applicable throughout the Community, whereas the machinery for intervention is operated by the national intervention agencies which are, accordingly, responsible for performing all the functions of supervision needed to ensure ... that any breaches by traders of the rules of the Community are duly penalised."

The significance of the Treaty and the basic legal principles is clear on matters where they are the only source of Community law, but the Treaty and the basic legal principles are also significant in areas where penalty provisions are included in secondary legislation.

First of all, the secondary legislation shall comply with the Treaty and the basic legal principles in order to be valid. Secondly, and of more interest in the present context, the Treaty and the basic legal principles are significant because penalty provisions in secondary legislation are often vague and only to a lesser degree provide norms for sanctions. In Case 52/77[525] there was a situation in which the regulation relevant to the case provided that "Member States shall take all appropriate measures to provide penalties for infringement of this regulation;" in this case the Court used EEC Treaty Article 30 (after amendment now Article 28 in the EC Treaty) together with the penalty provision to establish that the national provisions for milder penalties for infringement of the

521. Lynne Watson and Alessandro Belmann, [1976] ECR 1185.
522. Suzanne Criel, née Donckerwolcke and Henri Schou v Procureur de la République au tribunal de grande instance de Lille and Director General of Customs, [1976] ECR 1921.
523. Leonce Cayrol v Giovanni Rivoira & Figli, [1977] ECR 2261.
524. BayWa AG and others v Bundesanstalt für landwirtschaftliche Marktordnung, [1982] ECR 1503.
525. Leonce Cayrol v Giovanni Rivoira & Figli, [1977] ECR 2261.

same norms when relating to domestic products than when relating to Community products was inconsistent with Community law. It is clear that the more complete the provisions for penalties in secondary legislation, the less scope there is for the operation of Treaty provisions, always assuming, of course, that the secondary legislation conforms with the Treaty.

13.1.1. The principle of solidarity

The principle of solidarity expressed in Article 10 of the EC Treaty obliges Member States to ensure compliance with Community law. It is a necessary pre-condition of this requirement that Community law is implemented, and controls and sanctions are central in this connection.[526] The focus here is on the significance of the solidarity principle for Member States' penalising infringements of EC law.

In an early Case 50/76[527] the Court stated that "although article 5 of the EEC treaty [now Article 10]places member states under a duty to take all appropriate measures , whether general or particular, to ensure fulfilment of the obligations resulting from action taken by the institutions of the community, it allows the various member states to choose the measures which they consider appropriate , including sanctions which may even be criminal in nature ... [this means that] ... in the absence of any provision in the community rules providing for specific sanctions to be imposed on individuals for a failure to observe those rules, the member states are competent to adopt such sanctions as appear to them to be appropriate." This confirms that the Member States are obliged to ensure that Community law is implemented and that, as a consequence of this, Member States have the authority to penalise infringements of Community law, and that they have a considerable degree of discretion as to what penalty is appropriate.

Subsequently the Court of Justice in Cases 14/84[528] and 79/83[529] has established that the discretion of the Member States is not entirely free. There is thus a requirement that penalties shall be effective and deterrent.

On 21st September 1989 the Court gave its judgment in Case 68/88[530] which is, for the EC law on sanctions, what the Dassonville case[531] and the Cassis de Dijon case[532] are for the law on the free movement of goods. In that case the

526. Cf. Vervaele, John A E; Fraud against the Community, p. 5 et seq.
527. Amsterdam Bulb BV v Produktschap voor Siergewassen, [1977] ECR 137. European Court Reports 1977 page 0137
528. Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen, [1984] ECR 1891.
529. Dorit Harz v Deutsche Tradax GmbH, [1984] ECR 1921.
530. Commission of the European Communities v Hellenic Republic, [1989] ECR 2965.
531. Case 8-74, Procureur du Roi v Benoît and Gustave Dassonville [1974] ECR 837.
532. Case 120/78, Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein, [1979] ECR 649.

previously relatively broad scope for the discretion of the Member States on sanction issues was changed to an obligation to enforce the law and to impose penalties.

The facts of the case were that two shiploads of maize were exported from Greece to Belgium as Greek maize, though it had in fact been imported from Yugoslavia. The Greek authorities had not collected agricultural duties on the import, and these were duties which would have been the Community's own resources. Furthermore, the irregularity had been committed with the co-operation of Greek officials, and subsequently a senior official had sought to conceal it by issuing false documents and making a false declaration. It was against this background that the Commission had made a number of claims against Greece, among other things that the country should pay the agricultural duties with the addition of interest for late payment, and, which was more important in this instance, that Greece should institute "criminal or disciplinary proceedings against the authors of the fraud and their accomplices." Greece replied evasively to the communications from the Commission, which ended in a judgment against Greece *in absentia*. As part of the reasons for its judgment the Court stated that "where Community legislation does not specifically provide any penalty for an infringement or refers for that purpose to national laws, regulations and administrative provisions, Article 5 [now Article 10] of the Treaty requires the Member States to take all measures necessary to guarantee the application and effectiveness of Community law. For that purpose, whilst the choice of penalties remains within their discretion, they must ensure in particular that infringements of Community law are penalized under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive.[533]"

Apart from noting the considerable restraints to which national discretion is subject to after this, the arguments of the Court can be interpreted as containing a double obligation on Member States. Firstly national penalties must be effective, proportionate and dissuasive, and secondly the principle of non-discrimination applies.[534]

The principle of non-discrimination means that infringements of Community law shall be penalised in a manner that corresponds to the penalty for infringements of national laws of a similar nature and importance. The basis of the comparison is thus the nature and importance of the infringement. In this

533. The Court has subsequently repeated this word for word in premiss 17 in Case C-326/88, Anklagemyndigheden v Hansen & Søn I/S, [1990] ECR I-2911.

534. This has also been called an assimilation principle, cf. for example; Sevenster, Hanna G, "Criminal law and EC law" in Common Market Law Review, 1992, Vol. 29, pp 34 and 51. In the present thesis this term is used in the sense used in section 7.1.2

connection it must be assumed that the infringement's 'nature' refers to how the illegality would be categorised under national law. For example, is the infringement in the nature of a breach of the rules relating to duties, or value added tax, or subsidies or some other rules? As for the concept of 'importance', it is the national criteria of importance that are decisive. For example it can be a question of the degree of responsibility etc. In the Advocate General's opinion in Case C-326/88[535] the word 'importance' was replaced by 'significance', which may indicate the use of broader parameters than 'importance', but the Court retained the use of its previous formulation.

The requirement that penalties must be effective, dissuasive and proportionate was also repeated in Case C-326/88.[536]

On the basis of the opinion of Advocate General W Van Gerven in this case there are reasons for assuming that the requirement that a penalty shall be effective means at least that the Member States are obliged to pursue and realise the aims of the relevant provisions of the Community law. In the later Case C-352/92[537] the Court expanded on the question of the requirement for effectiveness, saying that "it is for the Member States to combat fraud effectively ... where a Community regulation does not specifically provide any penalty for an infringement or refers for that purpose to national laws, regulations and administrative provisions, Article 5 [now Article 10] of the Treaty requires the Member States to take all measures necessary to guarantee the application and effectiveness of Community law." The Court also held that "the obligation based on Article 5 [now Article 10] of the Treaty also extends to the initiation of any proceedings under administrative, fiscal or civil law for the collection or recovery of duties or levies which have been fraudulently evaded or for damages."

The requirement that penalties must be dissuasive presumably means that they shall have both individual and general dissuasive effects.

That penalties shall be both effective and dissuasive has been referred to collectively by Ruth Nielsen[538] as the 'principle of effectiveness'. In Case 14/83[539] this principle was used to set a lower limit for Member States' penalties since it was argued that, for infringements of the Directive on equal treat-

535. Anklagemyndigheden v Hansen & Søn I/S, Case C-326/88, [1990] ECR I-2911. In this case the Court stated that, while the choice of penalties remains within the discretion of the Member States, "they must ensure in particular that infringements of Community law are penalized under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance."
536. Anklagemyndigheden v Hansen & Søn I/S, [1990] ECR I-2911.
537. Milchwerke Köln/Wuppertal eG v Hauptzollamt Köln-Rheinau, [1994] ECR I-3385.
538. EF-arbejdsret, 2nd edition, 1992.
539. Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen, [1984] ECR 1891.

ment, Member States should establish such effective and dissuasive penalties as are suitable in relation to the injury suffered that they must go further than a merely symbolic compensation. Taken in isolation, the principle of effectiveness argues in favour of strict penalties, however, this can be contrary to the requirement that penalties should be proportionate.

The requirements of the principle of proportionality are well known in EC law, and here the requirements are considered in the context that penalties shall be necessary to achieve their aims, but not go further than is required by the infringement.[540]

Ruth Nielsen[541] has argued that there is a ranking between the principles of non-discrimination, proportionality and effectiveness, with the latter principle is ranked above the other two. This view is supported by the opinion of the Advocate General in Cases 14/83[542] and 79/83.[543] In the opinion of the present writer this conclusion is not unconditionally correct. First, it should be noted that the Advocate General's opinion was expressly based on the idea that the national sanctions referred to were aimed at securing compliance with a basic principle laid down in the Treaty, such as the equal treatment of men and women, which argues for stricter penalties with a different emphasis than is the case, for example, of a disregard of formal rules in secondary legislation. Secondly, both the principle of non-discrimination[544] in relation to penalties and the principle of proportionality have since been directly incorporated in the EC Treaty in Article 209a (now after amendment Article 280) and Article 3b.3 (now Article 5.3), which suggests that very special circumstances must be necessary for these principles to be subject to a third principle. However, in the opinion of the present writer, what is decisive is that the principles consist of a symbiosis, where a general primacy of one principle can risk the distortion of the requirements for national provisions for penalties. Whatever the case, it must be emphasised that the Court of Justice has not addressed the question of any ranking.

The suggested limits to national provisions for penalties which the Court of Justice has derived from Article 5 of the EC Treaty (now Article 10), has since been upheld. In Case C-7/90,[545] the question was whether Belgium was obliged to introduce criminal liability for legal persons in a situation where the relevant

540. For a more detailed consideration of the principle of proportionality see section 7.1.3 and especially section 13.1.4.
541. EF-arbejdsret, 2nd edition, 1992, p. 243.
542. Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen, [1984] ECR 1891.
543. Dorit Harz v Deutsche Tradax GmbH, [1984] ECR 1921.
544. However, in the form of the assimilation principle which derives from the principle of non-discrimination, cf. 8.1.2.
545. Criminal proceedings against Paul Vandevenne and others, [1991] ECR 4371.

regulation was silent on the issue. The Court rejected this, and referring to the discretion which Member States have with regard to the setting of penalties, the Court held "under Article 5 of the EEC Treaty (now Article 10), which requires the Member States to take all measures necessary to guarantee the application and effectiveness of Community law, they must ensure that infringements of a Community regulation are penalized under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive." Against this background the Court concluded that Article 5 (now Article 10) does not require "a Member State to introduce into its national law a specific system of criminal liability, such as the criminal liability of legal persons." In reality this means that Member States must ensure that the responsibilities of legal persons can, if necessary, be referred back to natural persons to such a reasonable extent that infringements of EC law can be penalised in a way which meets the requirements.

Altogether it can be said that the principle of loyalty restricts the freedom of Member States in penalising infringements of EC regulations, so there is an obligation to enforce and to penalise according to the same rules that apply to infringements of national laws of a similar nature and importance, and that the penalties must be effective, dissuasive and proportionate.

13.1.2. The principle of subsidiarity

As noted before, a review of the law relating to the principle of subsidiarity is subject to considerable uncertainty. Therefore just two comments will be made about the principle of subsidiarity and sanctions.

First, it cannot be denied that the principle of subsidiarity will have special importance in relation to sanctions as long as the imposition of sanctions is considered to be *par excellence* a matter for national authority.

Secondly, in the general and horizontal regulation for the protection of the Community's financial interests[546] rules for subsidiarity are included, since the period of limitation for proceedings and the time limit for implementation by each Member State can be made longer, though not shorter, than the periods given in the Regulation.[547] That there is no scope for laying down a shorter period, should be seen in conjunction with the need for the effective protection of the Community's financial interests.

546. Regulation 2988/95 on the protection of the European Communities financial interests (OJ 1995 L 312/1).

547. See in greater detail section 13.2.4.5 below.

13.1.3. The principle of equality

The general principle of equality, as created by the Court of Justice, applies in EC law. The principle has a wider area of application than the specific prohibition of discrimination which is contained in the Treaty, and can with some justification be described as a positive mirror image of the prohibition of discrimination, since the principle of equality requires that similar situations should not be treated differently and different situations should not be treated similarly, unless there are objective reasons for doing so.[548]

Case 299/86[549] illustrates the significance of the principle in relation to the question of sanctions. According to the national laws the infringement of VAT rules was subject to stricter penalties in connection with the import of goods than with domestic trading of goods. The Court held that this was incompatible with the Treaty, unless this difference was reasonable in relation to the differences between the two kinds of infringement. The differences which could justify there being different penalties for the two types of infringement were, among other things, the substance of the delinquent act and the probability for its discovery.

The principle of equality is not typically seen in a general description of the content of the principle, but is revealed in the requirement that infringements of Community laws shall be punished in line with infringements of corresponding national laws. This is a requirement which applies both to the provision for penalties and the application of penalties.

Thus, in Case 68/88[550] the Court stated that Member States "must ensure in particular that infringements of Community law are penalized under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance." Further, the Court stated that national authorities must be just as alert to infringements of Community law as they are with the implementation of corresponding national laws.

One facet of the requirement for equality in penalties is the question of the reduction or modification, under national law, of penalties applied for breaches of Community law. Here, too, the principle of equality applies, as can be seen clearly in Case C-290/91,[551] where the question was whether a supplementary duty applied in the area of agriculture in accordance with Community law could

548. See section 7.1.5 above.

549. Criminal proceedings against Rainer Drexl, [1988] ECR 1213. The case concerned Article 95 of the EC Treaty (after amendment now Article 90), which, according to the view of the Court, should be interpreted by reference to the purpose of the Treaty.

550. Commission of the European Communities v Hellenic Republic, [1989] ECR 2965. See also the Joined Cases 205 to 215/82, Deutsche Milchkontor GmbH and others v Federal Republic of Germany, [1983] ECR 2633.

551. Johannes Peter v Hauptzollamt Regensburg, [1993] ECR I-2981.

be waived under purely national law. The Court accepted this since it remarked, among other things that "national authorities, when implementing Community legislation, follow the procedural and substantive rules of their own national law."

Even though the requirement for equality of penalties is, in practice, typically a question of making penalties under Community law more strict, it also works the other way round. It follows from Case 54/81[552] that the requirements of the principle of equality will not have been met if the penalty for the breach of Community law is stricter than for breaches of corresponding national provisions, since, as the Court stated "the obligations imposed by national legislation on undertakings which have been wrongly granted pecuniary advantages based on community law must not be more stringent than those imposed on undertakings which have wrongly received similar advantages based on national law , assuming , however , that the two groups of recipients are in comparable situations and therefore that that different treatment is not objectively justifiable."[553]

The principle of equality is not only significant in connection with penalties for breaches of Community law, but also where there is an infringement of national law, and the person subject to the jurisdiction has a right to equal treatment.

Case 115-116/81[554] illustrates what this means very well. The circumstances of the case were that Belgium refused to grant residency permits to two French prostitutes, because their behaviour was regarded as being against good public order. Since prostitution was not forbidden in Belgium, the Court found that such behaviour was not "of a sufficiently serious nature to justify restrictions on the admission to or residence within the territory of a member state of a national of another member state in a case where the former member state does not adopt, with respect to the same conduct on the part of its own nationals repressive measures or other genuine and effective measures intended to combat such conduct." This argument was made in connection with the issue of the prohibition of discrimination on the grounds of nationality under Article 6 of the EC Treaty (now Article 12), but in its statement of the content of the principle of non-discrimination the Court referred to it synonymously with the requirement for equal treatment. On this basis it is hardly too much to say that Member States have a duty to treat their own and other EC citizens equally, with regard to the investigation and punishment of breaches of the law.

552. Firma Wilhelm Fromme v Bundesanstalt für landwirtschaftliche Marktordnung, [1982] ECR 1449.

553. See the corresponding premiss in the Joined Cases 205 to 215/82, Deutsche Milchkontor GmbH and others v Federal Republic of Germany, [1983] ECR 2633.

554. Rezguia Adoui v Belgian State and City of Liège; Dominique Cornuaille v Belgian State, [1982] ECR 1665.

In the later Case 186/87[555] the Court confirmed the significance of the principle of equality in this respect by stating that while, in principle, criminal law and the rules of criminal procedure are matters for which the Member States are responsible, "such legislative provisions may not discriminate against persons to whom Community law gives the right to equal treatment or restrict the fundamental freedoms guaranteed by Community law."

13.1.4. The principle of proportionality

With the EU Treaty at Maastricht the principle of proportionality was inscribed in Article 3b.3 (now Article 5.3) of the EC Treaty. Thus the principle of proportionality, developed under the practice of the Court, is established in the Treaty, though even before its inclusion in the Treaty it already had its place in the normative hierarchy of EC regulations.[556] This means that the comprehensive practice of the Court in relation to the proportionality principle can be used in interpreting the Treaty provision, and that the proportionality principle within the Union's first pillar is identical with the Treaty provision.

The proportionality principle is well established in EC law, and when it is remembered that this is an established principle of criminal law, it is no surprise that the requirement for proportionality has a leading role in connection with penalties under Community law. The principle is binding on national sanctions,[557] both with regard to the regulation of sanctions[558] and their application in practice,[559] and this is regardless of whether the principle is expressed in secondary legislation or not.[560] It is obvious that the Community's own institutions are similarly bound by the principle.

In connection with sanctions, the Community has developed a particular legal approach to the question of the proportionality principle, since the application

555. Ian William Cowan v Trésor public, [1989] ECR 195.
556. Cf. Rasmussen, Hjalte: EU-ret i kontekst, 2nd edition, 1995.
557. Sevenster, Hanna G, "Criminal law and EC law" in Common Market Law Review, 1992, Vol. 29, p. 46.
558. See Case C-2/93, Exportslachterijen van Oordegem BVBA v Belgische Dienst voor Bedrijfsleven en Landbouw and Generale Bank NV, [1994] ECR I-2283.
559. See Case 326/88, Anklagemyndigheden v Hansen & Søn I/S, [1990] ECR I-2911.
560. See the judgment in Case C-199/90, Italtrade SpA v Azienda di Stato per gli interventi nel mercato agricolo (AIMA), [1991] ECR I-5545, in which the Court's detailed consideration of whether the penalty was proportionate confirmed that the principle of proportionality always applies to the regulation of sanctions in secondary legislation even if the principle is not expressed in the individual provision.

of the principle is based on a distinction between principal obligations and secondary obligations.[561]

In the Court's first direct expression of it, a principal obligation is an obligation which "is of fundamental importance to the proper functioning of a community system," cf. Case 21/85.[562] In 1994, in Case C-2/93,[563] the Court stated that a principal obligation is one which is "inherent in the very nature and the purpose of the Community measure in question," and in its further reasoning that the measure in question was a principal obligation, the Court referred to it as "an obligation which may be regarded as an important and principal one, that is to say an obligation which is essential in order for the measure in question to achieve its aim." What characterises a principal obligation is thus an obligation the compliance with which is of significant importance for the achievement of the objectives of the regulation. Other obligations are secondary obligations, including such obligations as are primarily of an administrative nature, cf. for example Case 122/78[564] where the obligation which had not been satisfied had, in the words of the Court, the aim of helping "administrative efficiency in the context of the system of import and export licences."

Whether the matter at issue is a principal obligation or a secondary obligation depends upon the circumstances of the case. In Case 272/81[565] the period of limitation was regarded as a principal obligation, and disregard for it justified strict penalties. This case underlines that the distinction between principal and

561. The distinction between principal and secondary obligations was introduced at the end of the 70's and beginning of the 80's, and has subsequently been regularly applied. The judgments in the following cases can be referred to: Case 122/78, SA Buitoni v Fonds d'orientation et de régularisation des marchés agricoles, [1979] ECR 677; Case 240/78, Atalanta Amsterdam BV v Produktschap voor Vee en Vlees, [1979] ECR 2137; Case 147/81, Merkur Fleisch-Import GmbH v Hauptzollamt Hamburg-Ericus, [1982] ECR 1389; Case 272/81, Société RU-MI v Fonds d'orientation et de régularisation des marchés agricoles (FORMA), [1982] ECR 4167; Case 66/82, Fromançais SA v Fonds d'orientation et de régularisation des marchés agricoles (FORMA), [1983] ECR 395; Case 181/84, The Queen, ex parte E. D. & F. Man (Sugar) Ltd v Intervention Board for Agricultural Produce (IBAP), [1985] ECR 2889; Case 21/85, A. Maas & Co. NV v Bundesanstalt für landwirtschaftliche Marktordnung, [1986] ECR 3537; Case C-2/93, Exportslachterijen van Oordegem BVBA v Belgische Dienst voor Bedrijfsleven en Landbouw and Generale Bank NV, [1994] ECR I-2283; Case C-104/94, Cereol Italia Srl v Azienda Agricola Castello Sas, [1995] ECR I-2983.

562. A. Maas & Co. NV v Bundesanstalt für landwirtschaftliche Marktordnung, [1986] ECR 3537.

563. Exportslachterijen van Oordegem BVBA v Belgische Dienst voor Bedrijfsleven en Landbouw and Generale Bank NV, [1994] ECR I-2283, cf. premiss 26.

564. SA Buitoni v Fonds d'orientation et de régularisation des marchés agricoles, [1979] ECR 677.

565. Société RU-MI v Fonds d'orientation et de régularisation des marchés agricoles (FORMA), [1982] ECR 4167.

secondary obligations does not depend on the character of the obligation, but on how critical the obligation is to the achievement of the aim of the regulation. In order to decide whether the obligation in question is a principal or secondary, the Court makes a thorough analysis of the circumstances, as for example in Case 147/81[566] and Case C-104/94.[567]

Until the beginning of the 1990's, all cases in which the Court of Justice distinguished between principal and secondary obligations had concerned penalties in the form of forfeiture of security provided. This gave rise to the question as to whether the distinction concerned all administrative penalties, or whether it is a particular legal position in relation to the forfeiture of security.

In its judgement in Case C-2/93[568] the Court indicated that the distinction concerns the whole area of sanctions, since, while the case in question concerned the forfeiture of security, the Court included an *obiter dictum* in which it stressed that the distinction between principal and secondary obligations applied not only to the forfeiture of security, but can concern "more generally, exclusion from the benefit of a favourable Community measure."

This is confirmed in Case C-104/94,[569] which concerned subsidies for the production of soya beans. A contract was entered into in Italy, which involved 93 hectares sowed with soya beans. An inspection visit revealed that the cultivated area was only 77 hectares. The intervention body declared that, as a result of this, the right to subsidies for the soya beans produced under the contract was lost, and the producer was excluded from receiving subsidies in the following year. In a case for a preliminary ruling the question was raised, among others, whether the penalty was proportionate. The Court gave a detailed review of why the requirement that the producer of soya beans should inform the authorities of changes to the cultivated area was important. It concluded that "the obligation imposed on the producer to declare changes to the competent agency, ... constitutes an obligation essential to the proper functioning of the system of aid and is therefore of fundamental importance to that system," and that, in other words, it was a principal obligation. The Court went on to state that "The Court has consistently held that the infringement of obligations whose observance is of fundamental importance to the proper functioning of a Community system may be penalized by forfeiture of a right conferred by Community legislation."

566. Merkur Fleisch-Import GmbH v Hauptzollamt Hamburg-Ericus, [1982] ECR 1389.
567. Cereol Italia Srl v Azienda Agricola Castello Sas, [1995] ECR I-2983.
568. Exportslachterijen van Oordegem BVBA v Belgische Dienst voor Bedrijfsleven en Landbouw and Generale Bank NV, [1994] ECR I-2283, cf. premiss 27.
569. Cereol Italia Srl v Azienda Agricola Castello Sas, [1995] ECR I-2983.

With this judgment and with the judgment in Case C-2/93,[570] it is certain that the legal situation which has been developed applies to all penalties which are of the nature of the loss of a right to benefit conferred by Community legislation. Nor is there any real basis for arguing that the same does not apply to the other administrative penalties that are applied in connection with breaches of Community regulations.

It follows from the practice of the Court that where there is a failure to fulfil a secondary obligation, there shall be proportionality between that failure and the penalty associated with it. There has been some discussion among legal writers as to how far the failure to fulfil a principal obligation overrides the principle of proportionality so that penalties in these cases should also be proportionate.[571]

In the opinion of the present writer the practice of the Court can also be interpreted so that the principle of proportionality also sets limits to the severity of penalties for the breach of principal obligations, and that an evaluation of proportionality is therefore relevant.

In Case 21/85,[572] concerning the shipping of food aid to Ethiopia, the Court argued that "as regards the obligation to ship the goods within a specified period, there can be no question that that is a principal obligation." At the same time, the Court found that a few days delay in lading could not justify the forfeiture of the security, because in the actual situation it did not affect the functioning of the food aid programme. Thus, there was an evaluation of proportionality in connection with a penalty for breach of a principal obligation.

The situation was similar in Case 47/86;[573] here production refunds were paid to the Roquette company for maize which was intended for the production of starch. Roquette had lodged security corresponding to the production refunds plus 5% for the processing of the maize. After the starch had been manufactured, it was noted that only 95.91% of the maize which had been under official supervision had been processed. As a consequence it was decided, in accor-

570. Exportslachterijen van Oordegem BVBA v Belgische Dienst voor Bedrijfsleven en Landbouw and Generale Bank NV, [1994] ECR I-2283, cf. premiss 27.

571. See Barents, René; The system of deposits in Community agricultural law; efficiency v proportionality, European Law Review, 1985 p. 239 et seq, according to which the proportionality principle is not relevant in connection with infringements of principal obligations. For the opposite view see Hansen Jensen, Michael: The proportionality principle in an EC law perspective, Gad, 1990.

572. A. Maas & Co. NV v Bundesanstalt für landwirtschaftliche Marktordnung, [1986] ECR 3537.

573. Roquette Frères SA v Office national interprofessionnel des céréales (ONIC), [1987] ECR 2889.

dance with Article 3.3 of Regulation 1570/78,[574] only to release the security which corresponded to the production refund for the amount which had in fact been processed, and to regard the remaining portion of the security as forfeited. This was in compliance with a Commission regulation that if 96% of the maize was processed, the whole of the security would be released. The 0.09% which Roquette lacked to have processed 96% of the maize thus meant that Roquette forfeited 9.09% of the security deposited, which raised a question before the Court of the compatibility of this with the principle of proportionality. In its decision the Court distinguished between the tolerance of 4% against the 100%, and the supplement of 5%. As for the security lodged corresponding to the tolerance of 4%, the Court found that this was a suitable means of ensuring that a product, for which refunds are paid, is of a reasonable quality and that its processing is carried out with reasonable care. The Court emphasised that the tolerance set at 4% was not so low that a reasonable producer would not be able to meet it, and that the aim of setting a maximum tolerance would not be fulfilled if an operator who exceeded the tolerance limit retained the right to the part of the refund corresponding to the tolerance. In contrast to this, the Court found that the forfeiture of security corresponding to the supplement of 5% conflicted with the principle of proportionality to the extent that the loss was not calculated in relation to the production refund that should be repaid. The reason for this was that the loss of the whole security was not necessary for achieving the aims of the regulation. The obligation to process the maize was a principal obligation, and when the Court held that the disputed provision conflicted with the principle of proportionality, insofar that it did not enable the forfeiture of security corresponding to the 5% supplement to be adjusted according to the extent of the failure to fulfil the principal obligation, the Court acknowledged the application of the principle of proportionality could extend to penalties for the breach of principal obligations.

The final judgement to be referred to here in support of the argument that the principle of proportionality applies to penalties for the breach of principal obligations, is Case C-104/94,[575] in which it was established that there was a failure to fulfil a principal obligation, and it was argued that the penalty was proportionate since the penalty was limited to cases where there was intention or grave negligence.

Against this background it can be concluded that the principle of proportionality applies to penalties for the failure to fulfil both principal and secondary obligations.

574. Laying down detailed rules for the application of Regulation (EEC) No 2742/75 as regards production refunds on starches and repealing Regulation (EEC) No 2026/75, (OJ 1978 L 185/22).

575. Cereol Italia Srl v Azienda Agricola Castello Sas, [1995] ECR I-2983.

The Court of Justice has on several occasions given expression to the principle of proportionality in connection with penalties. For example in Case 66/82,[576] having considered the question as to whether there was a principal or secondary obligation, the Court stated that "in order to establish whether a provision of community law is consonant with the principle of proportionality it is necessary to establish, in the first place, whether the means it employs to achieve its aim correspond to the importance of the aim and, in the second place, whether they are necessary for its achievement."

In Case 47/86[577] it was argued that in order to decide "whether a provision of community law is in conformity with the principle of proportionality it is necessary to verify whether the means which it employs are appropriate to achieve the objective pursued and whether or not they go beyond what is necessary to achieve it." The judgement illustrates that, in connection with penalties, the proportionality principle consists of the same elements as are known from the proportionality principle in other areas of EC law, being the requirements for suitability, necessity and relation to the facts, and is identical with the conditions reviewed in section 7.1.3.

The review of the practice of the Court on the proportionality principle in relation to penalties identifies the distinction between principal and secondary obligations, and leads to the conclusion that the same considerations of proportionality are applied to each of the two categories. Thereafter, the significance of the distinction comes into question. In general it can be said that if there is a failure to fulfil a principal obligation a penalty will more readily be regarded as proportionate than if there is a failure to fulfil a secondary obligation. It is probably no exaggeration to say that there must be very clear reasons before a penalty for the failure to fulfil a principal obligation will be considered to be disproportionate. In particular, the loss of a right granted by a Community programme will overwhelmingly likely be considered a proportionate penalty. The reverse of this is expressed by the Court in relation to secondary obligations in Case 21/85,[578] where the Court said that the infringement of secondary obligations "should not be punished with the same rigour as is applied to the failure to fulfil a principal obligation." In this case the forfeiture of the whole of security was regarded as a disproportionate penalty for the infringement of a secondary obligation. The infringement consisted in the food aid which was transported to Ethiopia being carried on a ship which was older than the age

576. Fromançais SA v Fonds d'orientation et de régularisation des marchés agricoles (FORMA), [1983] ECR 395.

577. Roquette Frères SA v Office national interprofessionnel des céréales (ONIC), [1987] ECR 2889.

578. A. Maas & Co. NV v Bundesanstalt für landwirtschaftliche Marktordnung, [1985] ECR 3537.

limit of 15 years laid down in the regulation. Sanctions for the failure to fulfil secondary obligations should be "more consonant with the practical effects of such a failure," cf. Case 181/84.[579] The standard is lower for a penalty for infringement of a secondary obligation to be regarded as disproportionate, and the practice of the Court provides several examples where the loss of the right to the benefits of a Community programme has been regarded as a disproportionate penalty.

Case 181/84[580] is an almost classic example illustrating the difference between the evaluation of proportionality in relation to principal and secondary obligations. In the case, on 27th July 1983, an English company tendered for the export of sugar to countries outside the EC; in this connection the company provided the required security in the form of a bank guarantee. The following day the company was informed that its tender was accepted. Under Community rules the company was thereafter required to apply for an export licence by 12.00 noon on 2nd August 1983. However, the application was first received between 3.41 p.m. and 3.57 p.m. on the same day, whereupon the British authority with responsibility for administering the common agricultural policy declared the whole security of over £1.6 million to be forfeited, in accordance with Article 6.3 in Regulation 1880/83. Against this background the company claimed before the Court of Justice that the regulation, and thus the loss of security, was against the principle of proportionality. The Court held that "although it is clear from the foregoing that the obligation to obtain export licences performs a useful administrative function from the Commission's point of view, it cannot be accepted that that obligation is as important as the obligation to export, which remains the essential aim of the community legislation in question. It follows that the automatic forfeiture of the entire security, in the event of an infringement significantly less serious than the failure to fulfil the primary obligation, which the security itself is intended to guarantee, must be considered too drastic a penalty in relation to the export licence's function of ensuring the sound management of the market in question. Although the commission was entitled, in the interests of sound administration, to impose a time-limit for the submission of applications for export licences, the penalty imposed for failure to comply with that time-limit should have been significantly less severe for the traders concerned than forfeiture of the entire security and it should have been more consonant with the practical effects of such a failure." The Regulation was thereafter declared to be invalid, insofar as it provided for

579. The Queen, ex parte E. D. & F. Man (Sugar) Ltd v Intervention Board for Agricultural Produce (IBAP), [1985] ECR 2889.

580. The Queen, ex parte E. D. & F. Man (Sugar) Ltd v Intervention Board for Agricultural Produce (IBAP), [1985] ECR 2889.

the forfeiture of the whole of the security upon exceeding the time limit for making an application for an export licence.

13.1.5. Procedural principles

In Case 85/76[581] the Court established that the right to be heard is fundamental right in all processes that can lead to the imposition of a penalty, and one which must always be respected. This also applies in cases where there is an administrative procedure.

The Court of Justice has also pointed out that Member States have a duty to ensure that reasonable time should be given to enable disputed cases to be brought before the courts, since the national rules must not be so framed that "as to render virtually impossible the exercise of rights conferred by community law," cf. Case 309/85.[582] The case did not concern the imposition of a penalty, but, under the principle of legal certainty, the precedent must be assumed to apply even more in such a case, since it is up to the person subject to the law to bring to have an administrative penalty tried by the courts.

13.1.6. Retroactive effect

In January 1983 a Danish fishing vessel was seized by a ship of the Royal Navy, since it was within a zone from which, according to recently adopted British regulations, Danish registered fishing vessels were excluded. Kent Kirk, the Danish skipper, was fined £30,000. The judgment was appealed against, the Crown Court submitted the case to the Court of Justice for a preliminary ruling, in Case 63/83.[583] The legal situation was that the British regulation which was the authority for the fine, was in conflict with the then applicable EC regulations.[584] Meanwhile, at the end of January, the Council adopted a regulation[585] which had the effect that the different treatment was lawful, and not only that, but the regulation was given retroactive effect[586] to 1st January 1983. The question was whether the national fine could be upheld. The Court was clear in its opinion and on the facts of the case it stated that "such retroactivity may not, in any event, have the effect of validating ex post facto national measures of a

581. Hoffmann-La Roche & Co. AG v Commission of the European Communities, [1979] ECR 461.
582. Bruno Barra v Belgian State and City of Liège, [1988] ECR 355.
583. Regina v Kent Kirk, [1984] ECR 2689.
584. Regulation 101/76 laying down a common structural policy for the fishing industry, (OJ 1976 L 20/19).
585. Regulation 170/83 establishing a Community system for the conservation and management of fishery resources, (OJ 1983 L 24/1).
586. The Court often uses the expression 'retroactive validity' synonymously with 'retroactive effect'. See Rasmussen, Hjalte, EU-Ret i Kontekst, 3rd edition, 1988, pages 294-5 for a discussion of the terminology.

penal nature which impose penalties for an act which, in fact, was not punishable at the time at which it was committed." This was followed by a general comment that "the principle that penal provisions may not have retroactive effect is one which is ... a fundamental right; it takes its place among the general principles of law whose observance is ensured by the Court of Justice."

This approach to the retroactive effect of penal provisions has since been followed in Case C-331/88.[587] In this case the question of retroactive effect arose because the relevant Directive had an implementation date three months prior to its adoption because it replaced an earlier identical Directive which had been annulled by the Court because of a procedural fault. The Court made it clear that an obligation on Member States to institute the necessary measures to conform with the requirements of the Directive in question, prior to its publication in the Official Journal, "cannot be interpreted as imposing on Member States the obligation to adopt measures which conflict with Community law, in particular with the principle that penal provisions may not have retroactive effect." The Court added that the Directive could not provide "a basis for criminal proceedings instituted under provisions of national law which may have been adopted in implementation of the annulled directive and whose sole basis is to be found in that directive."

In other words, the prohibition of laws with retroactive effect is absolute, at least in relation to criminal penalties.

However, in relation to administrative penalties and other measures, the situation is not quite so clear cut in practice.[588] The Court of Justice gave its opinion on this in Case C-331/88[589] in which it stated "as regards the retroactive effect of the directive at issue outside the criminal sphere, it should be recalled that ... although in general the principle of legal certainty precludes a Community measure from taking effect from a point in time before its publication, it may exceptionally be otherwise where the purpose to be achieved so demands and where the legitimate expectations of those concerned are duly respected."

Reference can also be made to Case C-337/88,[590] which does not concern the issue of sanctions, but where the Court emphasised the criteria of respect for the purpose to be achieved and for the legitimate expectations of those concerned.

587. The Queen v Minister of Agriculture, Fisheries and Food and Secretary of State for Health, ex parte: Fedesa and others, [1990] ECR I-4023.
588. Sevenster, Hanna G, "Criminal law and EC law" in Common Market Law Review, 1992, Vol. 29, p. 43.
589. The Queen v Minister of Agriculture, Fisheries and Food and Secretary of State for Health, ex parte: Fedesa and others, [1990] ECR I-4023.
590. Società agricola fattoria alimentare SpA (SAFA) v Amministrazione delle finanze dello Stato, [1990] ECR I-001.

As for administrative penalties, it must be assumed, on the basis of the above, that the general principles of EC law apply to the protection of honestly acquired rights and legitimate expectations.[591]

13.1.7. Nulla poena sine lege

In Case 117/83[592] the Court held that "a penalty, even of a non-criminal nature, cannot be imposed unless it rests on a clear and unambiguous legal basis."[593]

There is thus no doubt that the doctrine of *nulla poena sine lege* applies to both administrative and criminal penalties under EC law.

As for the content of the principle in EC law, it is clear that any penalty must have an authorisation. Whether there is such an authorisation depends on the relevant provision, which must be "interpreted in the light of its wording, context and purpose," cf. Case 117/83.[594] Thus an evaluation cannot be based on the wording of the provision alone. In Case C-352/92,[595] the purchaser of milk had, in a number of instances, deliberately over-reported the quantities of milk, which meant that the producers of the milk were subsequently required to pay a supplementary duty, with retrospective effect, regardless of the fact that they totally innocent. The national authorities wanted to collect the supplementary duty from the purchaser instead of from the producers. The Court rejected this, as it argued that "notwithstanding the need to combat fraudulent transactions, a penalty consisting in the substitution of the purchaser for the producer presupposes the existence of a legal basis laying down the conditions for, and the scope of, that penalty."

The conditions for and the extent of a penalty must be derived from the authorising provision, but the implementation of it depends not only on the wording of the provision, but also other general interpretative elements, including the context and purpose of the regulation.

591. For a more detailed review of this see, for example, Wyatt, D. and Dashwood, A: European Community Law, 3rd edition, Sweet & Maxwell, 1993.
592. Karl Könecke GmbH & Co. KG, Fleischwarenfabrik, v Bundesanstalt für landwirtschaftliche Marktordnung, [1984] ECR 3291.
593. See also Case 309/85, Bruno Barra v Belgian State and City of Liège, [1988] ECR 355, as well as the following cases dealing with ECSC co-operation; Case 83/83, Estel NV v Commission of the European Communities, [1984] ECR 2195, Case 8/83, Officine fratelli Bertoli SpA v Commission of the European Communities, [1984] ECR 1649, Case 14/81, Alpha Steel Ltd. v Commission of the European Communities, [1982] ECR 749, all of which confirm that the principle is a part of EC law.
594. Karl Könecke GmbH & Co. KG, Fleischwarenfabrik, v Bundesanstalt für landwirtschaftliche Marktordnung, [1984] ECR 3291.
595. Milchwerke Köln/Wuppertal eG v Hauptzollamt Köln-Rheinau, [1994] ECR I-3385.

13.1.8. Nulla poena sine culpa

It is a basic principle of criminal law that there shall be no punishment without guilt or without responsibility. But the Court of Justice has disregarded the principle in relation to penalties arising out of the first pillar of EC law – the administrative penalties. Thus the principle was considered in Case 137/85[596] on the forfeiture of security provided, and where the Court took the view that the requirement for the provision of security was not of a criminal law character, so that the traditional criminal law principle of *nulla poena sine culpa* was not applicable.

In Case 326/88[597] the national implementation provisions gave authority for objective responsibility, and the defendant in the case argued, among other things, that objective criminal responsibility conflicted with the regulation which authorised it. The Court held that penalties can be applied on the basis of objective responsibility as long as the penalty laid down corresponds to the penalties that apply under national law to infringements of an analogous nature and importance, and as long as the penalty is reasonably proportionate to the infringement. The fact that the Court was silent on the principle of n*ulla poena sine culpa*, in a case which specifically dealt with responsibility, can be regarded as a rejection of it.

It seems to be the Court's view that the principle is restricted to the area of criminal law. The only possible modification to this conclusion can be that in Case 137/85[598] the Court emphasised that the actual penalty in question was not of a criminal law nature, but that there might be other penalties which, while not being criminal penalties, may have some of the characteristics of criminal penalties, so that the principle could conceivably play a role.[599] However, the penalty of a fine in Case 326/88,[600] without the principle being thought relevant, can be considered as a significant argument against this.

13.1.9. In dubio pro reo

The principle of *in dubio pro reo* expresses the idea that any doubt must be interpreted to the benefit of the defendant, so that the burden of proof lies with the prosecuting authority.

596. Maizena Gesellschaft mbH and others v Bundesanstalt für landwirtschaftliche Marktordnung (BALM) [1987] ECR 4587.
597. Anklagemyndigheden v Hansen & Søn I/S, [1990] ECR I-2911.
598. Maizena Gesellschaft mbH and others v Bundesanstalt für landwirtschaftliche Marktordnung (BALM) [1987] ECR 4587.
599. It should be noted that the principle is important in connection with the regulation of penalties in secondary legislation, cf. section 13.2.4.1.
600. Anklagemyndigheden v Hansen & Søn I/S, Case C-326/88, [1990] ECR I-2911.

In Case 137/85[601] it was argued that Community law was in conflict with this principle, since it was the person subject to the law and not the relevant authority who had to show that there was *force majeure* such that security should not be forfeited, in other words that a person subject to the law should not suffer a penalty. In his opinion the Advocate General found that the principle had not been set aside. On this basis it would have been unproblematic for the Court to include the principle as part of Community law, but it decided not to. Instead, the Court found that the penalty of the forfeiture of security was not of a criminal law nature, and that the traditional criminal doctrine of *in dubio pro reo* was not applicable.

On this basis, the principle must be regarded as being reserved for criminal law cases, and it is unlikely that the principle will be applied to cases of administrative penalties under Community law. However, the wording of the Court's decision does not absolutely exclude the possibility, since in its reasons it emphasised that the regulation in question concerning the provision of security was not of a criminal law character. This could perhaps allow for the possibility of the use of the principle in a situation where a sanction under consideration had several of the characteristics of a criminal law penalty, but without in fact being a criminal penalty.

13.1.10. Force majeure

There is no agreement on the extent to which the doctrine of force majeure has obtained the status of a basic legal principle in EC law.[602] General discussion on this topic will not be pursued further here since it can be noted that in Case 71/87[603] the Court acknowledged the validity of force majeure as a basic principle in relation to the implementation of penalties.[604]

However, force majeure is not an unambiguous concept in EC law. In Case 158/73[605] the Court stated that "since the concept of force majeure differs in

601. Maizena Gesellschaft mbH and others v Bundesanstalt für landwirtschaftliche Marktordnung (BALM) [1987] ECR 4587.
602. See on the one hand Rasmussen, Louise Nan and Schønberg, Søren: EU-menneskerret – en udfordring til dansk ret, Karnov, 1993, which regards it as indisputable that there is a basic legal principle, and on the other hand Hansen Jensen, Michael: The proportionality principle in an EC law perspective, Gad, 1990 and Schermers, H G and Waelbroeck, Denis: Judicial Protection in the European Communities, 4th edition, 1987, who are of the opinion that force majeure is not a basic principle of EC law.
603. Greek State v Inter-Kom Emboriki kai Biomichaniki Epicheirisis Elaion, Liparon kai Trofimon AE. [1988] ECR 1979.
604. In agreement with this see Due, Ole et al: EU-Karnov, 1996, Section 5.2.7, p. 1645 and Schermers, H G and Waelbroeck, Denis: Judicial Protection in the European Communities, 4th edition, 1987.
605. E. Kampffmeyer v Einfuhr – und Vorratsstelle für Getreide und Futtermittel,[1974] ECR 101.

content in different areas of the law and in its various spheres of application, the precise meaning of this concept has to be decided by reference to the legal context in which it is intended to operate."

It is, though, possible to indicate the core of the argument for force majeure in EC law. It is established that in order to make a claim of force majeure it is not necessary for there to be absolute impossibility, but that there should be quite exceptional and unforeseeable circumstances, over which those who make a claim of force majeure have no influence, and the effects of which could not have been avoided despite all care being shown, see Case 209/83,[606] Case 109/86[607] and Case 71/87.[608]

If the actual circumstances match these general conditions, and if their application does not conflict with the aim of the regulation then, all things being equal, force majeure as understood within EC law will be found to exist, and consequently the imposition of penalties will be excluded.

Perhaps it is because of the lack of precision about the concept that it has become more common for secondary legislation to include provisions on force majeure. Regulation 3887/92,[609] as amended by Regulation 1678/79[610] illustrates the point. Articles 9 and 10 of the Regulation contain comprehensive provisions for penalties in cases where farmers making applications for subsidies in connection with either cultivated acreage or animal husbandry claim a greater area or a larger number of animals than is entitled to subsidy. However, the provisions exclude the imposition of penalties in cases where there is force majeure. A more specific definition of the content of the concept of force majeure is laid down in Article 11 of the same Regulation, and among other things it lists the death of the farmer, the expropriation of a significant part of the farmed area, the occurrence of a natural disaster etc. The provision leaves a certain room for the discretion of Member States to allow other circumstances to be considered as covered by the concept of force majeure, subject to this being reported to the Commission.

606. Ferriera Valsabbia SpA v Commission of the European Communities, [1984] ECR 3089.
607. Ioannis Theodorakis Viomichania Elaiou AE v Greek State, [1987] ECR 4319.
608. Greek State v Inter-Kom Emboriki kai Biomichaniki Epicheirisis Elaion, Liparon kai Trofimon AE, [1988] ECR 1979.
609. Laying down detailed rules for applying the integrated administration and control system for certain Community aid schemes (OJ 1992 L 391/36). There are corresponding provisions in Regulation 3888/92 on establishing certain transitional provisions in the beef and veal sector pending the entry into force of the integrated administration and control system for certain Community aid schemes (OJ 1992 L 391/46).
610. Amending Regulation (EEC) No 3887/92 laying down detailed rules for applying the integrated administration and control system for certain Community aid schemes, (OJ 1998 L 212/23).

13.2. The regulation of sanctions in secondary legislation

This section reviews the Community's regulation, in secondary legislation, of sanctions imposed by national authorities on those subject to the laws of the Member States. This covers both the authority to regulate for sanctions, the form in which the regulations are made, how the regulation of sanctions works in practice, and how all this has developed in recent years as the question of sanctions has come increasingly to the fore. Finally there is a review of the legal principles that apply to the Community's regulation of controls and sanctions. The principles that apply have either been developed over a longer period or are based on a clear decision by the law-making institutions, including the Court of Justice.

13.2.1. The framework for the regulation of sanctions

Under the heading of the framework for the regulation of sanctions, first, there will be consideration of the Community's powers to carry out regulation for sanctions in secondary legislation, including the possibility of the delegation of these powers to the Commission. Secondly an attempt will be made to clarify which legal form the Community can use for the regulation of sanctions, which primarily means the consideration of whether both Regulations and Directives are relevant, but it also includes a consideration of the significance non-legislative processes.

13.2.1.1. The authority to regulate sanctions

The Treaty does not contain any provisions expressly dealing with the question of sanctions imposed by national authorities on those subject to the laws of the Member States. On the other hand, Article 229 of the EC Treaty states as follows: "Regulations adopted jointly by the European Parliament and the Council, and by the Council, pursuant to the provisions of this Treaty, may give the Court of Justice unlimited jurisdiction with regard to the penalties provided for in such regulations." This provision pre-supposes that the Community can make regulations for penalties, and even though the area of application of the provision is the penalties that are laid down by EC institutions and implemented on those subject to the laws of the Member States, it also gives indirect support for the idea that Member States' penalties imposed on those subject to their laws can also be covered by the Community's authority to regulate.

However, the main argument for the legal position proposed is to be found in the practice of the Court of Justice. It is implicit in the following statement which the Court gave in Case 68/88:[611] "where Community legislation does not

611. Commission of the European Communities v Hellenic Republic. [1989] ECR 2965, premiss 23.

specifically provide any penalty for an infringement or refers for that purpose to national laws, regulations and administrative provisions ... the Treaty requires the Member States to take all measures necessary to guarantee the application and effectiveness of Community law." The Court has expressed itself similarly in Cases 326/88[612] and C-352/92.[613] But the Court has also given an explicit statement of the law. In Case C-240/90[614] the Court held that, in the area of agriculture, the Community has powers to set penalties for the repayment of a higher amount and exclusion from participation in support programmes in the following year. These were considered to be non-criminal penalties. On this basis it must be assumed that the various authorising provisions of the Treaty, for example for the regulation of agriculture, also include authorisation for the regulation of administrative penalties. Article 308 of the EC Treaty can also be used, of which Regulation 2988/95[615] is an example.[616]

13.2.1.2. Delegation of the power to regulate

The delegation of the power to regulate from the Council to the Commission is based on Articles 202 and 211 of the EC Treaty. Article 202 states that the Council shall "confer on the Commission, in the acts which the Council adopts, powers for the implementation of the rules which the Council lays down. The Council may impose certain requirements in respect of the exercise of theses powers. The Council may also reserve the right, in specific cases, to exercise directly implementing powers itself." Article 202 is matched by the duty of the Commission to exercise the delegated implementing powers so that, as stated in Article 211, "In order to ensure the proper functioning of the common market, the Commission shall ... exercise the powers conferred on it by the Council

612. Anklagemyndigheden v Hansen & Søn I/S. [1990] ECR I-2911
613. Milchwerke Köln/Wuppertal eG v Hauptzollamt Köln-Rheinau. [1994] ECR I-3385, premiss 23.
614. Federal Republic of Germany v Commission of the European Communities. [1992] ECR I-5383
615. On the protection of the European Communities financial interests (OJ 1995 L 312/1)
616. While the Court previously found that Article 235 of the EC Treaty (now Article 308) could be cited as a double authority alongside another of the Treaty's authorising provisions, cf. Case 8-73, Hauptzollamt Bremerhaven v Massey-Ferguson GmbH, [1973] ECR 897, today it is the view of the Court that Article 308 can only be used if the use of another authorising provision is excluded, even upon its widest interpretation, cf. Case 242/87, Commission of the European Communities v Council of the European Communities, [1989] ECR 1425 and Case C-295/90 REV, Council of the European Communities v European Parliament, Commission of the European Communities, United Kingdom and Kingdom of the Netherlands, [1992] ECR I-5299. See Rasmussen, Hjalte, EU-retten i kontekst, 3rd Edition, 1998 in which there are references to a more detailed review of the authority in principle, authority in practice and the nature of the relationship between them, as well as an interpretation of authorising provisions and analogous conclusions.

for the implementation of the rules laid down by the latter." From these provisions flows the presumption that the Council gives the Commission powers to take the necessary measures for implementing the rules which it makes. However, if the Council does not make a decision to delegate powers, the Commission cannot independently make implementing measures under the authority of Articles 202 and 211. The Court confirmed this in Case C-303/90,[617] which concerned controls in connection with the Structural Fund, and in which the Court said "Article 155 [now Article 211] of the Treaty gives the Commission the right to formulate recommendations or deliver opinions which, according to Article 189 [now Article 249] of the Treaty, are not binding. It follows that the Commission cannot draw from Article 155 [now Article 211] the power to adopt an act imposing on Member States obligations going beyond what is provided for in [the Regulation in question]."

In accordance with the above it is the common practice, in connection with regulations for a given area, for the Council to delegate to the Commission the adoption of the relevant implementing provisions.

The present question is whether the Commission can be delegated powers to undertake the regulation of sanctions. The answer to this starts from the position of Case 25/70[618] from which it appears that with the delegation of powers a distinction is to be made between, on the one hand, those provisions that are essential to the subject matter for the area to be regulated, and which are therefore subject to the powers of the Council, and on the other hand those provisions which are merely implementing provisions and which it is within the powers of the Commission to make.

Whether or not the Council can delegate powers to regulate sanctions to the Commission therefore depends on whether such regulation is essential to the subject matter.

In Case C-240/90[619] the Court gave its view that the rules challenged in the case "cannot be classified as essential ... such classification must be reserved for provisions which are intended to give concrete shape to the fundamental guidelines of Community policy." In the case in question this meant that a penalty consisting of a repayment with a supplement or the exclusion from a subsidy programme for a longer period was not an essential regulation, and could therefore be laid down by the Commission. Case 27/70[620] also confirmed the penalties as being implementing provisions.

617. French Republic v Commission of the European Communities. [1991] ECR I-5315
618. Einfuhr- und Vorratsstelle für Getreide und Futtermittel v Köster et Berodt & Co. Kg, [1970] ECR 1161.
619. Federal Republic of Germany v Commission of the European Communities. [1992] ECR I-5383
620. Einfuhr- und Vorratsstelle für Getreide und Futtermittel v Köster et Berodt & Co. Kg, [1970] ECR 1161.

The aim of sanctions is to ensure a proper administration of the Community's finances and to enable the carrying out of the policies which are expressed in the regulations, so that sanctions will only occasionally be regarded as covered by the concept being essential. However, it is possible that the question of penalties could be so central to a regulation that it could be covered by the concept being essential. As a rule the regulation of penalties will be a matter for the Commission, but the evaluation depend on the case.

Delegation by the Council is often expressed in rather general terms, as for example, the Commission "shall adopt implementing rules for this Article",[621] or "The Commission shall adopt detailed rules for the application of this Regulation."[622] However there are more precise provisions for delegation.

Such a variation gives rise to the question of how precise the provisions for delegating powers must be for the Commission to be authorised to regulate penalties.

According to Article 202 of the EC Treaty the Council may impose certain requirements for the exercise of powers delegated to the Commission. This was the case in a Decision in 1987,[623] which stated that "the Council shall specify the essential elements of these powers" delegated to the Commission, which can be interpreted as a requirement that the delegation of powers to regulate for penalties shall be expressly given. This was the view of Germany in Case C-240/90.[624] However, the Court rejected this argument, and referred to the fact that when the Council, in its basic regulation, had laid down the ground rules for the area in question, the Commission can be given general powers to adopt the necessary implementing measures, without a specification of the main points of the delegated powers. Furthermore, the Court added, "that principle is not affected by the aforementioned decision. As a measure of secondary law it cannot add to the rules of the Treaty, which do not require the Council to specify the essential components of the implementing powers delegated to the Commission."

Against this background even the delegation of powers which are almost without content will constitute a sufficient basis for the Commission to regulate for penalties, even if penalties are not referred to in the delegating powers.

621. Cf. Regulation 3013/89 on the common organization of the market in sheepmeat and goatmeat, (OJ 1989 L 289/1).
622. Cf. for example Article 12 in Regulation 3508/92 establishing an integrated administration and control system for certain Community aid schemes, (OJ 1992 L 355/1).
623. Decision 87/373/EEC, laying down the procedures for the exercise of implementing powers conferred on the Commission, (OJ 1987 L 197/33).
624. Federal Republic of Germany v Commission of the European Communities. [1992] ECR I-5383

In these cases it must be assumed, with the support of Case 121/83,[625] that the Commission is empowered to adopt any measures, including provisions for penalties, that are necessary or appropriate for the implementation of the basis regulation, provided that the measures do not conflict with the basis regulation, other implementing provisions laid down by the Council and, of course, EC law in general.

With the adoption of the important framework regulation for the protection of the EC's financial interests, Regulation 2988/95,[626] the question arises as to whether the necessary follow-up regulation of administrative penalties in sectoral regulations will be able to be adopted by the Commission, or whether such provisions will require the involvement of the Council. The Danish view[627] is that the aim of the regulation is to create a general framework for combating fraud, and that administrative penalties can only be imposed with the authority of a sectoral regulation and that it is the Council that decides upon the inclusion of administrative penalties in sectoral regulations, upon the recommendation of the Commission. This seems to be in agreement with the general guidelines for implementing provisions derived from the practice reviewed above, since the in this context the question of penalties must be seen as being 'essential'.

13.2.1.3. The form of regulation for penalties

As shown above, the Community can unquestionably adopt provisions for penalties in Regulations. By contrast, it is less certain whether provisions for penalties can be adopted by Directives.[628]

To answer this it can be noted that there is a long list of Directives which include obligations for Member States to lay down rules for penalties. This is

625. Zuckerfabrik Franken GmbH v Hauptzollamt Würzburg, [1984] ECR 2039.
626. On the protection of the European Communities financial interests (OJ 1995 L 312/1)
627. From the answer of the Danish Foreign Ministry to Question No. 102 of 6th June 1995,of the European Committee of the Danish Parliament, j.nr.400.D.9-0-0.
628. For example it is argued in Gulmann, Claus and Hagel-Sørensen, Karsetn: EF-ret, rnd Edition, 1993, p. 342: "the view of most of the Member States, which is presumably still the case, is that the Council cannot determine in a Directive that infringements of the provisions which are laid down by Member States for the implementation of the Directive can be penalised in a particular way, for example that there shall be a tariff of punishments for up to 2 years imprisonment." As the wording indicates, this quotation only concerns the regulation of criminal cases, and this is not only the view of most of the Member States but, as previously argued, it expresses the position under Community law. However, if the quotation is directed at administrative penalties, there is a distinction between the legal position relating to Regulations and to Directives, since the Community's regulation of administrative sanctions can only take place via Regulations, and not via Direcrives.

the case for example with Directive 92/65,[629] which in Article 12.6 provides that " Member States shall take the appropriate administrative or penal measures to penalize any infringement of this Directive." By contrast, Directives seldom include actual provisions for penalties in themselves. The regulatory practice thus does not give any clearer answer than that Directives can require Member States to adopt penalties, but that more extensive regulation is not entirely excluded.

It does not seem that there is any decision of the Court of Justice which expressly takes a view on the question of the regulation of sanctions in directives. In Case 14/83[630] the Court noted that Article 189 of the EC Treaty (now Article 249) provides that a directive "leaves Member States to choose the ways and means of ensuring that the directive is implemented," but that Member States are required to adopt all the measures necessary to ensure that the directive is fully effective and against this background the Court examines whether the directive in question "requires member states to provide for specific legal consequences or sanctions."[631] In the way the judgment is phrased, any such examination would be pointless unless it were possible to regulate for sanctions in directives.

It thus appears to be the view of the Community that Member States' obligation to apply sanctions can be expressly laid down in a directive, and that a directive can contain provisions for sanctions, in the same way as is the case with regulations.

This answer provokes two further questions. The first relates to the position of those directives which have direct legal effect, and the other concerns directives which do not meet the requirements for direct legal effect and which are not (yet) implemented in national legislation.

The answer to these questions starts from the position that all public authorities,[632] including local authorities,[633] have a duty to apply valid EC rules within their respective areas of authority, and this includes directives which the legislature may have implemented wrongly or late.[634] As for the question of sanctions

629. Laying down animal health requirements governing trade in and imports into the Community of animals, semen, ova and embryos not subject to animal health requirements laid down in specific Community rules referred to in Annex A (I) to Directive 90/425/EEC, (OJ 1992 L 268/54).
630. Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen. [1984] ECR 1891.
631. See also Case 79/83, Dorit Harz v Deutsche Tradax GmbH, [1984] ECR 1921.
632. For a discussion of this term see Case C-188/89, A. Foster and others v British Gas plc, [1990] ECR I-3313.
633. See Case 103/88, Fratelli Costanzo SpA v Comune di Milano, [1989] ECR 1839.
634. See Case 14/83, Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen, [1984] ECR 1891. See also Case 103/88, Fratelli Costanzo SpA v Comune di Milano, [1989] ECR 1839, referred to above.

and the regulation of sanctions, this means that, in their areas of competence, the prosecuting authorities and courts are required to ensure that directives are applied and applied correctly. However, it is important to emphasise that directives cannot in themselves create obligations for private persons, and that therefore the provisions of a directive cannot be asserted by national authorities against private persons, see for example Case 8/81[635] and Case 152/84.[636]

In Case 80/86,[637] which specifically concerned the question of sanctions, the Court stated that "a directive cannot, of itself and independently of a national law adopted by a member state for its implementation, have the effect of determining or aggravating the liability in criminal law of persons who act in contravention of the provisions of that directive," and in Case 14/86[638] the Court acknowledged that a "Council directive ... cannot, of itself and independently of a national law adopted by a member state for its implementation, have the effect of determining or aggravating the liability in criminal law of persons who act in contravention of the provisions of that directive."[639]

It therefore seems to be accepted[640] that directives cannot, independently of national implementation, be the basis for applying penalties or increasing liability for those subject to the law of the Member States.

To answer the second question, about the significance of directives which do not have direct effect, it is important to note that, even though such directives may not fulfil the conditions for being directly applicable, they are binding on national authorities, and these are required to take them into consideration. Thus, referring to Article 10 of the EC Treaty, the Court has established that there is an obligation to interpret national rules in accordance with EC regulations that may not be directly applicable. In Case 14/83[641] the Court held that Article 5 of the EC Treaty (now Article 10) involves an obligation on the authorities in Member States, including the courts and prosecuting authorities, to apply national regulations in the light of the aims and wording of relevant

635. Ursula Becker v Finanzamt Münster-Innenstadt, [1982] ECR 53.
636. M.H. Marshall v Southampton and South-West Hampshire Area Health Authority (Teaching), [1986] ECR 723.
637. Criminal proceedings against Kolpinghuis Nijmegen BV, [1987] ECR 3969.
638. Pretore di Salò v Persons unknown, [1987] ECR 2545.
639. See also Case 80/86, Criminal proceedings against Kolpinghuis Nijmegen BV, [1987] ECR 3969.
640. There appears to be general agreement about this among legal writers, at least as regards criminal penalties. See for example Gulmann, Claus and Hagel-Sørensen, Karsten: EF-ret, 1988, p. 136.
641. Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen. [1984] ECR 1891. See also Case C-106/89, Marleasing SA v La Comercial Internacional de Alimentacion SA, [1990] ECR I-4135.

directives, and this applies especially to the rules that give expression to the implementation of directives.[642]

In the first instance the question of interpretation in conformity with a directive concerns how far the wording of the national provision can be stretched, and this is a matter which the national court must decide, and there is also the question of the clarity of the relevant provision of a directive. Despite this, the basic principle of legal certainty in connection with the regulation of sanctions requires that there shall be a clear and unequivocal authority as a pre-condition for the application of sanctions. It must thus be regarded as doubtful whether the wording of a national regulation interpreted in conformity with a directive can be stretched so far as to create a power to impose a sanction which would not otherwise arise from the national regulation in question.

There is a special problem which should be mentioned briefly, and that is that EC Regulations may not be incorporated into national law,[643] and presumably may not be subject to any re-writing, but at the same time it is frequently necessary to adopt supplementary provisions dealing with, among other things, penalties for the infringement of regulations. In certain areas, including that of agriculture, there is a further problem that many EC regulations are changed so frequently that it is impossible to lay down provisions for penalties in step with the changes to the regulations. In Denmark these problems are solved by adopting administrative laws that authorise the minister to lay down such provisions as are necessary so that regulations of a particular type can be applied. At the same time authorisation is given to lay down provisions for sanctions.

13.2.2 The nature and interpretation of provisions for penalties

This section reviews how the Community undertakes the regulation of penalties in secondary legislation, as well as their interpretation. The review is divided into three parts. The first deals with cases where there is no provision for penalties in the secondary legislation, the second looks at cases where there are only imprecise provisions for the regulation of penalties, and the third considers those cases where the secondary legislation contains precise provisions for penalties. This division is made for presentational reasons, since in actual fact the regulation of penalties stretches in a continuum between the two extremes.

642. See also Case C-6/90 and Case C-9/90, in which, with reference to the effectiveness of the Community and EC Treaty Article 5 (now Article 10), the Court held that a Member State can be liable to compensate private persons who suffer loss as a result of wrong or delayed implementation.

643. Cf. Case 272/83, Commission of the European Communities v Italian Republic, [1985] ECR 1057.

13.2.2.1. The absence of provisions for penalties

It is quite common for EC secondary legislation to contain no reference to the question of penalties. This is a matter which is left to the Member States which shall merely show due regard for the Treaty and the basic legal principles, as reviewed above.

But even in these cases the material provisions in secondary legislation will to some extent establish norms for national provisions for penalties that must be adopted for the implementation of the secondary legislation as well as for the concrete application of national penalties.

This can be illustrated in Case C-290/91.[644] In this case the question was whether the purely national German rules could be used to excuse a farmer from a supplementary duty imposed in accordance with a Council Regulation. The Court argued that "the Community legislation on milk quotas contains no specific provisions regarding the collection, remission or enforcement of the levy payable," and that "Consequently it is for the competent national authorities to ensure, in accordance with national law, that the levy is collected, remitted or enforced. Provided, however, that in applying that provision there is no discrimination by comparison with the manner in which equivalent fiscal debts are treated under national law and no impairment of the objectives of the milk quota system established by [the] Regulation." On this basis the Court reached the conclusion that to exempt the farmer from the requirement to pay the supplementary duty on the basis of national law would be incompatible with the aim of the milk quota programme, and thus incompatible with Community law. Consideration of the purposes of the secondary legislation with which the provisions for penalties were associated thus established the standard for the provision of penalties, since they must not conflict with its purpose.

13.2.2.2. Imprecise provision for sanctions

The end of the 1980's and the start of the 1990's saw an increase in the Community's regulation of sanctions. Such regulation was typically quite vague. It was often limited to such phrases as "Member States shall adopt appropriate measures to penalize natural or legal persons who fail to fulfil their obligations under this Regulation" cf. Article 6.2 in Regulation 4045/89.[645] In Case C-

644. Johannes Peter v Hauptzollamt Regensburg. [1993] ECR I-2981

645. On scrutiny by Member States of transactions forming part of the system of financing by the Guarantee Section of the European Agricultural Guidance and Guarantee Fund and repealing Directive 77/435/EEC, (OJ 1989 L 388/18). For a number of corresponding provisions see also Regulation 2082/93 amending Regulation (EEC) No 4253/88 laying down provisions for implementing Regulation (EEC) No 2052/88 as regards coordination of the activities of the different Structural Funds between themselves and with the operations of the European Investment Bank and the other existing financial instruments (OJ 1993 L 193/20). The provision carries forward Regulation 4253/88,

217/88[646] the Court held that even such vague wording does have a substantive meaning which must be interpreted as containing specific obligations for the Member States. The starting point for this case was Regulation 337/79,[647] which, in Article 64.1, provides that "Member states shall take all necessary measures to ensure compliance with community provisions in the wine sector." The Court held that this phrasing 'clearly' requires Member States to use national provision to enforce compliance with Community law. The Court further stated that the provision requires Member States to take the necessary measures, both legislatively and administratively, to ensure compliance with the regulation. Finally, the Court held that provisions in German law, to the effect that appeals against administrative acts have suspensive effect, conflicted with Community law, and that those applying national law were therefore required to bring an end to the suspensive effect by deciding on the immediate implementation of the requirements, even if this conflicted with national law. This thus allows for the imposition of a penalty for the failure to comply with the requirements.

The provision in question in the regulation was thus interpreted by the Court as containing an obligation to provide for a system of penalties, either by using

laying down provisions for implementing Regulation (EEC) No 2052/88 as regards coordination of the activities of the different Structural Funds between themselves and with the operations of the European Investment Bank and the other existing financial instruments, (OJ 1988 L 374/1). Regulation 1164/94 establishing a Cohesion Fund, (OJ 1994 L 130/1), as amended by Regulation 1264/1999 amending Regulation (EC) No 1164/94 establishing a Cohesion Fund (OJ 1999 L 161/57) provides, in Article 12 on financial controls in connection with Structural Funds, that Member States shall take responsibility in the first instance for the financial control of projects and be accountable for the measures they take in this respect. The Commission has laid down implementing provisions for this in Regulation 1681/94 concerning irregularities and the recovery of sums wrongly paid in connection with the financing of the structural policies and the organization of an information system in this field, (OJ 1994 L 178/43) and in Regulation 1831/94 concerning irregularities and the recovery of sums wrongly paid in connection with the financing of the Cohesion Fund and the organization of an information system in this field, (OJ 1994 L 191/9). Despite the somewhat vague scope of the provision there has not been a more detailed regulation of the duty concerning sanctions. Some Directives also use this formulation, see Directive 92/65 laying down animal health requirements (OJ 1992 L 268/54), which in Article 12.6 lays down "Member States shall take the appropriate administrative or penal measures to penalize any infringement of this Directive." There is an almost identical phrasing in the appendix to Directive 92/5 amending and updating Directive 77/99/EEC on health problems affecting intra-Community trade in meat products and amending Directive 64/433/EEC, (OJ 1992 L 57/1).

646. Commission of the European Communities v Federal Republic of Germany, [1990] ECR I-2879.

647. On the common organization of the market in wine, (OJ 1979 L 54/1). The wording of the cited provision is repeated in Regulation 822/87, (OJ 1987 L 84/1).

existing national legislation, or by amending the legislation, or by disregarding the existing national legislation, depending on what is necessary to ensure compliance with the Community provisions. Furthermore, the national authorities were considered as having a duty to ensure the effectiveness of the regulation through their administration of sanctions.

As for the Community's finances, Regulation 729/70[648] provided that "Member States ... shall take the measures necessary to ... prevent and deal with irregularities." In the Joined Cases 205-215/82[649] the Court interpreted as including an obligation so that "the competent national authorities are bound to exercise all the supervision necessary to ensure that aids are granted only upon the conditions laid down by the community regulations and that any infringement of the rules of community law is appropriately penalized."

In the light of these judgments, the interpretation of other non-specific provisions for penalties in secondary legislation must, depending on the actual wording, include the requirement for a loyal upholding of Community laws both by regulation and by administration, imposing sanctions where necessary.

13.2.2.3. Precise provision for sanctions

Particularly since the beginning of the 1990's secondary legislation has contained several examples of precise provisions for sanctions, where the procedures to be followed have been regulated in detail, and where there has also been a precise definition of the legal facts. Possible penalties (or administrative measures) have been listed, just as the duration and criteria for their use is set out. There have been references to the significance of the risk of repetition, the size of the transactions, the amount of the EC's own means involved, on whether the irregularities have been attempted or carried out, as well as culpability etc. Finally, there have been examples where there have been a number of provisions to ensure legal certainty built into the regulation, such as the right to a hearing, the right to appeal, the principle of proportionality, equal treatment etc.

In 1995 Regulation 1469/95[650] was adopted, with a horizontal effect across the whole area of agriculture, which lay down what measures shall be taken in relation to operators who intentionally or by gross negligence either commit or are suspected of committing irregularities in connection with export subsidies, tendering, or the sale of intervention products at a reduced price, and thus wrongfully obtain or seek to obtain a financial advantage.

648. On the financing of the common agricultural policy, (OJ 1970 L 94/13).
649. Deutsche Milchkontor GmbH and others v Federal Republic of Germany. [1983] ECR 2633.
650. Regulation 1469/95, on measures to be taken with regard to certain beneficiaries of operations financed by the Guarantee Section of the EAGGF (OJ 1995 L 145/1).

The measures include stricter control, suspension of payment for current transactions, or suspension of release of security deposited, as well as "exclusion for a period of time from operations to be determined."

The regulation provides that when Member States' authorities take decisions either to suspend payment or to exclude from operations, they shall have "due regard to the risk of further irregularities that may be committed by the operator." Furthermore, apart from the fact that the measures concerned shall be in accordance with the laws of the Member States, they shall also satisfy the principle that an operator shall have a right to a hearing before a decision is taken to suspend payment or to exclude from operations, just as the decision taken can be appealed against. In addition to this, there shall be proportionality between the irregularity committed or suspected, and any measure taken. Finally, the regulation clearly states that the principle of non-discrimination applies, in accordance with which the operator may not be treated differently from others.

In Commission Regulation 745/96,[651] adopted to implement the Council regulation, there is a very thorough regulation of legal procedure. For both suspension of payment or exclusion from operations it provides that the duration of the measure shall be determined on the basis of four carefully listed criteria: the stage of the inquiry being held, since it is possible to apply measures in a case which is not completed; the volume of the operator's activities within the scope of EAGGF; the amount of Community funds involved in the suspected or confirmed irregularity; the seriousness of the irregularity, according to whether it has been committed or attempted, deliberately or through gross negligence. The regulation further provides that, for exclusion, the period shall be a minimum of six months, except in duly substantiated exceptional cases, and a maximum of five years.[652]

651. Laying down detailed rules for the application of Council Regulation (EC) No 1469/95 on measures to be taken with regard to certain beneficiaries of operations financed by the Guarantee Section of the EAGGF, (OJ 1996 L 102/15).

652. See also Regulation 3887/92, laying down detailed rules for applying the integrated administration and control system for certain Community aid schemes, (OJ 1992 L 391/36), as amended by Regulation 1678/98, (OJ 1998 L 212/23), in which there is very detailed regulation of the Member States' duties in relation to sanctions. The cases concerned are those where a farmer has applied for subsidies for an area which is larger than exists in fact. In such cases it is provided that, without regard for the subjective intention, if the excess area consists of more than 2% or 2 hectares, but a maximum of 10% of the actual area, the subsidy shall be reduced by an amount corresponding to twice the subsidy which would relate to the excess area. Where the area claimed is more than 10%, but not more than 20% of the actual area, as established by controls, then the subsidy shall be reduced by 30%. And finally, if the excess area is more than 20% more than the actual area, then no subsidy shall be paid. There is thus a precise scale of sanctions in cases of irregularities in the claim of the size of an area entitled to subsidy.

The culmination, hitherto, of Community regulation of sanctions came in 1995 with the adoption of Regulation 2988/95,[653] which has both horizontal and general relevance to the question of sanctions. The horizontal application of the regulation means that all the Community's expenses and its traditional own resources are covered by it, with the single exception of VAT.[654] This is quite unusual since, prior to this, the widest scope of a regulation on controls and sanctions had been the regulation previously referred to which covered the common agricultural programme, and this is significant because, due to their wide area of application, the provisions in the regulation can easily assume the character of general principles of Community law.

The general aspect of the regulation is expressed by the fact that the regulation lays down basic principles for administrative measures and administrative penalties which shall subsequently be introduced into sector-specific regulations, so the regulation implies demands for further development of such instruments within the individual sectors.

The regulation is supplemented by a provision that, if the incorrect claim of the area is intentional or due to gross negligence, then the farmer shall be excluded from the subsidy programme for the calendar year in question. This means that if these subjective conditions are met, there is a total exclusion, even if the excess area is only of a few percentage points. The sanction can be further strengthened if there is a deliberately incorrect claim, since there can also be an exclusion from the subsidy programme for the area in question for the following year. However, no sanctions shall be applied in cases of *force majeure* or if the farmer, on his own initiative, informs the proper authorities within 10 working days of finding the mistaken claim in the application, and where this wrong claim is neither intentional nor due to gross negligence. The same regulation also contains provisions for sanctions in cases where a farmer has sought a subsidy for a greater number of animals than there are in fact in his flocks or herds. The provisions for sanctions are constructed in exactly the same way as the above. In other words, the greater the divergence the harsher the penalty, so that the subsidy is reduced in proportion to the divergence and the entitlement to subsidy is reduced to nil when the divergence exceeds 20%. The increased penalty for intentionally false claims or claims which are false due to gross negligence which is set out above in relation to cultivated area also applies to subsidy programmes for animals. The fact that the same pattern of sanctions is used both in relation to subsidies for cultivated areas and for animal husbandry suggests that, to some extent, the regulation expresses some general principles for EC regulation of sanctions. It should be noted that the penalty increases in line with the size of the infringement, whether objective or subjective. Likewise it can be assumed that in its secondary legislation the EC can operate without applying strict liability, though with an exception being made for cases of *force majeure*.

653. On the protection of the European Communities financial interests (OJ 1995 L 312/1).
654. See Article 1.2 of the Regulation and the Commission report: Protecting the community's financial interests – the fight against fraud – annual report 1995, COM/96/173 Final. For another definition see Article 1.2 in the Commission's original Proposal for Council of the European Union Act establishing a Convention for the protection of the Communities' financial interests, COM/94/214, (OJ 1994 C 216/14).

The nature of a framework regulation means that administrative penalties will only be applied on the basis of the authority of regulations in the individual sectors. This is confirmed in Article 2.3 of the regulation which lays down that "Community law shall determine the nature and scope of the administrative measures and penalties necessary for the correct application of the rules in question, having regard to the nature and seriousness of the irregularity, the advantage granted or received, and the degree of responsibility." However, there are parts of the regulation which are directly applicable, without depending on follow-up regulations. For example this applies to the rules on periods of limitation in Article 3,[655] administrative measures in Article 4 and the principle of double jeopardy in Article 6. Because of the central position of the regulation, it is included as an important part of the review of the regulation of sanctions in secondary legislation dealt with below under Section 13.2.4. At this point it is sufficient to emphasise that the regulation in itself constitutes an important example of precise and comprehensive regulation of sanctions in secondary legislation, as well as laying down requirements for similar standards in other secondary legislation.

13.2.3. The development of the regulation of sanctions

Since the mid 1980's there has been a notable growth of interest in combating irregularities against the EC's finances. This has meant that while previously sanctions and the regulation of sanctions were left to the Member States, they have steadily become more prominent in secondary legislation.

The development referred to in the previous paragraph can be illustrated by the following example from the area of fisheries. Article 1.2 of Regulation 2241/87[656] contained a requirement that infringements of the regulation should be subject to penalties. Article 11c of Regulation 3483/88,[657] which amended Regulation 2241/87,[658] specified the requirements for Member States' penalties, among other things by requiring that the person responsible shall effectively be deprived of the economic advantage derived from the infringement, or shall otherwise be subject to penalties which correspond to the seriousness of the infringement and effectively deter further infringements. Regulation 2847/93[659]

655. Commission report; Protecting the community's financial interests – the fight against fraud – annual report 1994 , COM/95/98 Final, and Commission report: Protecting the community' s financial interests – the fight against fraud – annual report 1995, COM/96/173 Final.
656. Establishing certain control measures for fishing activities (OJ 1987 L 207/1).
657. Amending Regulation (EEC) No 2241/87 establishing certain control measures for fishing activities, (OJ 1988 L 306/2).
658. Establishing certain control measures for fishing activities (OJ 1987 L 207/1).
659. Establishing a control system applicable to the common fisheries policy, (OJ 1993 L 261/1).

which replaced Regulation 2241/87[660] further tightened the regulation and in Article 31 it specified the penalties which Member States can apply, including fines, confiscation and withholding of licences.

In recent years the regulation of sanctions has not only been more extensive, but it has also been more horizontally orientated. The regulation of sanctions has developed from being an appendix to other regulations to become an independent element in secondary legislation.

These regulatory developments give rise to new legal problems. The need has arisen to create some principles in Community law relating to penalties, so that the regulation of sanctions can be a more consistent and co-ordinated system and not just a series of unconnected elements.

That the Community is aware of this need has been confirmed on a number of occasions. In Regulation 2988/95[661] as well as in Regulation 1469/95[662] there are clear and concrete demonstrations of this view of the regulation of sanctions, and it is reasonable to expect significant developments in this era in coming years, which will lead to there being more precise general principles for the regulation of sanctions in secondary legislation.

13.2.4. Principles for the regulation of sanctions in secondary legislation

As stated above, there are clear tendencies towards the adoption of some general principles for the regulation of sanctions in secondary legislation. This section reviews the principles which can be regarded as applying today, and their content.

13.2.4.1. Nulla poena sine culpa

The requirement in Community law for culpability in the form of negligence or intention can only be regarded as applying where this is expressly provided for in the relevant regulatory instrument. This is in accordance with the decision of the Court in Case 137/85,[663] where, having established that a penalty consisting of the loss of security was not in the nature of a criminal penalty and that therefore the principle of *nulla poena sine culpa* (no punishment without culpability) did not apply, the Court rejected the idea that a distinction between various forms of culpability was relevant, since this was not contained in the relevant agricultural regulation.

660. Establishing certain control measures for fishing activities (OJ 1987 L 207/1).
661. On the protection of the European Communities financial interests (OJ 1995 L 312/1).
662. On measures to be taken with regard to certain beneficiaries of operations financed by the Guarantee Section of the EAGGF (OJ 1995 L 145/1).
663. Maizena Gesellschaft mbH and others v Bundesanstalt für landwirtschaftliche Marktordnung (BALM), [1987] ECR 4587.

If Community law does not contain any provision with regard to culpability, it may be assumed that the Member States are relatively free in their approach to the question. This is the view derived from Case C-326/88,[664] in which the Court of Justice found that an objective responsibility did not conflict with Article 18.1 in Regulation 543/69,[665] according to which the Member States were required to make administrative provisions or lay down legal provisions for the implementation of the regulation, and that these should include regulations for sanctions to be applied to cases where the rules laid down in the regulation were infringed.

Both judgments indicate that the regulation of culpability can be provided for in secondary EC legislation, and it is possible to point to many examples of this. An analysis of these instances confirms that the Community has used the regulation of culpability in two principally quite different situations, on the one hand to intensify the responsibility, and on the other hand as a condition to be met for responsibility to be said to exist.

Regulation 3887/92,[666] as amended by Regulation 1678/98,[667] provides an example of the first kind. This Regulation contains detailed rules on the reduction of the agricultural subsidy which a farmer can get if controls show that the area in question is in fact smaller than the area for which subsidy has been claimed. These rules are supplemented by a provision to the effect that if the incorrect claim is made intentionally or due to gross negligence, then the farmer can be excluded from the subsidy programme for the calendar year in question, and if there is a question of wrong information being given intentionally there can also be exclusion from the subsidy programme for the area in question for the following year. The penalty where a subsidy is claimed for a greater number of animals than there is an entitlement to corresponds to this. In both cases the subjective responsibility is significant in determining the penalty to be applied to the farmer. Thus, the distinction between negligence or intention is not material to whether a penalty is imposed, but it is a significant circumstance which can lead to an intensification of culpability.

The proposal for a council regulation on the checks and penalties applicable under the common agricultural and fisheries policies[668] contains an example of

664. Anklagemyndigheden v Hansen & Søn I/S. [1990] ECR I-2911.
665. On the harmonisation of certain social legislation relating to road transport, (OJ 1969 L 77/49).
666. Laying down detailed rules for applying the integrated administration and control system for certain Community aid schemes, (OJ 1992 L 391/36).
667. Amending Regulation (EEC) No 3887/92 laying down detailed rules for applying the integrated administration and control system for certain Community aid schemes, (OJ 1998 L 212/23).
668. Proposal for a council regulation (EEC) on the checks and penalties applicable under the common agricultural and fisheries policies, COM/90/126 Final, (OJ 1990 C 137/10).

the use of the concept of culpability in the form of intention or gross negligence as a pre-condition for imposing a penalty.

As secondary legislation increasingly includes regulations which establish horizontal regulation of sanctions across several sectors, and in which the question of sanctions is a significant element in the regulations, it is natural that the legislation on this point becomes more sophisticated and that it should include a consideration of whether intention or negligence should be a necessary condition for the imposition of administrative penalties.

Against this background it is no surprise that Regulation 1469/95,[669] which lays down rules for measures against irregularities for the whole area of agriculture, cutting across various agricultural programmes, should contain rules on culpability. According to the Regulation, it is a condition for establishing that an offence has been committed that there shall have been gross negligence or intention on the part of the operator. Furthermore in the Regulation's implementing provisions in Regulation 745/96[670] it is provided that when considering the duration of a penalty consisting of the exclusion of an operator from taking part in tendering, from export subsidies and/or the sale of intervention stocks at reduced prices, account shall be taken of whether the irregularity was committed intentionally or through gross negligence. The evaluation of whether the necessary gross negligence or intention exists shall be made by Member States in accordance with their own rules.

With the adoption of the general and horizontal Regulation on the protection of the European Communities financial interests, Regulation 2988/95,[671] the question of culpability becomes an important theme for future regulation of sanctions. Thus in Article 4, which concerns administrative measures, provides that these can be imposed regardless of subjective culpability. In contrast with this, Article 5.1 provides that administrative penalties can only be imposed where irregularities are committed intentionally or through negligence. However this approach is softened in Article 5.2 which states as follows: " Without prejudice to the provisions laid down in the sectoral rules existing at the time of entry into force of this Regulation, other irregularities may give rise only to those penalties not equivalent to a criminal penalty that are provided for in paragraph 1, provided that such penalties are essential to ensure correct application of the rules." Since the irregularities covered by Article 5.1 are "intentional irregularities or those caused by negligence," the "other irregularities" referred

669. On measures to be taken with regard to certain beneficiaries of operations financed by the Guarantee Section of the EAGGF (OJ 1995 L 145/1).
670. Laying down detailed rules for the application of Council Regulation (EC) No 1469/95 on measures to be taken with regard to certain beneficiaries of operations financed by the Guarantee Section of the EAGGF, (OJ 1996 L 102/15), cf. Article 3.4.
671. On the protection of the European Communities financial interests (OJ 1995 L 312/1).

to in Article 5.2 must be understood to be irregularities committed without subjective culpability. The meaning of Article 5.2 must thus be that administrative penalties can only be imposed on the basis of objective culpability if this is essential to ensure correct application of the rules. In its entirety Article 5 must thus mean that the starting point for future regulations for administrative penalties in secondary legislation must be that there shall be a requirement that the irregularity shall have been committed intentionally or through negligence, though this is not unconditional, since exceptions can be made where this "essential" in the case in question.

Even though it will in future be the starting point for secondary legislation to include a requirement of culpability in the form of intention or negligence before administrative penalties can be imposed, it must be emphasised that this depends upon the actual circumstances of the case, and that this assumption does not apply in relation to regulations dating from before the entry into force of Regulation 2988/95[672] at the end of 1995.

13.2.4.2. Proportionality

As has previously been pointed out, the requirement for proportionality is central in connection with the question of sanctions. This is presumably why both the principle of proportionality itself and the conceptual approach of proportionality frequently arise in connection with the regulation of sanctions in secondary legislation.

For example Article 3.1 of Regulation 2262/84[673] states that "where the inaccurate crop declaration includes an increase in the olive oil production potential in question which does not correspond to the actual situation, the grower concerned must pay an amount which is related to the resulting increase in potential and is sufficiently dissuasive." The same applies if the amount of olive oil which is entitled to subsidy is less that that which the producer has claimed support for. Thus the provisions for sanctions in the Regulation adopt the proportionality principle's requirements both that sanctions shall be suitable for their purpose, and that they not go beyond what is necessary.[674]

In Section 13.1.4 there is a review of the legal approach to the question of the proportionality principle in connection with sanctions, and in particular the distinction between principal obligations and secondary obligations. There are examples of where this legal approach has been directly imported into second-

672. On the protection of the European Communities financial interests (OJ 1995 L 312/1).
673. Laying down special measures in respect of olive oil. (OJ 1984 L 208/11).
674. For other examples see Article 11c in Regulation 3483/88 amending Regulation (EEC) No 2241/87 establishing certain control measures for fishing activities, (OJ 1988 L 306/2), and Article 4.1.a) in Regulation 1469/95, on measures to be taken with regard to certain beneficiaries of operations financed by the Guarantee Section of the EAGGF (OJ 1995 L 145/1).

ary legislation. In Regulation 3887/92,[675] as amended by Regulation 1678/98,[676] a distinction is made, though without being directly stated as such, between sanctions for the infringement of secondary obligations and sanctions for the infringement of principal obligations, whereupon the proportionality approach is used for both categories.

As for an infringement of the formal requirements of the Regulation (the secondary obligations), Article 8 provides that where there is a delay in submitting a request for subsidy, the amount of the subsidy shall be reduced by 1% per working day by which the application is delayed, but if the delay exceeds 20 days, the application shall be rejected in its entirety. However, the rules do not apply either to a reduction or to a total rejection in cases of *force majeure*. This Regulation expresses the approach of proportionality since a minor delay in making an application does not lead to the loss of the right to subsidy, while at the same time establishing a system by which the length of the delay proportionately determines the sanction to which the applicant is subject.

With regard to the infringement of the principal obligations of the Regulation, it follows from Articles 9 and 10 that the subsidy that farmers shall receive in relation cultivated land or animals shall be reduced if an application for subsidy claims a greater cultivated area or a greater number of animals than there is in fact a basis for. In relation to subsidies for animals it thus provides that if the excess claimed is no more than 5%, then the subsidy shall be reduced by a percentage corresponding to the excess; where the excess claimed is between 5% and 20%, the subsidy shall be reduced by a percentage corresponding to twice the excess. If the excess claimed is more than 20% then the right to a subsidy lapses entirely.[677] The same principle applies for the reduction of subsidies relating to cultivated areas. In both these cases the Regulation expresses the proportionality principle since the greater the infringement (looked at objectively) the greater the penalty.

With the important horizontal Regulation 2988/95 the assessment of proportionality is explicitly required in future regulation of sanctions. Thus Article 2.3

675. Laying down detailed rules for applying the integrated administration and control system for certain Community aid schemes, (OJ 1992 L 391/36). There are corresponding provisions in Regulation 3888/92 establishing certain transitional provisions in the beef and veal sector pending the entry into force of the integrated administration and control system for certain Community aid schemes, (OJ 1992 L 391/46).
676. Amending Regulation (EEC) No 3887/92 laying down detailed rules for applying the integrated administration and control system for certain Community aid schemes, (OJ 1998 L 212/23).
677. There are equivalent provisions in Article 6 of Regulation 3888/92 establishing certain transitional provisions in the beef and veal sector pending the entry into force of the integrated administration and control system for certain Community aid schemes, (OJ 1992 L 391/46).

of the Regulation states that "Community law shall determine the nature and scope of the administrative measures and penalties necessary for the correct application of the rules in question, having regard to the nature and seriousness of the irregularity, the advantage granted or received and the degree of responsibility."

It applies to Regulation 2988/95[678] as well as the other regulations for proportionality that they shall not go further than what is already derived directly from the statement of the proportionality principle in Article 5 of the EC Treaty, as this has been interpreted in the legal practice of the Community. The regulations on the principle of proportionality are nevertheless important in that they lay down the criteria for its application in a given area. Also there is presumably some value in the acts of secondary legislation drawing attention to the proportionality principle.

It is in the nature of sanctions that they are intrusive, so it can be assumed that they should only be applied, and provisions for regulations for sanctions should only be made, when necessary for achieving the objectives of the Community.

In the area of agriculture Article 34.2 of the EC Treaty provides that the common organisation of agricultural markets "may include all measures required to attain the objectives set out in Article 33, in particular regulation of prices, aids for the production and marketing of the various products, storage and carryover arrangements and common machinery for stabilising imports and exports." That the possible measures can include sanctions follows from the fact that the list of possible measures in Article 34.2 is not exhaustive, cf. the words "in particular."

According to its wording the provision must be understood as acknowledging that sanctions can be necessary. In support of this, in Case C-240/90[679] the Court stated that the right of the Council and the Commission to lay down sanctions in the area of agriculture is conditional only on the measures in question being necessary to achieve the objectives of the common agricultural policy. The Court added that it is for the legislators of the Community alone to determine which solutions are most appropriate for the achievement of the goals.

There is thus a requirement of necessity in the area of agriculture, but this is not a significant independent requirement. In other areas where there is such a requirement which is not derived directly from the Treaty, the requirement of necessity is not present, apart from the requirement that any provision must be interpreted to be in accordance with the principle of proportionality. However,

678. On the protection of the European Communities financial interests (OJ 1995 L 312/1).
679. Federal Republic of Germany v Commission of the European Communities, [1992] ECR I-5383.

it should be noted that under Regulation 2988/95[680] administrative penalties can be imposed only if there are irregularities caused intentionally or by negligence, "provided that such penalties are essential to ensure correct application of the rules" of secondary legislation.

13.2.4.3. The principle of effectiveness

A key characteristic of administrative penalties is that, compared with criminal law, they contain fewer guarantees of legal certainty and give greater weight to administrative effectiveness. In the general and horizontal Regulation 2988/95[681] this is expressed in the requirement that administrative measures and penalties shall be effective and dissuasive which, as referred to previously, has been called the principle of effectiveness. The principle was created by the EC Court of Justice in Case 68/88[682] and confirmed in subsequent judgments. The repetition of the principle of effectiveness in Regulation 2988/96[683] indicates that the principle has received political backing and that it must be honoured in future regulations for sanctions.

13.2.4.4. Limitation period

Article 3.1 of Regulation 2988/95[684] provides that the limitation period for proceedings against irregularities in connection with the Community's financial interests shall be four years from the date when the irregularity occurred. However, the provision states that sectoral rules may make provision for a shorter, but not longer, period though not less than three years. Member States can use a longer limitation period though not shorter than the four year period of the Regulation.

If there are continuous or repeated irregularities, the period of limitation shall run from the day on which the irregularity ceases. This is supplemented by a somewhat cryptic provision that if the irregularity relates to a programme which runs over several years, then the limitation period shall run until the programme is definitively terminated. In the proposal for the Regulation the limitation period ran from the date of the termination of the programme, which seems more reasonable. But the law is as amended from the original proposal and adopted in the Regulation.

The limitation period is interrupted by any act of a competent authority relating to investigation or legal proceedings concerning the irregularity, and which is notified to the person in question. The requirement that the person in

680. On the protection of the European Communities financial interests (OJ 1995 L 312/1).
681. On the protection of the European Communities financial interests (OJ 1995 L 312/1)
682. Commission of the European Communities v Hellenic Republic, [1989] ECR 2965.
683. On the protection of the European Communities financial interests (OJ 1995 L 312/1).
684. On the protection of the European Communities financial interests (OJ 1995 L 312/1)

question should be notified was not included in the Commission's original proposal,[685] which meant that internal steps taken by competent authorities could interrupt the limitation period. From the point of view of legal certainty, the requirement that the person in question should be notified before the limitation period is interrupted seems justified.

Regardless of the rules stated on the interruption of the limitation period etc., it is clear that the limitation period shall become effective on the latest day on which a period equal to twice the limitation period expires without the competent authority having imposed a penalty. This absolute limitation period for proceedings will be assumed to be eight years, unless otherwise provided for in sectoral regulations, or unless Member States specifically provide otherwise. However, this absolute limit does not apply in cases where administrative procedures have been suspended because criminal proceedings have been instituted in connection with the same set of circumstances.[686]

Apart from the limitation periods for proceedings reviewed above, there is also a limitation period for implementing administrative penalties. This is in Article 3.2 of Regulation 2988/95.[687] The period is three years from the day on which a decision becomes final. According to Article 3.2 the rules on interruption and suspension are governed by the relevant provisions of national law. Member States can extend the limitation period but not shorten it, cf. Article 3.3.

685. See Article 9.1 in the Commission's original Proposal for Council of the European Union Act establishing a Convention for the protection of the Communities' financial interests, COM/94/214, (OJ 1994 C 216/14).

686. See Section 14.3 on the rules on *ne bis in idem*.

687. On the protection of the European Communities financial interests (OJ 1995 L 312/1). In the area of agriculture Regulation 1469/95, on measures to be taken with regard to certain beneficiaries of operations financed by the Guarantee Section of the EAGGF (OJ 1995 L 145/1), has allowed for the possibility of penalising irregularities by excluding the operator in question from receiving export subsidies etc. for a period. In connection with this, Article 8.2 in Regulation 745/96, laying down detailed rules for the application of Council Regulation (EC) No 1469/95 on measures to be taken with regard to certain beneficiaries of operations financed by the Guarantee Section of the EAGGF, (OJ 1996 L 102/15), provides that a decision to exclude shall be applied only within a period of four years from the date when the irregularity in question was committed. Furthermore, the provision states that "The other provisions on the limitation period in Article 3 (1) of Regulation (EC, Euratom) No 2988/95 shall also apply." This reference must be understood as meaning that if a person subject to the laws achieves better protection under Regulation 2988/95, then the rules in that regulation can be referred to. Such a reference in one act of secondary legislation to the provisions of another act of secondary legislation is unusual in Community law, and it underlines the central role of Regulation 2988/95.

That so much attention is paid to Regulation 2988/95[688] is because, even though the Regulation is intended to be a framework regulation which needs follow-up implementing provisions, there is no doubt that the rules on limitation periods in Article 3 will be directly applicable in connection with irregularities against the Community's financial interests.[689] It is thus only when there are contrary rules in subsequent sectoral regulations that the rules on limitation periods in Regulation 2988/95[690] will not apply.

13.2.4.5. Retroactive effect

In the area of agriculture, Regulation 1469/95[691] allows for the possibility for penalising irregularities by excluding operators from receiving export subsidies etc. for a certain period. In the implementing provisions[692] it is stated that exclusionary measures cannot be applied in relation to irregularities committed before Regulation 1469/95[693] entered into force. This absolute prohibition against penalties with retroactive effect, which is thus taken up by secondary legislation, is more extensive than the practice of the Court.

This restrictive approach is followed in the general and horizontal Regulation 2988/95,[694] which established two important principles for the retroactive effect of administrative penalties in its Article 2.2. First it establishes that "no administrative penalty may be imposed unless a Community act prior to the irregularity has made provision for it." Secondly it established that if provisions in Community rules for administrative penalties are amended subsequent to an irregularity, then "the less severe provisions shall apply retroactively." It therefore seems that the Community law prohibition against the retroactive effect of criminal penalties is extended to cover administrative penalties as well.

According to its wording and subject matter the provision must be regarded as being directly applicable without depending on follow-up regulation, and this means that unless there are directly contrary provisions in some other sector-related regulations, Article 2.2 will apply to the question of the retroactive

688. On the protection of the European Communities financial interests (OJ 1995 L 312/1).
689. In support of this see the Commission report: Protecting the community's financial interests – the fight against fraud – annual report 1994, COM/95/98 Final, and Commission report; Protecting the community' s financial interests – the fight against fraud – annual report 1995, COM/96/173 Final.
690. On the protection of the European Communities financial interests (OJ 1995 L 312/1).
691. On measures to be taken with regard to certain beneficiaries of operations financed by the Guarantee Section of the EAGGF (OJ 1995 L 145/1).
692. Regulation 745/96, laying down detailed rules for the application of Council Regulation (EC) No 1469/95 on measures to be taken with regard to certain beneficiaries of operations financed by the Guarantee Section of the EAGGF, (OJ 1996 L 102/15).
693. On measures to be taken with regard to certain beneficiaries of operations financed by the Guarantee Section of the EAGGF (OJ 1995 L 145/1).
694. On the protection of the European Communities financial interests (OJ 1995 L 312/1).

effect of administrative penalties for irregularities against the Community's financial interests.

13.2.4.6. Complicity

The Member States of the Community have widely differing approaches to the question of complicity, even though it seems that they all have the concept of co-responsibility in some form or other. The problem of finding a common approach can be an explanation as to why the Community has so far only dealt with the question peripherally.

In the important framework Regulation 2988/95[695] it thus states that "administrative measures and penalties may be applied ... to those who are under a duty to take responsibility for the irregularity." There is thus no doubt about the existence of the responsibility of those who are accessories to the commission of irregularities, but there is no clarification as to what this complicity consists of.

The question of responsibility for complicity is therefore left to the relevant sectoral regulations, and when these are silent on the question, which is usually the case, it is left to national law to determine.

In extension of the question of responsibility for complicity, Regulation 2988/95[696] refers to the responsibility of those who have a duty to prevent the commission of irregularities, since Article 7 provides that "Community administrative measures and penalties may be applied to ... those who are under a duty ... to ensure that [an irregularity] is not committed."

The fact that this responsibility is explicitly stated in Community law should be seen in the context that, in a project of supranational co-operation such as the European Community, there is a danger that alliances may be formed between those who commit irregularities and the officials of the Member State or EC officials of the same nationality who are entrusted with preventing irregularities, but who may not have such strong feelings of loyalty towards the Community. This is a danger which was seen in fact in Case 68/88.[697]

The provision makes it possible to impose penalties on such national or EC officials. However, the use of the Regulation on those subject to the law requires follow-up regulations in sectoral legislation.

695. On the protection of the European Communities financial interests (OJ 1995 L 312/1).
696. On the protection of the European Communities financial interests (OJ 1995 L 312/1).
697. Commission of the European Communities v Hellenic Republic, [1989] ECR 2965.

13.2.4.7. Circumvention of the law

According to the wording of Article 4.3 of Regulation 2988/95,[698] circumvention of the law is an irregularity described as follows: "Acts which are established to have as their purpose the obtaining of an advantage contrary to the objectives of the Community law applicable in the case by artificially creating the conditions required for obtaining that advantage."

This refers to activities which do not have a genuine economic purpose, which are contrary to the aims of the law but which are not, in a formal sense, infringements of the law. An example of this is the possibility of importing an agricultural product which has a certain percentage of oil and fat at a low import duty, whereupon a further one percent of oil and fat is added and the product is re-exported with a higher export subsidy than the duty paid on importation.[699] Such a transaction has no economic purpose other than to obtain the difference between the import duty and the export subsidy. Another example is the export of frozen milk with the aim of obtaining export subsidies for dried milk because the relevant regulation lays down higher rates for milk in the form of powder "or other solid form."

Since this circumvention of the law does not strictly constitute an infringement of the rules, it falls outside the Community law concept of an irregularity[700] and cannot be proceeded against as such.

However, the Community has long been aware of the unsatisfactory position of not being able to take steps against such circumventions of the law, so that Article 4.3 in Regulation 2988/95[701] includes a provision that lays down that circumventions as described above shall, according to the circumstances, either lead to an advantage being withdrawn or not being granted.

These steps are both administrative measures and not penalties, cf. Article 4.4, because the provisions on the circumvention of the law are placed in Article 4, together with administrative measures, and it must be assumed that

698. Cf. Article 4.3 in Regulation 2988/95, on the protection of the European Communities financial interests (OJ 1995 L 312/1).

699. The example is taken from Sherlock, Ann: Controlling Fraud within the European Community, European Law Review, 1991, Vol. 16, p. 24.

700. In the Proposal for a Council Regulation (EC, Euratom) on protection of the Community' s financial interests, COM/94/214 Final – CNS 94/0146, (OJ 1994 C 216/11), which later become Regulation 2988/95, the Commission proposed that circumvention of the law should be covered by the concept of irregularity. This was to be under the heading of 'misuse', which was to be defined as "an act is done for the purpose of obtaining an unwarranted advantage by means of fictitious or artificial operations designed to create a situation that is formally in accordance with the law but is devoid of any real economic purpose and is contrary to the purpose sought by the material instrument of Community law." However, this disappeared from the regulation before its final adoption.

701. On the protection of the European Communities financial interests (OJ 1995 L 312/1).

this provision in Regulation 2988/95[702] can be applied without any follow-up regulations.

13.2.4.8. Sanctions against legal persons

The EC Treaty does not contain any obligation on Member States to introduce the possibility of imposing penalties on legal persons and it is not equally clear that legal persons can be subject to penalties in all Member States.[703] Against this background it is necessary to look at the approach of Community law to this question.

Upon an evaluation of the specific requirements which secondary legislation makes on national laws, it is possible that an obligation to impose penalties can be met without introducing the responsibility of legal persons. But if the secondary legislation requires the possibility of imposing penalties on legal persons sufficiently precisely, the Member States will have to act in accordance with such a requirement, regardless of any contrary national legal principles. In this connection see Case C-326/88[704] and Case C-7/90,[705] which both limit the discretion of Member States over how infringements shall be penalised to those cases in which there is no specific provision in Community legislation laying down a penalty.

There are also a number of examples in secondary legislation where Member States are required to impose penalties on both natural and legal persons, see for example: Regulation 4045/89,[706] Directive 89/662[707] and Directive 91/628.[708]

With the adoption of the general and horizontal Regulation 2988/95[709] a general principle has been established that administrative measures and penalties contained in Community laws can be applied to "natural or legal persons

702. On the protection of the European Communities financial interests (OJ 1995 L 312/1).
703. Germany, Spain, Portugal and presumably Greece thus operate without such a responsibility.
704. Anklagemyndigheden v Hansen & Søn I/S. [1990] ECR I-2911.
705. Criminal proceedings against Paul Vandevenne et al., [1991] ECR I-4371.
706. On scrutiny by Member States of transactions forming part of the system of financing by the Guarantee Section of the European Agricultural Guidance and Guarantee Fund and repealing Directive 77/435/EEC, (OJ 1989 L 388/18), which states in Article 6.2 "Member States shall adopt appropriate measures to penalize natural or legal persons who fail to fulfil their obligations under this Regulation."
707. Concerning veterinary checks in intra-Community trade with a view to the completion of the internal market, (OJ 1989 L 395/13), which states in Article 4.2 "Member States of dispatch shall take the appropriate administrative, legal or penal measures to penalize any infringement of veterinary legislation by natural or legal persons."
708. On the protection of animals during transport and amending Directives 90/425/EEC and 91/496/EEC, (OJ 1991 L 340/17), which states in Article 18.1 "Member States shall take the appropriate specific measures to penalize any infringement of this Directive by natural or legal persons."
709. On the protection of the European Communities financial interests (OJ 1995 L 312/1).

and the other entities on which national law confers legal capacity who have committed the irregularity."

Against this background it seems to be accepted that Community law operates with the concept that legal persons can have responsibility and that it can require Member States to introduce such responsibility into their national laws. Whether such a requirement exists in fact depends on the interpretation of the individual legislation.

13.2.4.9. The capacity of Member States to vary legislation

In Case C-217/88[710] Germany claimed that since the regulation that was under consideration in the case provided for a sanction under Community law, national measures were excluded. The sanction which Germany referred to was the possibility of obtaining a subsidy if certain conditions were met, and correspondingly the loss of subsidy if the conditions were not met. Germany argued that this latter was a sanction, but this was naturally rejected by the EC Court. The Court added the following *obiter dictum*: " Even if [the Regulation] did introduce a specific sanction ... it cannot be assumed that the Community legislature, by adopting that provision, intended to exclude the application of national coercive measures in order to ensure the implementation of compulsory distillation." The Commission supported this view by declaring[711] that the administrative penalties in Community regulations should be considered as minimum penalties.

It can therefore be assumed that even if provisions are made for sanctions in Community secondary legislation, this does not mean that Member States are excluded from laying down further administrative or criminal penalties, as long as they serve to ensure that Community law is implemented, and that they do conflict with the Community's relevant legal principles, particularly the principle of proportionality.

13.2.4.10. Sectoral regulations and general regulations

The EC's provisions for sanctions in secondary legislation has developed from being highly sectoral and associated with specific rules in a given area to becoming increasingly more general and horizontally oriented, and this has led to the risk of there being overlapping provisions for sanctions for the same offence under different laws.

710. Commission of the European Communities v Federal Republic of Germany, [1990] ECR I-2879.

711. Cf. the statements from the working group set up by the Commission in October 1988, consisting of representatives from three Directorates General, the Commission's legal service and UCLAF (OLAF).

There is an example of this in Regulation 1469/95,[712] with its implementing provisions in Regulation 745/96.[713] The Regulation concerns irregularities in connection with tendering, export subsidies and sales of intervention products at reduced prices, in the whole area of agriculture financed by the Guarantee Section of the EAGGF, and it is horizontal since it applies across the various market programmes in the area. In this case there is scope for conflict between the provisions of Regulation 1469/95[714] and the provisions for sanctions which are associated with the various market programmes. There could be a number of solutions to such a potential conflict, and it would be natural to look for a solution in the principles of *lex specialis* or *lex posterior*. The Regulation itself takes the sting out of the conflict by providing, in Article 6, that "This Regulation shall be supplementary to the specific provisions under the CAP." The approach of the *lex specialis* is thus adopted.

The important horizontal Regulation 2988/95,[715] which was adopted half a year later than the Regulation just referred to, seems to be in line with the above, since in its preamble and in Article 2.3 it indicates that it is a framework regulation which presumes that it will be implemented "in sectoral rules in accordance with this Regulation."

It can thus be assumed that conflicts between sectoral regulations and general regulations will be resolved under the principles of *lex specialis*.

13.3. Conclusions on sanctions imposed by national authorities on those subject to the laws of the Member States

The review undertaken has shown that the Community has considerable and growing influence on the imposition of sanctions by national authorities on those who are subject to the law of the Member States and who infringe EC law.

This is on the basis of the Treaty and the basic legal principles which establish some significant requirements for and set important limits to national regulation of sanctions and imposition of penalties.

This development has taken place through secondary legislation where the question of sanctions has played an increasingly important role in recent years.

712. On measures to be taken with regard to certain beneficiaries of operations financed by the Guarantee Section of the EAGGF (OJ 1995 L 145/1).
713. Laying down detailed rules for the application of Council Regulation (EC) No 1469/95 on measures to be taken with regard to certain beneficiaries of operations financed by the Guarantee Section of the EAGGF, (OJ 1996 L 102/15).
714. On measures to be taken with regard to certain beneficiaries of operations financed by the Guarantee Section of the EAGGF (OJ 1995 L 145/1).
715. On the protection of the European Communities financial interests (OJ 1995 L 312/1).

From a somewhat sporadic beginning, there are today significant examples of the regulation of sanctions in individual areas as well as horizontal regulation of sanctions in Community law. It is thus possible to deduce a number of principles for the EC's regulation of sanctions in secondary legislation.

At the same time there is nothing to suggest that the development towards increased influence by the Community in the area of sanctions will not continue. The Community's powers are indeed limited to administrative penalties, but partly because of the rather uncertain boundary between administrative and criminal penalties, and partly because there is still considerable scope for regulation both in depth and in breadth, for example on the question of complicity, and especially outside the area of agriculture, it must be expected that Community regulations will make further significant advances in coming years.

CHAPTER 14

Sanctions imposed by the Community on those subject to the laws of the Member States

This section contains a review of the legal position with regard to sanctions imposed by the Community on those subject to the laws of the Member States.

14.1. The authority of the Treaty and the basic legal principles for the imposition of sanctions

Within the areas to which this thesis is limited, there are no examples of instances where the Community can impose sanctions on those subject to the law of the Member States on the basis of the Treaty or the basic legal principles.[716]

This clear and unmistakable statement of the law is in line with the point of departure in Community law which is that the implementation of EC law, including the imposition of sanctions, is a matter for national authorities.

The reason why this basic position has been adhered to, unaltered since the establishment of the Community, is because the imposition of sanctions on those subject to the laws of the Member States is *par excellence* the embodiment of national sovereignty, so that the Member States have been very reluctant to surrender powers in this respect. Therefore, from the point of view of the Member States, there is a world of difference between the Community having influence on the regulation of national sanctions and actually imposing them.[717]

716. It should be emphasised that competition law falls outside the scope of this thesis. However, it should be noted that the Treaty only authorises prohibition as a result of infringement of the competition rules in Article 81, while Article 83 allows for secondary legislation to make provision for fines and periodic penalty payments for infringements of Article 81.1 and Article 82.

717. For a more detailed review of this, refer to Section 18.1.6.

14.2. The authority for the imposition of sanctions in secondary legislation

14.2.1. The powers of the Community

Article 83.2 of the EC Treaty allows for the possibility of secondary legislation making provision for fines and periodic penalty payments imposed by the Commission to ensure compliance with the rules in Article 81.1 and Article 82. That there is a provision in the Treaty that expressly gives authority for the regulation of sanctions to be imposed on those subject to the law of the Member States could conversely lead to the conclusion that secondary legislation is otherwise excluded from allowing Community institutions such powers in relation to sanctions.

The thinking behind such a conclusion is that Article 83.2 clearly indicates that such regulation requires express authority in the Treaty. This conclusion is supported by the legality principle in Articles 5.1 and 7 of the EC Treaty.[718]

However, the fact that this conclusion cannot nevertheless be regarded as the legal position is due to a number of circumstances.

First, Article 229 of the EC Treaty provides that "Regulations ... may give the Court unlimited jurisdiction with regard to the penalties provided for in such regulations." The provision is based on the presumption that regulations for sanctions can be made in secondary legislation, and in Case C-24/90[719] it is laid down that Article 229 "concerns only penalties determined and imposed directly by the Community institutions."

Secondly, under the authority of Article 79.3 (after amendment now Article 75 of the EC Treaty) the Council may lay down provisions "to secure compliance ..." for freedom of transport within the Community, and adopt rules giving the Commission powers to impose sanctions on transport businesses.

From this it seems that the Community can make regulations for sanctions to be imposed by the Community on those subject to the laws of the Member States, even if the provision for sanctions is not expressly named in the authorising provisions for the secondary legislation. There is an example of this in Regulation 1469/95[720] which, under the authority of EC Treaty Article 43 (now Article 37), gives the Commission sanctioning powers in connection with agriculture.

In connection with the empowerment of sanctions, Article 308 of the EC Treaty does not occupy any special position since the sanctions provisions of

718. See also Article 5 of the EU Treaty.

719. Federal Republic of Germany v Commission of the European Communities, [1992] ECR I-5383.

720. On measures to be taken with regard to certain beneficiaries of operations financed by the Guarantee Section of the EAGGF (OJ 1995 L 145/1).

the kind referred to could be adopted under the authority of this provision.[721] This is illustrated by Regulation 4064/89[722] as amended by Regulation 1310/97.[723] The Regulation contains provisions for periodic penalty payments in Article 15, and is made under the authority of Articles 83 and 235 of the EC Treaty, (now, after amendment, Articles 83 and 308).

The legal service of the Commission would like to go a step further and have expressed the opinion that the Commission can impose sanctions on those subject to the laws of the Member States on the basis of Article 229 of the EC Treaty and the implementing provisions,[724] which presumably means that the Commission shall adopt implementing provisions. This would in any case require a decision from the Commission which could be tested before the EC Court, and referring to Section 13.2.1.2 it must require that the necessary delegation can be assumed to exist. It does not appear that there is any such regulation.

There is thus a parallel between the Community's powers to regulate the national sanctions which apply to those subject to the law of the Member States and the sanctions applied directly by the Community to those who are subject to the laws of the Member States. The exercise of the powers is much more limited in the latter case than in the former.

14.2.2. The principles for the regulation of sanctions

As argued above, there is a parallel between the powers of the Community to regulate the national sanctions which apply to those subject to the law of the Member States and the sanctions applied directly by the Community to those who are subject to the laws of the Member States. There are grounds for arguing that this comparison can be taken further.

In Article 3.3 of Regulation 1469/95,[725] which deals with irregularities in the agricultural sector, there is a provision which gives the Commission the right to take measures against natural or legal persons in the Member States who

721. While the Court previously found that Article 235 [now Article 308] of the EC Treaty could be cited as a double authority alongside another of the Treaty's authorising provisions, cf. Case 8-73, Hauptzollamt Bremerhaven v Massey-Ferguson GmbH, [1973] ECR 897, today it is the view of the Court that Article 308 of the EC Treaty can only be used if another authorising provision, even if widely interpreted, is not found to justify the legislative act required, cf. Case 242/87, Commission of the European Communities v Council of the European Communities, [1989] ECR 1425, and Case C-295/90, European Parliament v Council of the European Communities, [1992] ECR I-4193.
722. On the control of concentrations between undertakings, (OJ 1989 L 395/1).
723. Amending Regulation (EEC) No 4064/89 on the control of concentrations between undertakings, (OJ 1997 L 180/1).
724. Jur (89) D/1447, confidential document.
725. On measures to be taken with regard to certain beneficiaries of operations financed by the Guarantee Section of the EAGGF, (OJ 1995 L 145/1).

commit irregularities. In the implementing Regulation 745/96[726] it is laid down that the Commission may, when it conducts tendering, exclude an operator who makes an offer, if in relation to that operator a national decision has been made, without further right of appeal, that the operator in question has intentionally or by gross negligence committed an irregularity in relation to the relevant provisions in the agricultural sector, and has thereby sought to obtain or has obtained a financial advantage. A Commission decision on exclusion from tendering can therefore be compared with the penalty which Member States can impose on operators who commit irregularities, and which consists of exclusion from subsidies etc. for a period of between half a year and five years.

Among other things, this exclusion means that if the Commission excludes an operator from tendering, it shall comply with the principles laid down in the Regulation about the need for a prior hearing, the possibility for appeal, the principles of proportionality and equality, as well as that the penalty of exclusion shall be based on the criteria laid down, including the extent of the transactions of the operator, the amount of EC financial means involved in the irregularity, the seriousness of the irregularity etc.

There are also grounds for believing that the principle of *nulla poene sine lege* also applies to penalties imposed by EC institutions on those subject to the laws of the Member States. This view is supported by the judgement of the Court in Case 85/76[727] which concerned Regulation 17/62.[728] As previously mentioned, this Regulation gives the Commission powers to impose fines on businesses and groups of businesses. However, the nature of the offence is not described in detail in the sanction provisions, since they merely refer to other provisions in the Regulation or Treaty. This does not give the Commission wider powers to impose penalties, but means, on the contrary, that the provisions that are referred to must fulfil the criteria for the sanction provisions, as was made clear in Case 85/76,[729] in which Hoffmann-La Roche argued that the terms "dominant position" and "abuse" in Article 86 of the EC Treaty (now Article 82) were not sufficiently clear and nor calculated to form the basis on which the Commission could impose fines on the basis of the Regulation. The Court rejected this claim and stated that, while the terms were indeed general, they could not be characterised as unclear and uncertain. The Court also emphasised that the company could have consulted the Commission before

726. Laying down detailed rules for the application of Council Regulation (EC) No 1469/95 on measures to be taken with regard to certain beneficiaries of operations financed by the Guarantee Section of the EAGGF, (OJ 1996 L 102/15).
727. Hoffmann-La Roche & Co. AG v Commission of the European Communities, [1979] ECR 461.
728. First Regulation implementing Articles 85 and 86 of the Treaty, (OJ 1962 13/204).
729. Hoffmann-La Roche & Co. AG v Commission of the European Communities, [1979] ECR 461.

carrying out its illegal act, instead of complaining about the lack of legal certainty after the event. The judgment, which concerns competition law, is included here because it can presumably be read as an acknowledgement of the principle of *nulla poene sine lege*.

With their parallel form of empowerment and the comparability of sanctions, whether imposed by national authorities under Community regulations or imposed directly by the Community, as occurs under Regulation 1469/95,[730] and given the principle of *nulla poena sine lege* and the protection of those subject to the law who in any case experience the sanctions as being the same regardless of who imposes them, it must be assumed that the principles for the regulation of sanctions set out above in Section 13 will apply to the imposition of sanctions by the Community on those subject to the laws of the Member States.

14.3. Ne bis in idem

The basic principle of *ne bis in idem*, which can also be called the prohibition of double jeopardy, is that proceedings cannot be conducted twice on the same facts. The idea is that no-one should be subject to sanctions (whether administrative or criminal) for circumstances for which that person has already been accused of, regardless of whether or not such proceedings found that person liable.

In a supranational project such as the EC, both the Community and the Member States will operate as law making and law enforcing authorities in relation to their subjects, so the problem of double jeopardy will frequently appear. For example, a single set of circumstances could constitute an infringement of both Community law and national law. The question is whether such a set of circumstances can be subject to penalties under both laws independently of each other, or whether, for example, the imposition of a fine by the Commission will exclude a penalty under national law. Another example could be that the same infringement of an EC law could be penalised in parallel in two Member States. A third possibility could be that the same set of circumstances could constitute an infringement of two different EC laws and could be penalised cumulatively by a Member State under both laws, independently of each other.

The Court of Justice has developed principles to clarify the question of double jeopardy in connection with EC laws.

730. On measures to be taken with regard to certain beneficiaries of operations financed by the Guarantee Section of the EAGGF, (OJ 1995 L 145/1).

First it has established that the question is only relevant if the cases in question concern the same facts, cf. Case 7/72.[731] In this case a company was fined by a court in the USA and subsequently by the Commission. The company requested the Commission to set-off the fine paid in the USA against the Community's fine. This was rejected, whereupon the company brought a case claiming that the basic legal principle prohibiting a double penalty for the same facts had been overridden. The Court started by stating that the question of the prohibition of double punishment is only relevant if there is an identity of the factual circumstances. In the case before them the Court argued that this was not the case, since, even though the fines in question arose from the same group of agreements, and even though the judgment in the USA was partly based on the same set of circumstances as those which led to the Community penalty, it covered a wider set of circumstances and was focused on other parts of the agreement.

If the case does concern the same factual circumstances, in EC law there is only a limited prohibition against double punishment. In Case 14/68[732] the question was whether a fine imposed under purely German rules by a special German cartel tribunal prevented the Commission from imposing a fine under the competition rules for the same factual circumstances. The Court first put paid to the idea that there is an unconditional prohibition in Community law against a double penalty, since it stated: "The possibility of concurrent sanctions need not mean that the possibility of two parallel proceedings pursuing different ends is unacceptable." In other words, national law and Community law constitute two separate legal systems, and it there is no prohibition against imposing two penalties if they serve different purposes. However, the Court modified this approach slightly by adding that if two penalties are imposed, normal considerations of fairness require that in assessing the later penalty, regard shall be had to the fact that a penalty has already been imposed. That this is the legal position under the other variants where there can be a double penalty is confirmed in Case 137/85.[733] In this case an exporter of corn lost its security deposited in accordance with one EC law, and was, at the same time, required to deposit a new security in connection with another EC law, well-knowing that the second security would be lost whatever happened. The exporter claimed that this was a case of an unlawful double penalty. The Court held that the loss of the security was a non-criminal penalty, but added that the two forms of security served different purposes, so that it was unnecessary to

731. Boehringer Mannheim GmbH v Commission of the European Communities. [1972] ECR 1281.
732. Walt Wilhelm and others v Bundeskartellamt, [1969] ECR 1.
733. Maizena Gesellschaft mbH and others v Bundesanstalt für landwirtschaftliche Marktordnung (BALM), [1987] ECR 4587.

investigate further whether there was an unlawful double penalty. Without directly referring to the question of a reduction of the penalty out of consideration for fairness, the Court stated that "Since, therefore, the purposes of the two securities are completely different, the forfeiture of both of them, even if it is triggered by the same event, cannot be regarded as disproportionate if the different risks in respect of which the securities were lodged actually materialize."

Altogether it can be said that there is only a question of a double penalty if the two cases concern the same factual circumstances, and a double penalty is only prohibited if the penalties based on the same facts serve the same purpose. In the other cases where a double penalty for the same factual circumstances is acceptable, then the considerations of fairness require this to be taken into account when assessing the penalties.

Parallel with the developments in the practice of the Court, a number of acts of secondary legislation have been adopted which deal with the question of double penalties. In extension of comprehensive provisions concerning both the substance of offences and the legal procedure in connection with irregularities with subsidies for cultivated areas and animals in the agricultural sector, Article 11 of Regulation 3887/92[734] as amended by Regulation 1678/98[735] states that "The penalties laid down in this Regulation shall be without prejudice to additional penalties laid down at national level." Thus, in drafting the provisions, the Commission has been aware of the possibility of double penalties, but has nevertheless decided that both systems for penalties can be used in parallel, so that those subject to the law can suffer "additional penalties."[736]

In this case it is not a question of the Member State and the Community both imposing penalties, but of the Member States imposing penalties under two different sets of provisions, those of the Regulation and those of the national laws. All things being equal, this does not give rise to the same concerns as where the national authorities and the Community impose penalties independently of one another since in the latter case there is a greater risk of lack of coordination and a greater risk of a more onerous cumulative penalty.

734. Laying down detailed rules for applying the integrated administration and control system for certain Community aid schemes, (OJ 1992 L 391/36).

735. Amending Regulation (EEC) No 3887/92 laying down detailed rules for applying the integrated administration and control system for certain Community aid schemes, (OJ 1998 L 212/23).

736. There is a corresponding provision in Regulation 3888/92 on establishing certain transitional provisions in the beef and veal sector pending the entry into force of the integrated administration and control system for certain Community aid schemes (OJ 1992 L 391/46).

In connection with the adoption of the fisheries control Regulation 2847/93,[737] in Article 34.2 of the proposal[738] for the Regulation there was a provision that when the flag state where the vessel was registered received information about the discovery of infringements, the Member State could take such steps as it considered necessary to deprive a fisherman of the economic advantages of the infringements. This applied independently of Article 33.1 which gave the responsibility to the Member State in which the catch was landed or loaded to prosecute the infringements in question. The structure of the Regulation thus indirectly raised the question of double penalties, or at least double administrative measures, but it did not give an answer to the question. This was pointed out by the Member States in dealing with the proposal. The final text was therefore changed so that the initial responsibility was given to the Member State in which the catch was landed or loaded to prosecute the infringements in question, but with the possibility of transferring the case to the competent authorities in the Member State where the fishing vessel is registered, if this would improve the chances of penalising the infringement. This change can be seen as an expression that at the political level there is not support for double penalties.

These examples show that there has not been a consistent line in secondary legislation on the question of *ne bis in idem*. It must therefore be considered satisfactory that the question was addressed in connection with the framework Regulation 2988/95[739] which on this point is presumably directly applicable, without the need for follow-up sectoral regulation.[740]

The basic position is as stated in Article 6.1 of the Regulation, and is as follows: "Without prejudice to the Community administrative measures and penalties adopted on the basis of sectoral rules existing at the time of entry into force of this Regulation, the imposition of financial penalties such as administrative fines may be suspended by decision of the competent authority if criminal proceedings have been initiated against the person concerned in connection with the same facts." This means that for administrative penalties imposed under EC legislation adopted after 28th December 1995, the imposition of a penalty can be suspended if there are criminal proceedings based on the same facts. The reference to "the same facts" is understood as meaning the same actual circumstances. The basic principle that the prohibition against double punishment only applies when there is an identity of factual circumstances in

737. Establishing a control system applicable to the common fisheries policy, (OJ 1993 L 261/1).
738. COM/92/392 Final, Proposal for a Council Regulation (EEC) establishing a control system applicable to the common fisheries policy.
739. On the protection of the European Communities financial interests (OJ 1995 L 312/1).
740. See Section 12.1.1.

the relevant cases is thus maintained. If this is the case then, with the adoption of the Regulation, a criminal prosecution will take priority, which could cause problems for the effectiveness of EC law. However, it should be noted that there "may" and not "shall" be a suspension of the administrative proceedings, and that the decision on this depends on the administrative authority. According to its wording this provision applies both where there are criminal proceedings in one Member State and administrative proceedings in another Member State, and where both proceedings take place in the same Member State, or where the administrative proceedings are brought by the Community and the criminal proceedings by a Member State.

Article 6.2 provides that if the criminal proceedings are discontinued, the suspended administrative proceedings can be resumed. In such a case it is particularly provided that the limitation period, which is otherwise dealt with in Article 3, does not operate in relation to the administrative proceedings that are suspended: as stated in Article 6.3 "When the criminal proceedings are concluded, the suspended administrative proceedings shall be resumed, unless that is precluded by general legal principles." The general legal principles in this case are first and foremost the principles developed by the Court concerning *ne bis in idem* in EC law, as referred to above. If the administrative proceedings are resumed, "the administrative authority shall ensure that a penalty at least equivalent to that prescribed by Community rules is imposed, which may take into account any penalty imposed by the judicial authority on the same person in respect of the same facts," cf. Article 6.4. The starting point of the provision is that where there is a resumption of proceedings, full penalties shall be applied, as account "may" but not "shall" be taken of penalties imposed in the criminal proceedings.

There can be some concern about the way in which this provision about the assessment of penalties departs from the legal position developed by the Court of Justice since the Court has stated that normal considerations of fairness should apply when setting a penalty. If the provision is applied in strict keeping with its wording, it is possible to imagine situations which would be hard to reconcile with the principle of proportionality in EC law.

Finally, Article 6.5 provides that the rules in the Regulation "shall not apply to financial penalties which form an integral part of financial support systems and may be applied independently of any criminal penalties, if and in so far as they are not equivalent to such penalties." Apart from this limitation to the scope of application of the Regulation, it should be noted that according to Article 6.1 it only governs questions of double penalties when one of the cases is a criminal proceeding and the other an administrative proceeding, but not cases where there are two cases of administrative proceedings. In such cases either the provisions laid down in sectoral regulations or the principles established by the Court will apply.

The significance of Regulation 2988/95[741] can perhaps be seen in Regulation 745/96,[742] which deals, among other things, with reporting irregularities in the agricultural sector and which, in Article 6, provides that when a Member State or the Commission receives information from another Member State about irregularities committed by an economic operator, they shall decide as quickly as possible which measures shall be used in relation to the economic operator concerning the acts which the person in question has committed and which authority has the relevant powers. Even though it is not the primary purpose of the Article, it would have been simple enough in this situation to determine whether it is possible to take proceedings twice in respect of the same circumstances. However, this was omitted in accordance with Regulation 2988/95[743] so that this Regulation is decisive.

14.4. Conclusions concerning sanctions imposed by the Community on those who are subject to the laws of the Member States

There are no Treaty provisions or fundamental legal principles which allow the Community to impose sanctions directly on those who are subject to the laws of the Member States, and there is only a single act of secondary legislation, Regulation 1469/95,[744] within the scope of this thesis that contains a clear example of this.

This is thus a form of sanction which is of strictly limited significance for combating irregularities against the EC's financial interests.

It can be assumed that this will continue to be the case, given the considerable resistance to any such development on the part of the Member States.

However, should there occur any development in this area it must be assumed that the principles that have already been laid down in relation to the Community's influence on sanctions imposed by the Member States' authorities will be significant. It must be assumed that the principles for the regulation of sanctions will apply to the new circumstances.

741. On the protection of the European Communities financial interests (OJ 1995 L 312/1).
742. Laying down detailed rules for the application of Council Regulation (EC) No 1469/95 on measures to be taken with regard to certain beneficiaries of operations financed by the Guarantee Section of the EAGGF, (OJ 1996 L 102/15).
743. On the protection of the European Communities financial interests (OJ 1995 L 312/1).
744. On measures to be taken with regard to certain beneficiaries of operations financed by the Guarantee Section of the EAGGF (OJ 1995 L 145/1).

CHAPTER 15

Sanctions imposed by the Community on national authorities

This section deals with the legal status of sanctions imposed by the Community on national authorities. There are provisions for this both in the Treaty and in secondary legislation. In the case of the Treaty this particularly concerns Article 228.2 EC; this section tries to predict the future use of this Article. As for secondary legislation, below there is a review of such legislation as has been enacted, including its development, as well as consideration of why the Community has used this kind of regulation to such a limited extent.

15.1. The Treaty and the basic legal principles

It is the Member States' own view that the Community ought not have powers to impose sanctions on them.[745] This has also been the legal practice during the first many years of the Community's existence.[746] Action has been taken against Member States that have breached EC law by the Commission[747] bringing cases before the European Court, or less frequently another Member State[748] bringing a case. If such a case leads to the Court finding against the Member State, the State itself "shall be required to take the necessary measures to comply with the judgment."[749] There should be faithful compliance with the judgment if the Member State wants to avoid the risk of being found guilty of infringement of EC Treaty Article 171 (now 228 EC).

The Community has been able to, and can still, use this procedure and thus put considerable pressure on Member States, but until the beginning of the 1990's there had been no possibility of linking any sanctions to the judgments.

745. See Section 18.1.6.
746. With the exception of the European Coal and Steel Community.
747. Cf. EC Treaty Article 169 (Now Article 226 EC). On the Commission's powers to prosecute see also Article 88, Article 95.9 and Article 298 EC.
748. Cf. EC Treaty Article 170 (Now Article 227 EC).
749. EC Treaty Article 171.1 (Now Article 228.1 EC).

This was changed by the Maastricht Treaty. Article 171.2 (now Article 228.2 EC) gives authority to impose lump sum or penalty payments on Member States. However, the use of the sanction provisions in Article 228.2 requires the completion of a comprehensive procedure.

The basic assumption is that a Member State has already been judged not to have complied with the Treaty in a case in which the question of some sanction is raised. For example, it can be a judgement under Article 226 EC. The right to initiate procedures under Article 228.2 is reserved to the Commission, since it is only "If the Commission considers" that a Member State, which has been judged not to have complied with the Treaty, and has failed to take the necessary measures to comply with the judgment, as required by Article 228.1, that a case can be initiated under Article 228.2.

If these two conditions are met, then the formal phase of the procedure under Article 228.2 is opened by the Commission sending a preliminary notice to the Member State, which can then give counter-arguments to the opinion of the Commission, since it shall be given "the opportunity to submit its observations." If the Commission is still not convinced that the judgement of the Court has been faithfully complied with, or if the Member State has not followed the directions to eliminate the stated transgression, the next step is for the Commission to give a reasoned opinion. In this the Commission shall specify the points in the judgment of the Court which the Member State has failed to comply with. In other words the Commission shall put forward its accusations and encourage the Member State to adopt the necessary legal and practical measures within a given time limit. The Member States thereby has a last chance to put its point of view. If, after this, there is still a dispute, the Commission may bring the case before the Court of Justice.

In the summer of 1996 the Commission adopted a number of criteria for applying these provisions to Member States.[750] Among other things the Commission decided that at the end of a process in which a Member State does not give a reasoned statement of its position, the Commission will take the case further with a view to imposing sanctions on the Member State, unless there are special circumstances. In other words, as a general rule the Commission will exercise its discretion for the case to be laid before the Court.

According to Article 228.2, in bringing a case before the Court the Commission "shall specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers to be appropriate in the circumstances." The severity of the penalty proposed by the Commission will depend on the nature and duration of the Member State's breach of EC law as well as the necessity of ensuring that the penalty has a deterrent effect. A breach of the principle of non-discrimination will be considered as very serious,

750. Commission decision taken in Brussels on 5th June 1996.

and a disregard for the rules on freedom of movement or a breach of EC law which leads to depriving the Community of its "own resources" will be considered as serious. The Commission has indicated that it will use penalty payments rather than lump sum fines because the aim is to bring to an end the Member State's infringement of Community law. If it were up to the Commission, the Member State would be required to pay a certain amount for every day until the infringement is brought to an end. Apart from the severity and duration of the infringement, the amount of the penalty is also determined by the Member State's size and economic welfare. The Commission has thus decided upon a basic amount of 500 ECU per day, multiplied by a factor of between 1 and 20 for the seriousness of the infringement and a factor of between 1 and 3 for the duration of the infringement. These factors are applied by the Commission according to its evaluation of the case in question. This amount is thereafter multiplied by a fixed factor determined by the country's economic welfare and its voting strength in the Council. These country based factors range from 1 for Luxembourg to 26.4 for Germany.

On 4th July 2000, the EC Court of Justice handed down a judgment[751] in which a penalty was imposed under the terms of Article 228.2 for the first time. The background to this case was that Greece had already in 1992 been found by the Court[752] to have failed to comply with 2 directives by not having adopted the necessary measures for the disposal of toxic or dangerous waste without risk to people's health or damage to the environment. By the judgment in Case C-387/97 it was held, in accordance with Article 228.2, that Greece had still not adequately put in place the necessary measures to comply with the directives, and the country was required to pay penalty payments of 20,000 Euros for each day's delay in complying with the original judgment. The penalty payments were to be calculated from the day in which judgment was given in accordance with Article 228.2.

From the opinion given in the judgment it is clear that the Court of Justice accepts the principles in the guidelines given by the Commission for the size of penalties: "It should be stressed that these suggestions of the Commission cannot bind the Court. ... However, the suggestions are a useful point of reference" and further "In that light, and as the Commission has suggested, the basic criteria which must be taken into account in order to ensure that penalty payments have coercive force and Community law is applied uniformly and effectively are, in principle, the duration of the infringement, its degree of seriousness and the ability of the Member State to pay. In applying those criteria,

751. Case C-387/97, Commission of the European Communities v Hellenic Republic [2000] ECR

752. Case C-45/91, Commission of the European Communities v Hellenic Republic, [1992] ECR I-2509.

regard should be had in particular to the effects of failure to comply on private and public interests and to the urgency of getting the Member State concerned to fulfil its obligations", whereupon the Court used the criteria to arrive at the fine referred to of 20,000 Euros. This is a sum which, because of the evidence, or rather lack of evidence, was below the mathematically precise calculation of the Commission for a penalty payment of 24,600 Euros for each day's delay.

In reality, the Court decides whether to impose on the Member State the penalty proposed by the Commission, or a lesser penalty or no penalty. It is the Court, and not the Commission, which has the power to impose penalties. But, as has been shown, it is the Commission which has the right to initiate proceedings, and which has the discretion to stop proceedings before they come to the Court.

Nearly 7 years elapsed between the powers to impose penalties under Article 228.2 being introduced by the Maastricht Treaty and the first imposition of a penalty on a Member State. However, it can be assumed that in future judgments under the provisions of Article 228.2 will be handed down with greater frequency. There are currently two other cases in which the Commission has claimed that penalty payments should be imposed.[753]

15.2 Secondary legislation

As far as the Community has the authority to regulate for sanctions, which has been shown to be quite extensive, the Community also has authority to regulate for its own sanctions on Member States.

The regulation in secondary legislation for sanctions imposed by the Community on Member States can be divided in two categories. First there are sanctions which the Community can impose on Member States arising out of their administration of Community law in relation to those subject to the jurisdiction of the Member States. For example there can be sanctions because a Member State does not treat Community law sufficiently seriously, and in this connection it should be recalled that Member States do no always have the same interest in taking action against irregularities in Community financial interests as they do in their own financial interests.[754] The second category of sanctions is those which the Community imposes on Member States because of their administration of Community law in relation to the Community's institutions.

753. Case C-197/98, Commission of the European Communities v Hellenic Republic and Case C-224/99, Commission of the European Communities v France.

754. Case 68/88, Commission of the European Communities v Hellenic Republic, [1989] ECR 2965, in which Greece refused to undertake investigations of the alleged irregularities in spite of the encouragement of the Commission to do so.

Here there will typically be cases where Member States have failed to comply with a duty to give reports contained in secondary legislation. The treatment of this topic below deals with each of these categories separately.

15.2.1. Community sanctions imposed on Member States on the basis of their administration of Community law in relation to those subject to the law of the Member States

The regulation of this category of sanctions is mostly closely connected with duties imposed on Member States in secondary legislation. Regulations of this kind are relatively new in Community law and occur only sporadically, so the possibility of deriving anty general principles on this topic are still very limited.

An excellent example of a regulation of this type, as well as an illustration of the development of such regulation over time, can be found in the area of fisheries. As early as 1987, Article 11.4 of Regulation 2241/87[755] provided that if fishing were halted because the quota available to the Community had been exhausted, and a Member State had fished more than its quota, then measures could be taken which "may involve making deductions from a quota, allocation or share of the Member State which has overfished, the quantities so deducted to be allocated appropriately to the Member States whose fishing activities were halted before their quotas were fished", either in the year in which the quota has been exceeded or in the course of the following year. Such an approach is more of an administrative measure than a sanction, since what happens is that a Member State is deprived of an excess which it has wrongly received.

Since the Regulation was amended just one year later by Regulation 3483/88,[756] the issue of sanctions imposed on Member States was clear. In Regulation 3483/88,[757] Article 11c.2 contained the following provision: "If the member state of landing or transhipment is not the member state of registration and its competent authorities do not take penal or administrative action .... the landing or transhipment may be counted against the quota of the former member state". While the quantity of fish would normally relate to the quota of the Member State of registration, in this regulation it is deducted from the quota of the Member State where fish is landed or transhipped This is a true penalty which hits the Member State where the fish are landed or transhipped if it does not take proceedings against the infringement of Community law, since the

755. Regulation 2241/87, establishing certain control measures for fishing activities (OJ 1987 L 207/1).
756. Regulation 3483/88, amending Regulation 2241/87 establishing certain control measures for fishing activities (OJ 1988 L 306/2).
757. Regulation 3483/88, amending Regulation 2241/87 establishing certain control measures for fishing activities (OJ 1988 L 306/2).

fishing industry of the Member State in question will have a reduced quota of fish.

More recently these two regulations have been replaced by Regulation 2847/93[758] establishing a control system applicable to the common fisheries policy. Article 32.2 of this regulation contains provisions corresponding to those of Article 11c.2 of Regulation 3483/88,[759] for penalties imposed on Member States which do not initiate criminal or administrative procedures. There is also something new in Article 25.2 which provides that if the Commission establishes that a Member State has not undertaken the controls required by the regulation the Commission may "make proposals to the Council for the adoption of appropriate general measures. The Council shall decide by qualified majority."

The review of the three regulations shows that there has been a significant development in the scope of the Community for imposing sanctions on Member States in the area of fisheries. First there was a correction of damage occurring. This was taken further with penalties being imposed for the failure to initiate legal proceedings. And to this were added further sanctions if the Member States' failure to exercise control.

The agenda for future development is perhaps set by the Commission's proposal which wanted to go even further.

Even though the Community can be given powers to impose sanctions on Member States for their administration of Community law in relation to those subject to their jurisdiction, there are still only few examples of this. It is much more usual for the Community to penalise Member States by imposing a charge for the payment of unjustified subsidies or by withholding payments of money to a Member State if it does not undertake the correct administration of Community rules, including cases where a Member State may not have satisfactory arrangements for monitoring, controlling and evaluating the use of finances.

In these cases the regulation of sanctions is only indirectly involved. The fact that they are nevertheless considered as sanctions in the current context is to a wide extent because the Community has chosen to use charges on Member States and deposits for payments as a substitute for true sanctions. For the Member States such steps will readily be perceived as having the character of sanctions since they will themselves bear the economic burden, or at least run

758. Regulation 2847/93, establishing a control system applicable to the common fisheries policy (OJ 1993 L 261/1).

759. Regulation 3483/88, amending Regulation 2241/87 establishing certain control measures for fishing activities (OJ 1988 L 306/2).

the risk of doing so, cf. the Joined Cases 205-215/82.[760] In addition to this, the steps which apply to sanctions give the Community an important guarantee that Member States will seek to ensure that payments are made in accordance with the rules and they constitute a quick and effective sanction where this is not the case.[761] Finally, it is important that this form of control is more acceptable to the Member States with their sensitivity to the question of sovereignty,[762] since they are not true sanctions. The fact that the Community considers these steps as being entirely parallel with sanctions is underlined by the fact that in its latest implementing regulation in the area of the Structural Funds[763] the Community refers to the liability as being a question of applying "financial consequences" to the Member States.

An example of a measure of the type described is the fact that in connection with financial controls in the area of the Structural Funds[764] it has been decided that Member States have an obligation to prevent and to investigate irregularities, and that Member States shall seek "to recover any amounts lost as a result of an irregularity or negligence". This is supplemented by a provision on the liability of Member States which is worded as follows: "Except where the Member State and/or the intermediary and/or the promoter provide proof that they were not responsible for the irregularity or negligence, the Member States shall be liable in the alternative for reimbursement of any sums unduly paid".

760. Joined cases 205 to 215/82, Deutsche Milchkontor GmbH and others v Federal Republic of Germany, [1983] ECR 2633. In this case the Court of Justice established that the question of the collection of the relevant moneys from those subject to the law of the Member States is a matter for national rules.
761. The procedural but in practice important detail should be noted that in this case the Commission avoided using the procedure under Article 226. On the contrary, it is for a Member State to bring a case for annulment under Article 230, if it is of the opinion that the refusal of a refund is unjustified.
762. See Section 18.1.6.
763. Regulation 1831/94, concerning irregularities and the recovery of sums wrongly paid in connection with the financing of the Cohesion Fund and the organization of an information system in this field (OJ 1994 L 191/9)
764. The regulations reviewed below are in Article 23 of the regulation on the other Structural Funds, Regulation 2082/93, amending Regulation 4253/88 laying down provisions for implementing Regulation 2052/88 as regards coordination of the activities of the different Structural Funds between themselves and with the operations of the European Investment Bank and the other existing financial instruments (OJ 1993 L 193/20). In the regulation on the Cohesion Fund, Regulation 1164/94, establishing a Cohesion Fund (OJ 1994 L 130/1), Article 12 provides that Member States are responsible in the first instance for the financial control of projects and it lists the measures that Member States must take in this respect. A largely corresponding regulation existed previously, Regulation 4253/88, laying down provisions for implementing Regulation 2052/88 as regards coordination of the activities of the different Structural Funds between themselves and with the operations of the European Investment Bank and the other existing financial instruments (OJ 1988 L 374/1).

This regulation makes Member States responsible for repayment with a liability that can be characterised as culpability with a reversed burden of proof. However, it is not only the Member State itself, but also the intermediary or promoter that can lift the burden of proof. In the implementing regulation[765] it is provided that where a Member State considers that an amount cannot be recovered, it shall inform the Commission of the amount not recovered and give the reasons why the amount should, in its view, be borne by the Commission or by the Member State itself. On the basis of this information the Commission and the authorities of the Member State shall together decide whether the Member State shall make repayment. Thus, the decision on repayment is based on an agreement between the parties rather than being imposed by the Commission. Nevertheless, the repayment is referred to, as noted above, as having "financial consequences" for the Member States.

In the area of agriculture the EC Court has laid down that only those payments which the Member States have correctly administered can be refunded. This applies even where the Member State has made payments on the basis of a wrong interpretation made in good faith, cf. Case 11/76,[766] or even if it is merely a case of failure to fulfil a purely formal requirement, cf. Case 55/83.[767] In this context it should be noted that regulations that allow for the payment of subsidies should be interpreted narrowly, cf. the Joined Cases 146, 192 and 193/81[768] as well as Case 55/83.[769] However, within this framework, if the Community rules are correctly applied by the national authorities, then it is the Community which bears the financial consequences, unless the Member State's

765. Regulation 1681/94, concerning irregularities and the recovery of sums wrongly paid in connection with the financing of the structural policies and the organization of an information system in this field (OJ 1994 L 178/43), and Regulation 1831/94, concerning irregularities and the recovery of sums wrongly paid in connection with the financing of the Cohesion Fund and the organization of an information system in this field (OJ 1994 L 191/9).
766. Case 11/76, Government of the Kingdom of the Netherlands v Commission of the European Communities. [1979] ECR 245.
767. Case 55/83, Italian Republic v Commission of the European Communities. [1985] ECR 683.
768. Joined cases 146, 192 and 193/81, BayWa AG and others v Bundesanstalt für landwirtschaftliche Marktordnung. [1982] ECR 1503.
769. Case 55/83, Italian Republic v Commission of the European Communities. [1985] ECR 683.

authorities or institutions are responsible of irregularities or negligence.[770] It is thus as if the Member States are subject to an intensified liability.

There is a question of how clear an authority is required for the Community to take measures of the kind described, including whether the Commission alone, on the basis of its responsibility for the budget, has a right, or maybe even a duty, to halt payments provided for in the budget if a Member State does not undertake the correct administration of Community rules. This is an important consideration because the authorities of the Member States are responsible for administering about 80% of the Community budget, while the Commission has responsibility for the implementation of the budget; it is a necessary condition for the Commission to be able to fulfil its responsibilities that it should have the ability to have control over payments made.

The question is a real one since the Commission has itself said that it will withhold a proportion of payments for export subsidies and other amounts related to the export of agricultural products unless Member States fulfil their obligations under Regulation 386/90[771] to undertake controls on at least 5% of all transactions which give a right to the payment of export subsidies etc.[772]

The EC Court has indirectly given its views on the question in Case C-8/88.[773] The Commission had refused to fund, through the EAGGF, the payment of premiums to producers of sheepmeat and premiums for the maintenance of the suckler cow herds which Germany had paid out. The Commission' s refusal was based on "irregularities alleged against the German authorities" which consisted in there being a "lack of an adequate system of administrative and on-the-spot inspections and the lack of evidence that certain administrative inspections were carried out and that on-the-spot inspections were carried out in a satisfactory manner." In support of its claim for Community financing of the premiums, Germany argued that "the requirements ... laid down by the Commission represent for the Member States additional obligations which are not contained in the relevant Community rules", so that the measures for control or the lack thereof were not capable of being a valid basis for assessing Germany's application of the rules in question. Court made a preliminary decision that the

770. See Article 8.2 in Regulation 729/70, on the financing of the common agricultural policy (OJ 1970 L 94/13). The initial impression is that this regulation only applies in the area of agriculture, but in Case C-34/89, Italian Republic v Commission of the European Communities. [1990] ECR I-3603, the Court held that Article 8.2 of the regulation is a more specific expression of the general duty of the Member States to take care, as required under Article 5 of the Treaty (now Article 10 EC).

771. Regulation 386/90, on the monitoring carried out at the time of export of agricultural products receiving refunds or other amounts (OJ 1990 L 42/6).

772. Cf. Vervaele, John A E: Fraud Against the Community. 1992.

773. Case C-8/88, Federal Republic of Germany v Commission of the European Communities. [1990] ECR I-2321.

relevant Community regulations did not expressly require Member States to introduce the monitoring and control measures as argued by the Commission. But the Court referred, among other things, to Articles 8 and 9 of Regulation 729/70,[774] in accordance with which Member States are required to take all necessary measures to ensure that programmes financed through EAGGF are carried through correctly, as well as taking all suitable measures to allow for such control measures as the Commission may find necessary. Thereupon the Court of Justice concluded that "it is clear from those provisions, viewed in the light of the obligation of faithful co-operation with the Commission laid down in Article 5 (now Article 10 EC)of the Treaty, that Member States are required to set up comprehensive administrative checks and on-the-spot inspections thus guaranteeing the proper observance of the substantive and formal conditions for the grant of the premiums in question." The Court said that if such a system is inadequate or non-existent, the Commission is entitled to refuse to allow the payments in question.

By its reference to Article 10 EC and the provisions of Regulation 729/70[775] it seems that the Commission cannot refuse to finance expenses merely by reference to the Commission's budget responsibilities, but on the other hand it is clear that it is not necessary for authority for this to be found in sectoral regulations, as it can follow from the interpretation of other provisions. In particular, the Court's reference to Article 10 means that it can be assumed that regulations in secondary legislation need not be very detailed before there will be considered to be authority for the Commission to refuse to refund national payments of Community expenses.

In Case C-34/89[776] the Court thus stated that under Article 5 of the Treaty (now Article 10 EC) Member States have a duty to facilitate the fight against irregularities, including recovering wrongly paid out subsidies. In the case in question this meant that when Italy waited for between 4 to 10 years to take steps to recover overpayments of subsidies, the Commission was justified in withholding an amount corresponding to this in subsequent supports, so that Italy itself should bear the loss.

The administrative practice of the Commission also seems to be in line with this. On an inspection visit to Corsica in September 1994 the Commission found that there were serious problems in the French authorities' administration and control of the Community programmes for dairy herds. As a result of this

774. Regulation 729/70, on the financing of the common agricultural policy (OJ 1970 L 94/13).

775. Regulation 729/70, on the financing of the common agricultural policy (OJ 1970 L 94/13).

776. Case C-34/89, Italian Republic v Commission of the European Communities. [1990] ECR I-3603.

the Commission decided to suspend the payment of premiums for 1995, and subsequent accounting years and in this connection stated that the suspension would be maintained as long as the French authorities failed to introduce a system for administration and control of premiums which would meet the requirements of Article 8 of Council Regulation (EEC) 729/70.[777]

15.2.2. Community sanctions imposed on Member States on the basis of their administration of Community law in relation to the Community

There is not an obvious need for secondary legislation to regulate Community sanctions on Member States because of their administration of Community law in relation to the institutions of the Community.

On those seldom occasions when there is some provision for a sanction of this nature, it is highly specific. This is so, for example, in the area of fisheries where Regulation 2847/93[778] lays down detailed rules to the effect that Member States shall give information on the monthly catch by the 15th of every month. This information is important for the Commission's direction of fisheries, including an evaluation of whether a moratorium on fishing should be introduced because the quota has been exhausted. Because of this, inadequate or missing information from Member States can be penalised by the Commission setting a date on which the Member State's allocation shall be regarded as having been used up, with a consequent stop for fishing.

There are two reasons why true regulations for sanctions are seldom made.

First, it is considered that the legal resources of the Commission in relation to the Member States, not least by virtue of Article 228.2, are sufficient. This is confirmed, among other things, by regulations in the area of agriculture where Member States have a duty to identify and give information to the Commission on those who, on the basis of experience, may be expected to involve a risk of committing irregularities in connection with tendering, export subsidies and the sale of intervention stocks at reduced price.[779] This regulation has a provision that "where a Member State fails to fulfil its obligation ... the Commission shall, within the framework of the existing legal provisions, ensure that the identification and notification system is implemented by the Member State concerned." In reality this refers to proceedings against Member States in accordance with the Treaty.

777. Commission report; Protecting the community's financial interests – the fight against fraud – annual report 1994, COM/95/98 Final, page 51.
778. Regulation 2847/93, establishing a control system applicable to the common fisheries policy (OJ 1993 L 261/1).
779. Cf. Article 1 in Regulation 1469/95, on measures to be taken with regard to certain beneficiaries of operations financed by the Guarantee Section of the EAGGF (OJ 1995 L 145/1)

The second reason why true sanctions regulations are seldom made is because the Community has chosen to use other forms of control, for the reasons given in the foregoing section.

Just as Member States are encouraged to avoid making unjustified payments by making them liable for them, Member States have been made liable, in secondary legislation, for the transfer of the Community's own resources to the Commission. The Community's economic resources are collected by the Member States and transferred to the Commission. According to Article 17 in Regulation 1552/89,[780] Member States shall take "all requisite measures" to ensure that the moneys are made available to the Commission. Originally this obligation was followed by a provisions that Member States were exempted from paying the money to the Commission "solely if, for reasons of force majeure, these amounts have not been collected."[781] The situation was thus that the Member States were objectively liable for the payment of the amounts to the Community. Equally, the Member States were at risk of a situation comparable to an economic penalty, if they did not collect the full amount. The liability to which the Member States were thus subject was considered to be too broad, and in Article 17.2 of Regulation 1552/89[782] it was changed so that Member States are "free from the obligation to place at the disposal of the Commission the amounts corresponding to established entitlements solely if, for reasons of force majeure, these amounts have not been collected" and – a new provision – "if, after thorough assessment of all the relevant circumstances of the individual case, it appears that recovery is impossible in the long term for reasons which cannot be attributed to them." In the first instance it is the Member States themselves who take a view as to whether or not this condition is met, though this decision shall be notified to the Commission. The liability of the Member States is thus changed from being objective to being almost a liability with reversed burden of proof.

Another example of a situation where the Community has chosen not to adopt true sanctions regulations, where it might otherwise have been thought

780. Regulation 1552/89 implementing Decision 88/376/EEC, Euratom on the system of the Communities' own resources (OJ 1989 L 155/1). The provision in question replaced one with the same wording in Regulation 2891/77 implementing the Decision of 21 April 1970 on the replacement of financial contributions from Member States by the Communities' own resources (OJ 1977 L 336/1), and even earlier in Regulation 2/71 implementing the Decision of 21 April 1970 on the replacement of financial contributions from Member States by the Communities' own resources (OJ 1971 L 3/1).

781. Cf. Article 17.2 in Regulation 2891/77 implementing the Decision of 21 April 1970 on the replacement of financial contributions from Member States by the Communities' own resources (OJ 1977 L336/1).

782. Regulation 1552/89 implementing Decision 88/376/EEC, Euratom on the system of the Communities' own resources (OJ 1989 L 155/1).

suitable, is with regard to the enforcement of the Member States' ever more comprehensive duty to make reports. It is a frequent problem that Member States do not take the duty to report sufficiently seriously,[783] which is a problem the Community has chosen to solve by trying to motivate the Member States to give information rather than trying to achieve the same result through sanctions. There is a specific example of this in the area of agriculture. Article 5.2 and Article 7 of Regulation 595/91[784] provide that a Member State shall give the Commission information about wrongly made payments which it is believed it will not be possible to recover, as well as a statement on whether the amount is the liability of the Community or the Member State. Thereafter the Commission decides who shall be liable.[785] There is authority for the Member State to retain 20% of the amounts actually recovered. It is difficult to predict whether such measures will be transferred to other areas, but the regulation suggests that the Community does not see sanctions as the ideal solution even in the area of the Member States' obligation to report.

15.3. Conclusions about the sanctions imposed by the Community on national authorities

On the basis of the review made, it can be stated that true sanctions by the Community on Member States are rare. This is so in the Treaty and the basic legal principles, where Article 228.2 is the only exception and it applies to

783. See: Court of Auditors, Annual report concerning the financial year 1992 together with the institutions' replies (OJ 1993 C 309/1), in which the Court of Auditors encourages the Commission to insist on receiving the reports and information which the Commission is entitled to under secondary legislation, and to make much more use of such information. In Section 3.19 of the Court of Auditors, Annual Report concerning the financial year 1985 accompanied by the replies of the institutions (OJ 1986 C 321/1), the Court pointed out that Italy and Luxembourg refused to make statistical information on taxes available to the Commission, and in Section 6.62 of its Annual Report for 1988 (OJ 1989 C 321), it referred to the lack of will to co-operate and communicate on the question of skimmed milk powder.

784. Regulation 595/91, concerning irregularities and the recovery of sums wrongly paid in connection with the financing of the common agricultural policy and the organization of an information system in this field and repealing Regulation (EEC) No 283/72 (OJ 1991 L 67/11).

785. This decision is made under Article 8.2 of Regulation 729/70, on the financing of the common agricultural policy (OJ 1970 L 94/13), which says as follows: "In the absence of total recovery, the financial consequences of irregularities or negligence shall be borne by the Community, with the exception of the consequences of irregularities or negligence attributable to administrative authorities or other bodies of the Member States."

secondary legislation where regulations for sanctions are thin on the ground, but which do exist in the area of fisheries for example.

Instead of trying to ensure Member States' compliance with EC law by means of sanctions, the Community has chosen to adopt other means, particularly methods which do not conflict with the Member States' feelings on sovereignty. The methods chosen have primarily been the development in legal practice of the Member States' responsibility for paying compensation, and the development in secondary legislation of liability for wrongly paid subsidies and the collection of incomes due.

CHAPTER 16

Conclusions from the section on sanctions

The review of the regulation and use of sanctions in EC law has shown that the Community has only very limited powers in relation to criminal penalties. However, this is not too much of a restraint on the Community's activities in the field of sanctions. The scope which the Community needs in this respect is obtained by means of full powers in relation to administrative sanctions.

In particular there has been considerable Community regulation in relation to the national authorities' sanctions as applied to those subject to the jurisdiction of the Member States. There are provisions both in the Treaty and in the basic legal principles which have considerable influence on the question of sanctions, just as there have been comprehensive developments in secondary legislation which are clearly moving towards a body of law of a horizontal character.

In contrast to this it is noted that sanctions imposed by EC institutions on those subject to the jurisdiction of the Members States as well as on the Member States themselves are of limited significance. The needs which such regulations might satisfy are met by other regulatory methods, for example by responsibility for compensation and liability, and since account is taken of the resistance of the Member States to sanctions in this context, it can be assumed that such regulations will also be of limited importance in future.

CHAPTER 17

The effectiveness of the fight against irregularities

In evaluating the effectiveness of measures against irregularities in the EC's finances, which is the stated aim of this thesis, it is natural to start with the calculations of the extent of the irregularities since, all things being equal, there will be an inverse ratio between the extent of irregularities and the effectiveness of the measures against them. This is considered as an objective evaluation of whether measures against irregularities are effective.

It is difficult to obtain certain information about the extent of irregularities, primarily because only those irregularities that have been discovered are known about, and this is presumably only a fraction of the total.

To overcome the methodological difficulty of obtaining accurate and complete information about the extent of irregularities, it has been decided, for the purposes of this thesis, to define the effectiveness of measures against irregularities subjectively, in other words, to focus on whether the central agents believe that the fight against irregularities is satisfactory and whether it is judged that the regulation of controls and sanctions effectively resists irregularities. This is expressed in particular in the answers which the interviewees gave as to whether the extent of irregularities was a problem.

17.1. An objective evaluation of whether the fight against irregularities is effective

As stated above, the objective evaluation of the effectiveness of measures against irregularities starts from the position of the calculations of the extent of irregularities. In the following, three different methods have been used for this,

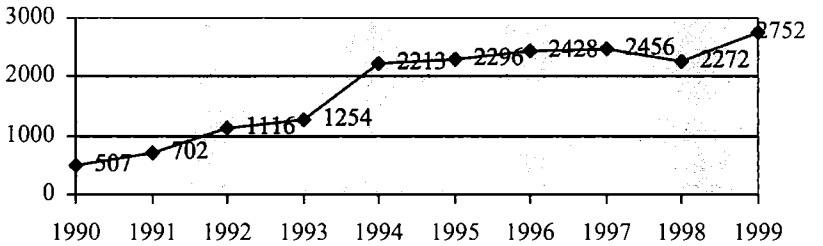
each of which has its strengths and weaknesses. The first looks at the available statistical information. The second considers the interviewees' assessment of the extent of irregularities, and the third looks at some specific examples of irregularities.

17.1.1. Statistical information about the extent of irregularities

As previously referred to, under secondary legislation the Member States have a duty to undertake comprehensive reporting to the Community on irregularities. This applies to all the major areas in relation to the EC budget: own resources, agriculture and structural funds. Since 1993 the information has been included in part in statistical form in the Commission's Annual Report on the protection of the Community's financial interests. The Annual Reports therefore contain the best available information for assessing the extent of irregularities.

Figure 1: Own recources, Irregularities, Number of cases

Source: The Commission, Protection of the financial interest, annual report 1993-1999



17.1.1.1. Own resources

Articles 6 and 17 of Regulation 1552/89[786] include obligations for Member States to report to the Commission on the extent of identified irregularities in connection with the Community's own resources. However, this obligation is limited to amounts of above 10,000 Euros. The reports of Member States for the period 1990 to 1999 are shown in the graph in Figure 1.

786. Implementing Decision 88/376/EEC, Euratom on the system of the Communities' own resources (OJ 1989 L 155/1).

According to the graph the total number of reported cases of irregularities increased from 1990 to 1997, almost doubling over the eight years. However, in reality, the number of irregularities has been fairly constant since 1994.

Figure 2: Own resources, Irregularities, Millions of Euros.

Source: The Commission, Protection of the financial interest, annual report 1993-1999

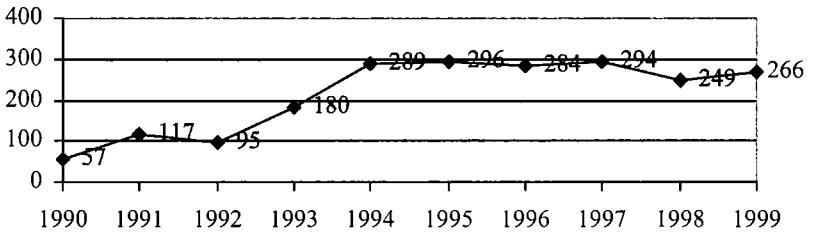


Figure 2 includes the same irregularities, but this time the amount of money involved is shown instead of the number of individual cases.

Calculated in this way, irregularities have increased constantly up to 1995, since when there has been a levelling off. In 1999 the Community was deprived of its own resources to the extent of 266 million Euros. In the same year the EC's budgeted income was 83.4 billion Euros, with an additional 0.6 billion from other sources; and in 1999 there was also about 1.5 billion Euros carried forward from the previous accounting year. Regulation 1552/89[787] should thus mean that reports should have been given on irregularities relating more than 97% of the Community's incomes. However, the position is that the EC only receives notification about irregularities which concern incomes which are described as 'traditional own resources', meaning customs, agriculture, sugar and isoglucose taxes. It follows from this that the Community does not receive notifications of irregularities on the two most important forms of revenue which are value added taxes and wealth taxes.[788] For example the Community does not

787. Implementing Decision 88/376/EEC, Euratom on the system of the Communities' own resources (OJ 1989 L 155/1).

788. In 1999 the EU had a budget of 85.557 billion Euros. On the income side 30.374 billion came from value added taxes, which constituted 1.2% of the basis for value added taxes in the Member States, 39.26 billion Euros came from the wealth tax based on the gross national income, 11.894 billion from customs duties, while agricultural, sugar and isoglucose taxes amounted to 1.921 billion Euros. Altogether these sources of income

receive information about avoidance of value added tax in Denmark, even though this alters the basis for the amount of the value added tax payable to the Community. The reason for this limited reporting is that, regardless of any contrary legal argument, the irregularities in connection with value added taxes and wealth taxes only result in minor damage to the Community's financial interests.[789] Thus, in 1999 notification was given of irregularities in relation to budgeted finances of 13.8 billion Euros. Looked at from this angle, the irregularities of 266 million are equal to about 1.9% of the corresponding income. However, the irregularities identified by the Commission in co-operation with the Member States and which, cf. Figure 8, amounted to 71 million Euros in 1999, should be added to this which brings the percentage of irregularities up to 2.4%.

17.1.1.2 Agriculture

Articles 3 and 5 of Regulation 595/91[790] include obligations on Member States to send to the Commission a report, within the two months of the end of each quarter, on all identified irregularities connected with costs paid by the European Agricultural Guidance and Guarantee Fund (EAGGF), in other words practically all the costs connected with the Community's agricultural policy.

constitute what is called the EU's 'own resources', of which the customs duties, and agricultural, sugar and isoglucose taxes are called 'traditional own resources'. See Protecting the Community's financial interests – The fight against fraud – Annual Report 1994, COM (95) 98 Final, p. 55. If the own incomes are added together they come to 83.449 billion Euro, in addition to which there is the modest (in this context) income of 0.6306 billion Euros in the budget which is classified as tax from employees and other incomes. Finally in the 1999 budget there is an income category for a surplus carried forward from the previous accounting year of 1.478 billion Euros. Thus the total budget for 1999 of 85.557 billion Euros is arrived at. As for the EU's costs, the Agricultural Policy (EAGGF Guidance Section) is responsible for the major part with 40.94 billion Euros, followed by the Structural Fund measures etc. which were budgeted to cost 30.658 billion Euros in 1999; these two together thus constitute 83.7% of the total budget. The remaining 16.3% is spent on a number of different aims such as education, culture, energy, consumer protection, research, external affairs, and the common foreign and defence policy. These various categories amount together to 9.11 billion Euros, and to this should also be added the costs of running the institutions, primarily the Commission, which amount to 4.847 billion Euros. Altogether the costs were 85.557 billion in 1999.

789. Protecting the Community's financial interests – The fight against fraud – Annual Report 1994, COM (95) 98 Final, p. 55.

790. Concerning irregularities and the recovery of sums wrongly paid in connection with the financing of the common agricultural policy and the organization of an information system in this field and repealing Regulation (EEC) No 283/72 (OJ 1991 L 67/11).

Figure 3: EAGGF Guarantee, Irregularities, Number of cases

Source: The Commission, Protection of the financial interest, annual report 1993-1999

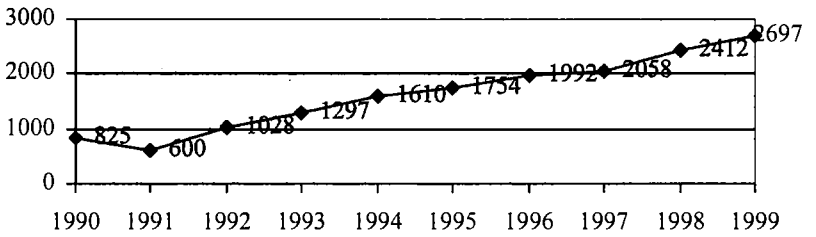


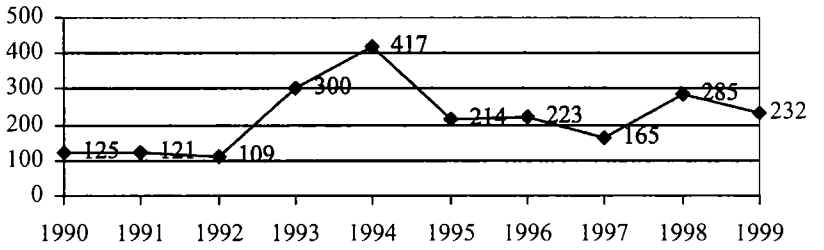
Figure 3 is compiled on the basis of reports given in accordance with Regula tion 595/91[791] and it shows that, after a fall at the start of the decade, the total of identified and reported cases of irregularities has grown steadily from 1991 to 1999, when notification was given of 2697 cases.

Figure 4 shows the picture for reported irregularities in the area of agriculture in millions of Euros.

791. Concerning irregularities and the recovery of sums wrongly paid in connection with the financing of the common agricultural policy and the organization of an information system in this field and repealing Regulation (EEC) No 283/72 (OJ 1991 L 67/11). The predecessor to this regulation, Regulation 283/72 concerning irregularities and the recovery of sums wrongly paid in connection with the financing of the common agricultural policy and the organization of an information system in this field, (OJ 1972 L 36/1), also included a duty to report. It is information given in accordance with this regulation which forms the basis for Figure 3, prior to 1991. For the period prior to that included in Figure 3, in other words from 1972 to 1989, notice was given of altogether 4491 cases of irregularity, corresponding to about 250 cases a year. However, care should be taken not to take these earlier figures at face value since the information from a number of Member States was either inadequate or totally non-existent.

Figure 4: EAGGF, Irregularities, Millions of Euros

Source: The Commission, Protection of the financial interest, annual report 1993-1999



In the period up to 1992 the amount of money involved in reported irregularities was more or less constant at a little over 100 million Euros, but then it rose to over 400 million Euros in 1994, falling back to around 200 million Euros in 1995, which is the level it has been at since.

In 1999 the amount of money involved in registered irregularities was altogether 232 million Euros. When this is compared with the budgeted expenditure for the agricultural guarantee fund in 1999 of 40.9 billion Euros, this means that the registered irregularities related to about 0.5% of the budget. To this must be added the figures for the irregularities connected with agriculture revealed by the Commission and the Member States working together, which amounted to 55 million Euros in 1999, bringing the total extent of registered irregularities up to 0.7% of the budget.

Figure 4 is the first statistical information on irregularities against the Community which shows a marked fall in the extent of the registered irregularities. If the figures for the amounts involved are to be believed, in the area of agriculture there was a steady increase in irregularities followed by a fall, which does not immediately appear plausible. These figures should be considered together with the fact that the number of registered cases of irregularity has been increasing during the whole of this period. The explanation for the fall in the reported amounts involved is presumably due, among other things, to the fact that a number of economically weighty cases are dealt with by the Member States and the Commission working together and which are thus not statistically registered here, cf. Figures 7 and 8. This is in accordance with the policy which the Commission has followed for its efforts in this area. Furthermore, it is not likely that it can be substantiated that the irregularities in agriculture have really had the growth indicated by Figures 3 and 4. The explanation for the changes

to the figures is probably rather that national controls have become more effective, and/or that the duty to report is now taken more seriously by the Member States. However, both of these arguments must remain hypotheses as long as it is impossible to substantiate them with data on the efforts of the Member States to combat irregularities.

17.1.1.3. The Structural Funds

The legal basis for the obligation to report on the Structural Funds is in Council Regulation 4253/88[792] with the implementation provisions in Commission Regulation 1681/94,[793] as far as the European Regional Development Fund (ERDF), the European Social Fund (ESF) and EAGGF Guidance Section are concerned. As for the remaining structural fund, the Cohesion Fund, this is dealt with in Council Regulation 1164/94[794] (9) with implementing provisions in Commission Regulation 1831/94.[795] The two Commission Regulations contain virtually identical requirements for reporting, based on the provisions in Regulation 595/91.[796]

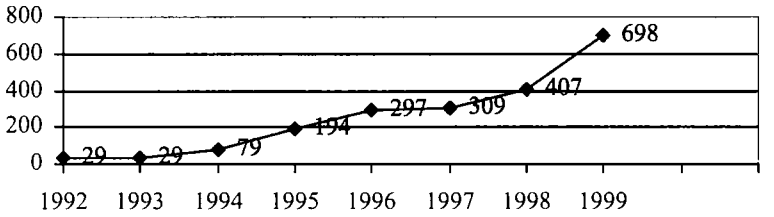
The implementing provisions for Regulation 4252/88[797] were originally laid down by the Commission in a code of conduct; however this was annulled by

792. Laying down provisions for implementing Regulation (EEC) No 2052/88 as regards coordination of the activities of the different Structural Funds between themselves and with the operations of the European Investment Bank and the other existing financial instruments, (OJ 1988 L 374/1). This regulation's content has been changed, but the regulation itself not repealed by Regulation (EEC) 2082/93 amending Regulation (EEC) 4253/88 laying down provisions for implementing Regulation (EEC) 2052/88 as regards coordination of the activities of the different Structural Funds between themselves and with the operations of the European Investment Bank and the other existing financial instruments, (OJ 1993 L 193/20).
793. Concerning irregularities and the recovery of sums wrongly paid in connection with the financing of the structural policies and the organization of an information system in this field, (OJ 1994 L 178/43).
794. Establishing a Cohesion Fund, (OJ 1994 L 130/1).
795. Concerning irregularities and the recovery of sums wrongly paid in connection with the financing of the Cohesion Fund and the organization of an information system in this field, (OJ 1994 L 191/9).
796. Concerning irregularities and the recovery of sums wrongly paid in connection with the financing of the common agricultural policy and the organization of an information system in this field and repealing Regulation (EEC) No 283/72, (OJ 1991 L 67/11).
797. Laying down provisions for implementing Regulation (EEC) No 2052/88 as regards coordination of the activities of the different Structural Funds between themselves and with the operations of the European Investment Bank and the other existing financial instruments, (OJ 1988 L 374/1).

the Court of Justice in Case C-303/90,[798] whereupon Regulation 1681/94[799] was adopted. The uncertainty surrounding the legality of the requirements meant that reports from Member States were particularly patchy until 1995.[800] The figures for 1992 and 1993 are based on the Annual Report for 1995,[801] but it must be emphasised that the actual figures for these years are not certain. Even in 1994 there is a degree of uncertainty about the figures, even though there is less uncertainty than with the preceding years. With this in mind, Figure 5 can be compiled in relation to the number of reported cases of irregularities concerning the Structural Funds.

Figure 5: Structural Funds, Irregularities, Number of cases

Source: The Commission, Protection of the financial interest, annual report 1993-1999

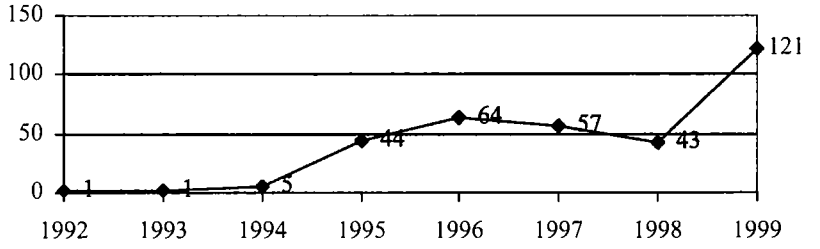


798. French Republic v Commission of the European Communities, [1991] ECR I-5315.
799. Concerning irregularities and the recovery of sums wrongly paid in connection with the financing of the structural policies and the organization of an information system in this field, (OJ 1994 L 178/43).
800. Cf. the Commission in Protecting the Community's financial interests – The fight against fraud – Annual Report 1993, page 37, where it was pointed out that not all Member States had complied with the obligation to make reports. Thus in 1993 six of the then twelve Member States had submitted no information.
801. Protecting the Community's financial interests – The fight against fraud – Annual Report 1995, COM (96) 173 Final.

Figure 6 shows the number of millions of Euros are reported in connection with irregularities committed with the Structural Funds.

Figure 6: Structural Funds, Irregularities, Mio. euro

Source: The Commission, Protection of the financial interest, annual report 1993-1999



It appears from Figures 5 and 6 that there is a steady growth in the extent of irregularities committed in connection with the Structural Funds. As argued above, it may be wrong to interpret the figures in this way, since it is more likely that the controls have been improved and/or that the reports from the Member States conform more closely to the requirements set out in the regulations.

The reason that it is unlikely that the graphs reflect a true growth in irregularities is due, among other things, to the fact that there have been no changes to the legal or factual circumstances which can justify such a conclusion. For example, the budgets for the Structural Funds have not grown at a rate which corresponds to the huge increase in irregularities expressed in Figure 6.

It may be hypothesised that as long as the extent of reported irregularities shows such wide variances from year to year as they do, the figures can probably not be interpreted as a true picture of the actual state of irregularities.

The only thing that can be said with certainty about irregularities connected with the Structural Funds is that they are not less than the number of cases shown nor the amount of money involved. Irregularities of 121 million Euros out of a total budget for the Structural Funds of 30.66 billion Euros corresponds to 0.39%. To this must be added the figures for the irregularities revealed by the Commission and the Member States working together, as shown in Figure 8 to the value of 25 million Euros, corresponding to 0.08% of the budget. Irregularities therefore amount to at least 0.48% of the budget.

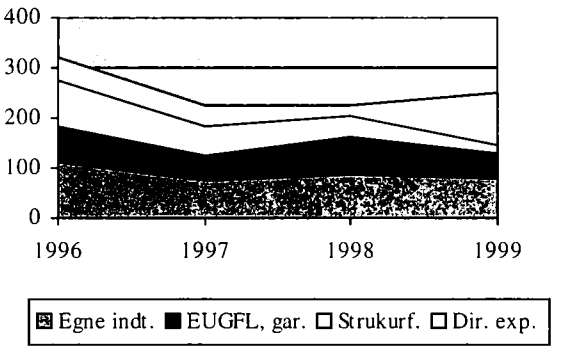
17.1.1.4. Irregularities revealed by co-operation between the Commission and the Member States

With effect from the Annual Report for 1995,[802] in reporting the extent of irregularities, the Commission has introduced a distinction between official reports of irregularities revealed by the Member States and reports of irregularities revealed by investigations carried out by the Commission working in co-operation with the Member States.

The latter group includes Commission investigations carried out in co-operation with the specialised services in the Member States. These include cases which the Commission starts on its own initiative as well as cases which the Commission deals with in co-operation with the Member States. The cases dealt with in co-operation cover, for example, those in which information is exchanged between the authorities in a Member State and the Commission, and cases where there is co-ordination within the framework of a regulation for mutual assistance, such as is found in Regulation 1468/81.[803]

The figures for irregularities revealed in this way are not entirely accurate, since the budgetary effect of the cases is only an estimate by the Commission. Likewise, the figures for 1999 do not cover all irregularities, but only certain narrow groups of actual fraud. Bearing this in mind, Figure 7 present a picture of the total number of irregularities revealed by investigations carried out by the Commission in co-operation with the authorities of the Member States.

Figure 7: Irregularities revealed by the Member States and Commission working in cooperation, Number of cases
Source: The Commission, Protection of the financial interest, annual report 1993-1999

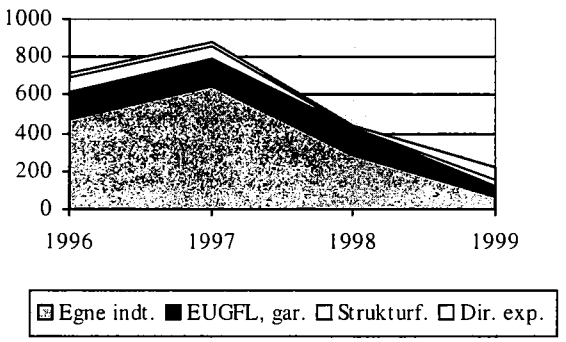


802. Protecting the Community' s financial interests – The fight against fraud – Annual Report 1995, COM (96) 173 Final.

803. On mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs or agricultural matters. (OJ 1981 L 144/1).

It appears from this figure that the total number of irregularities in this category has fallen and seems to have found a level at around 250. However, the composite total disguises a steady fall in the number of irregularities with the Structural Funds, while the number of irregularities in the area of agriculture has stayed more or less constant, and the number of irregularities associated with the Community's own resources has varied from year to year. Finally, there is a fourth category of cases relating to direct expenditure, in other words expenditure which is administered and controlled directly by the Commission and therefore, in principle, has nothing to do with the Member States. The irregularities which take place in this fourth group relate, among other things, to research, energy and the environment. In Figure 8 the same information is shown, this time with the irregularities shown according to the amount involved in millions of Euros, rather than the number of individual cases.

Figure 8: Irregularities revealed by the Member States and Commission working in cooperation, Millions of Euros
Source: The Commission, Protection of the financial interest, annual report 1993-1999



Presented in this way it can be seen that there has been a substantial fall from 1997 to 1999, with the amount nearly halved from year to year.

17.1.1.5. The total extent of irregularities

On the basis of the information reviewed above, about irregularities in connection with the Community's own resources, the EAGGF Guidance Section, the Structural Funds, and the irregularities revealed by the Commission and the Member States in co-operation, it is possible to sketch a picture of the total of

the irregularities committed against the Community's finances.[804] If the irregularities reported by the Member States are added to the irregularities identified by the Commission and the Member States working in co-operation, the result is the number of cases of irregularities shown by the graph in Figure 9.

Figure 9: The total Number of identified Irregularities against the Community, Number of cases

Source: The Commission, Protection of the financial interest, annual report 1993-1999

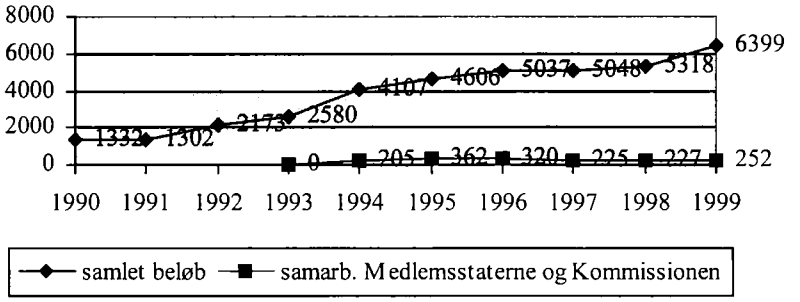


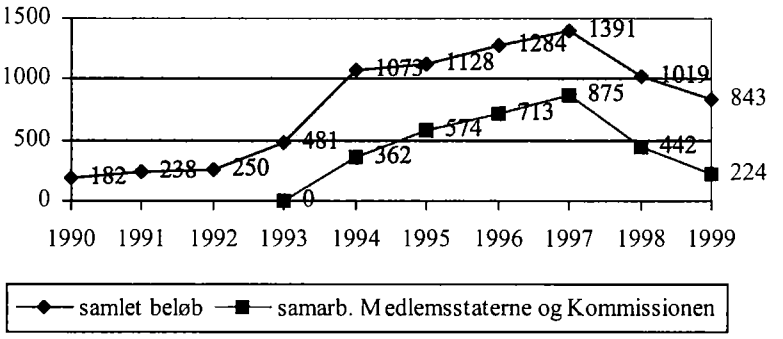
Figure 9 shows that the total number of cases of irregularities against the Community has increased more than five fold over the period, with a steadily increasing trend.

Figure 10 shows the total value in millions of Euros of the identified irregularities against the Community.

804. It should be remembered that the information covers neither the whole of the income nor the whole of the expenditure of the budget, and therefore what is shown is an incomplete picture. It should also be pointed out that the information about the total of irregularities shown in Figures 9 and 10 is based on a compilation of the information given above, so that the same faults and uncertainties also apply here.

Figure 10: The total Number of identified Irregularities against the Community, Millions of Euros

Source: The Commission, Protection of the financial interest, annual report 1993 - 1999



In Figure 10 the basic trend is the same as in Figure 9, up to 1997, after which there has been marked fall in the amount of money involved.

It is noted above that in 1999 the registered irregularities constituted 2.4% of traditional own resources, 0.48% of the Structural Funds, and 0.7% of expenditure on agriculture, EAGGF Guidance Section. If these are compounded into a single percentage, weighted according to the size of the budget for each area, the result comes to 0.98%. If the same calculation is made for the period between 1994 and 1999 the result is a level of irregularities varying between 1 and 2%.

However, the only thing that is really certain is that the total of registered plus non-registered criminality is not lower than that shown by the statistics. It is worth emphasising that the graphs presented above are based on irregularities identified and reported by the Member States as well as irregularities revealed by the Commission and the Member States working together. Since it is reasonable to assume that not all irregularities are discovered and that not all the irregularities that are discovered are in fact reported to the Commission, it must be reckoned that the actual extent of irregularities against the EC's finances is greater than the stated 0.98%.[805]

Apart from the Commission's estimate of the extent of irregularities, the Court of Auditors also makes an indirect estimate. According to Article 248.1 [EC] »The Court of Auditors shall provide the European Parliament and the

805. In a reply to a reply to a question in the European Parliament the Commission estimated the extent of irregularities to be 10% or more of the EC's budget, (OJ 1988 C 195/6).

Council with a statement of assurance as to the reliability of the accounts the legality and regularity of the underlying transactions.« This statement is often referred to by the abbreviation DAS.[806]

The DAS gives an indirect picture of the extent of irregularities in connection with the Community's finances.

The third DAS was published in the autumn of 1997[807] and dealt with the 1996 accounts. In the statement it was said, among other things, that »The most probable estimate of the rate of substantive errors concerning the transactions underlying payments is about 5,4% of the total recorded budgetary payments of the order of 77 000 Mio ECU.«

The DAS also stated that »The estimated level of error in the transactions underlying the payments for the financial year 1996 is so high that the Court declines to provide positive global assurance as to the legality and regularity of the transactions concerned«, and that »In a number of cases, estimated to represent 4,3% of Community payments, it was impossible for the Court to obtain sufficient evidence to reach a firm opinion as to the correct use of Community funds.«

Against this background it is reasonable to assume that the level of irregularities against the Community's finances lies somewhat above the stated figure of 1 to 2%.

17.1.1.5.1. Irregularities in southern Europe

One of the assertions that is often made is that the majority of irregularities take place in the southern European countries.[808] The Annual Reports for 1994, 1995 and 1996 give some basis for assessing the correctness of this assertion.

If the irregularities in connection with the Community's own resources, measured in millions of Euros, are shared out between the Members States, then

806. The name comes from the French term 'Déclaration d'Assurance'. The DAS is based on 600 samples of payments, 600 samples of receipts and 600 samples of obligations. The samples can be extrapolated with statistical certainty which will give a view of the correctness of the accounts as required by the Treaty Article. The Court of Auditors has stated that it has the target of being able to say with 95% certainty that irregularities connected with implementing the budget are less than 1%. The working methods of the Court of Auditors in connection with DAS have been developed together with a number of experts, including statisticians, and the Court of Auditors has a panel of experts to advise it on the selection of the 600 samples and carrying out investigations of them. The reason for choosing 600 samples was because, among other things, the Court of Auditors believed that this was achievable, given the resources and other tasks of the Court of Auditors.

807. OJ 1997 C 348.

808. See Section 18.1.6.

for the years 1991 to 1995[809] it appears that there is a reasonably close correlation between the size of the population of each country and its share of irregularities against the Community. As for the southern European countries, i.e. Greece, Italy, Spain and Portugal, it is noteworthy that, on the basis of the above proportions, taken together these countries constantly have a lower share of irregularities than would be expected, given their populations, and in the years 1991, 1992 and 1995 the share was markedly lower.

If the figures are considered in relation to agriculture, it is not only the focus of enquiry that changes, but the result given is radically different. Thus, the figures for 1996 show that, of the total irregularities in connection with agriculture, of 204 million Euros Italy is responsible for 60.6%, followed by Germany with 12.5%, while the third most serious offender, measured in Euros is Spain, with 8.1% of irregularities amounting to 16.5 million Euros. The rest of the Community, including the second and third most populous Member States, Great Britain and France, are each responsible for 5% or less of the irregularities. Even though individual figures varied, the countries were ranked exactly the same in 1995. There is nothing new in Italy being the country which makes the greatest number of notifications of identified irregularities connected with agriculture; it has been like that since at least 1991.[810] Assessed merely on the basis of the reported figures, the four most southerly Member States together were responsible for 79.5% of the irregularities in 1991, 71.6% in 1992, 73.8% in 1994, 55.3% in 1995 and 72.8% in 1996. If these figures are set in relation to the fact that only about one third of the population of the Community lives in the four most southerly Member States, it can be stated that a disproportionately large share of irregularities committed in connection with agriculture takes place in southern Europe.

The tendencies in agriculture are also apparent in relation to the Structural Funds. Here, Italy alone was responsible for 38% of the irregularities in 1996,[811] followed by Germany with 23.4%, Portugal with 16.9% and the UK with 11.1%. For 1995 the figures were:[812] Spain 45%, Germany 28.6%, Italy 9.9%, Portugal 5.9% and Greece 5.9%. Thus, the four most southerly Member States together were responsible for two-thirds of the irregularities reported for 1995 and 1996.

809. There are no figures available for 1994 or 1996, and the figures for 1995 only relate to the first 6 months of 1995.
810. The figures from prior to 1991 are not included, and the figures for 1994 are not known.
811. Protecting the Community's financial interests – The fight against fraud – Annual Report 1996. COM (97) 200 Final, p. 58.
812. Protecting the Community's financial interests – The fight against fraud – Annual Report 1995. COM (96) 173 Final, p. 91.

If all the figures for irregularities reported by the Member States in 1995[813] are set in relation to population size, the top 10 list of offenders is ranked as follows: Belgium, Italy, Germany, Greece, Netherlands, Spain, Denmark, Great Britain and Ireland.

Looked at from this point of view, irregularities are no greater in southern Europe than they are in central Europe. It is also notable that Belgium has proportionately the greatest number of irregularities and that Portugal does not feature in the top 10. The newest Member States, Sweden, Finland and Austria, report virtually no irregularities.

On the basis of the Annual Report for 1995,[814] the figures do not provide any basis for identifying one region or one geographical area as being the one that commits a clearly greater number of irregularities.

However, it should be remembered that this is only an analysis of the reported figures. In other words, some countries can present very tidy statistics by taking a rather relaxed approach to their duty to report – for example it seems remarkable that farmers in large agricultural countries such as Great Britain and France commits so surprisingly few irregularities. There will be a similar effect if the Member States have a relaxed approach to their duties under the relevant regulations to carry out controls; other things being equal, inadequate controls will result in fewer discovered irregularities, and this will naturally result in correspondingly lower reported figures in the statistics. The splitting up of irregularities by country and by sector – own resources, EAGGF Guidance Section, and Structural Funds – can prompt varying conclusions between areas, but the sectoral comparisons will be a fair reflection on the Member States if the figures take account of the socio-economic conditions of the Member States, including the importance of the agricultural industry and the structures of the various sectors of the Member States, rather than merely comparing population size. When apportioning irregularities between Member States, it should also be borne in mind that a number of irregularities have cross-border elements, both between Member States themselves and between Member States and third countries.

The figures should therefore be interpreted with great care. But if the information is taken at face value there are virtually no irregularities in southern

813. Protecting the Community's financial interests – The fight against fraud – Annual Report 1995, COM (96) 173 Final, p. 91. The information on own resources is only shown by Member State for the first half of 1995. This calculation is not made for 1996 on the basis of Protecting the Community's financial interests – The fight against fraud – Annual Report 1996, COM (97) 200 Final, because this report does not contain any report by Member State on irregularities with own resources.

814. Protecting the Community's financial interests – The fight against fraud – Annual Report 1995, COM (96) 173 Final.

Europe, though there is some tendency towards them as far as agriculture and the Structural Funds are concerned.

17.1.1.6. Sources of error

In the preceding section on the statistical information about the extent of irregularities, it has frequently been necessary to warn against drawing too general and confident conclusions on the basis of the figures available. This section draws attention to a number of factors which emphasise the need for such warnings.

First, it should be emphasised that, rather than reflecting any increase in the number of irregularities, the figures may be the result of the better reporting of information by the Member States. In several areas the duty to report has been intensified in recent years which makes this a likely outcome.

Second, it is not possible to see from the figures whether increases are the result of more effective activity in combating irregularities or whether there has been an increase in the real number and extent of irregularities.[815]

Third, it should be remembered that the figures do not cover all the Community budget areas; especially on the revenue side considerable sums are excluded, and irregularities which are internal to the Community's institutions are not included.

Fourth, it should be pointed out that disparities can be seen when comparing the different Annual Reports of the Commission. For example, the Annual Report for 1994 reports 104 cases of irregularities in connection with the Structural Funds, while the 1995 report gave the figure of 79 cases for the same item. The explanation for this can be that the statistics for the current year are partially based on forecasts, or that not all the Member States have been able to report for the whole period but only, for example, for the first three quarters. In order to avoid random differences, in cases where there are disparities, the figures given here give preference to later figures.

Fifth, it should be remembered that the figures for the extent of irregularities revealed by co-operation between the Commission and the Member States are based on the budgetary effect estimated by the Commission.

Finally, and most importantly, all the figures relate to identified irregularities. For good reason, irregularities which have not been discovered are not included.

17.1.2. Interviews about the extent of irregularities

In the interview research all interviewees were asked for their assessment of the extent of irregularities as a percentage of the total budget. All interviewees expressed uncertainty with statements such as, »Haven't a clue; I've seen all

815. This is stated in the Commission report: Protection of the Community's financial interests, Synthesis document of 13th November 1995.

kinds of figures«, »That's a question I can't answer« or »I've no idea about that.« The interviewed member of the European Parliament gave possibly the most thought provoking answer: »If I knew that there wouldn't be any irregularities, because then I would also know where they were. By definition, the best irregularities are those no-one knows anything about. I'm always very sceptical about people who say: It's 10%. If they know it's 10% why the blazes haven't they caught them?«

Once they had made their reservations about the uncertainty of the figures, about half of those interviewed gave an answer varying from under 1% to around 20% of the budget disappearing in irregularities. Most of the answers were answers such as »Between 1% and 4%« or »Between 10% and 15%.«

Among those who put a percentage figure on the extent of the cost of irregularities there were some who based their estimates on information from the Commission or the Court of Auditors, even though they simultaneously made some criticism of them. For example, the representative from the central administration of one of the Member States said: »Of course there are figures, but you have to be very careful about interpreting them. ... Sometimes there can be a missing signature or some such. This doesn't mean that someone is misusing Community finances, but the true irregularities are more important. The figures don't say a thing«, or »If you take the Commission's latest report or the most recent annual report of the Court of Auditors, you'll find figures there that are just ridiculous, They are without scientific basis, and are merely the result of extrapolation.« Criticisms were also made of the Commission's reports on the extent of irregularities which reflected on the Member States themselves. Thus, the representative from one Member State said: »We believe that maybe the Member States find out about irregularities which they don't report, even though they have had a duty to do so since 1994, because if you report irregularities this makes people talk more about your own irregularities.«

Furthermore it should not be forgotten that the interviewees' assessment of the extent of irregularities can be coloured by their political attitude to the Community; as one member of a national parliament said: »If I were a Eurosceptic I could say that half of the budget just vanishes. If I were a Europhile, which I am, I could downplay the amount.«

In conclusion it must be said that the interviews do not give any basis at all for a quantitative evaluation of the extent of irregularities which would raise it above the level of pure guesswork. However, it can be noted that the guesses of the interviewees about the extent of irregularities clearly suggested that it is higher than the stated 1 to 2% of the budget. This is in accord with the conclusion to the statistical analysis given above.

17.1.3. Examples of irregularities

In connection with the research into irregularities, there has been a more detailed examination of some individual transactions. The advantage of using information on this is that it gives a truthful and precise picture of the irregularities concerned and a direct indication of whether measures against irregularities are effective. The disadvantage is that these concern specific cases, so it is only possible to draw very limited conclusions about the general extent of irregularities and the effectiveness of measures against them. There follows a review of a number of examples of irregularities against Community finances, in three key areas: own resources, agriculture and the Structural Funds. The aim is to help gain an understanding of the nature and characteristics of irregularities for use in evaluating the extent of irregularities and the effectiveness of the measures against them.

17.1.3.1. Own resources

A typical irregularity in relation to the Community's own resources is the giving of wrong information about goods with a view to paying a lower duty on imports from third countries. It can be the composition of the goods that is given incorrectly, or the wrong designation given to them.

In particular there are obvious opportunities for irregularities when there are preferential arrangements for certain goods which are given favourable treatment when exported or imported, because of their place of origin, production method, content or for some other reason.[816] The most widespread infringements consist of giving a false designation of origin for goods imported to the Community, as well as the preparation of the wrong trading documents and/or false certificates of origin, or obtaining such papers from national authorities on the basis of false declarations.

One case which can well illustrate this problem concerned tinned tuna fish imported from Costa Rica, for which there was a preferential arrangement for duty free import. The Commission's investigations showed that the fishing fleet of Costa Rica did not have the capacity to catch the volume of fish that was imported to the Community ostensibly with Costa Rica as the country of origin. An inspection visit was made by representatives of UCLAF and the Member States concerned, and it was revealed that the tuna fish that was exported from Costa Rica had been fished by vessels of other nationalities and was therefore

816. Both the Court of Auditors and the Commission have reported that the preferential arrangements for developing countries and other countries receiving benefits are especially liable to fraud and irregularities, cf. the Court of Auditors 'Annual report concerning the financial year 1994 together with the institutions' replies (OJ 1995 C 303/1) and the Commission: Protecting the Communities' financial interests and the fight against fraud – Annual report 1998, COM (99) 590 Final.

not entitled to preferential arrangements. The Costa Rican authorities acknowledged that a number of certificates that had been issued with a view to duty-free import were invalid. The missing import duty, amounting to 7 million Euros was collected from importers within the Community.[817]

Another case concerned Chinese textiles. 18.5 million T-shirts were imported to the EU with their declared place of origin as the Maldive Islands. However, controls undertaken in the Community confirmed that the T-shirts in question were originally sent from China. The false declaration that the goods came from the Maldives had a double effect. On the one hand it enabled a preferential customs duty to be obtained, and on the other hand it enabled the evasion of the EU import quotas for textiles from China.[818]

The protection of the Community's budget in connection with imports from third countries, where there is a question of the use of preferential arrangements, depends on whether such arrangements are faithfully administered by the third countries concerned, as well as their willingness to co-operate administratively, as required by their agreements with the Community.[819]

In recent years the focus of interest on irregularities against the EC's own resources has largely been on arrangements for the transport of dutiable goods. Frequently, when goods are imported into the Community customs duties and/or taxes must be paid. The customs clearance takes place when the goods reach their destination. However, the procedure to ensure that the amount due is in fact paid starts at the customs office which gives access to the Community. Here the goods are presented and the documentation endorsed. A copy of the despatch documents is kept at the customs office for later control of whether the transaction is correctly carried out. The goods and the accompanying despatch documents can thereafter be transported within the Community, as long as both are presented to the customs office at the destination before a given deadline. The customs office at the destination undertakes its control and sends a copy of the despatch documents to the customs office at the point of entry, whereupon the duty and taxes shall be paid and the goods can be traded within the Community. The procedure described is what happens when everything proceeds as it should. However the system is vulnerable to irregularities, either of the very simple kind, where the goods never arrive at the destination customs office, or the slightly more sophisticated, where the despatch documents, which certify that the goods have been dealt with at the destination customs office, are falsi-

817. See Protecting the Community' s financial interests – The fight against fraud – Annual Report 1996, COM (97) 200 Final.
818. See Protecting the Community's financial interests – The fight against fraud – Annual Report 1998, COM (99) 590 Final.
819. See Protecting the Community's financial interests – The fight against fraud – Annual Report 1993, p.33.

fied. In both cases the result is that the goods are traded within the Community without customs duties or other taxes being paid.

Naturally, this form of irregularity is most profitable in relation to goods which are subject to heavy duties, in other words, certain agricultural products and cigarettes. Investigations in Denmark, Portugal and Spain, co-ordinated by the Commission,[820] have shown that a considerable quantity of cigarettes was being diverted under transport from Denmark to Portugal. The despatch documentation was completed by means of false stamps, which pretended to show that the goods had been cleared by the Portuguese customs.[821] In 1994 there was another, similar case in which it was found that about 10 million cigarettes had been sent from Hungary to the Community with false documents which meant the loss of considerable sums of customs duties, tobacco taxes and VAT.[822]

In the Commission's Annual Report for 1996[823] it was said that, according to information which the Commission had, a number of criminal organisations were behind a large number of fraudulent transactions involving cigarettes, which predominantly enter the Community physically via ports in northern Europe (though also over land borders with central and eastern Europe and Switzerland), and which are marketed in southern Europe. These criminal networks have impressive organisational skills and considerable financial and logistical capacity; they also have organisational structures reaching out over several national territories, both inside and outside the Community.

The irregularities referred to above concern the Community's traditional own resources. The EC's largest sources of income, a tax calculated on the basis for VAT and a wealth tax based on the gross national income, are not, by their nature, similar targets for criminal activity. The wealth tax only involves the Member States and the Community, and there are no known examples of irregularities in connection with this. As for value added tax, it is obvious that any measure that reduces the national basis for VAT, for example moonlighting, will affect the Community's income, but the effect is indirect, and all things being equal, it can be assumed that the economic interests of the Member States in preventing problems, will ensure the effectiveness of their counter measures.

The experience of collecting information on irregularities has shown that there are organisations, companies and individuals, often based outside the Community, which can obtain both false and genuine certificates of origin,

820. The task force for combating cigarette smuggling was set up in 1994.

821. Protecting the Community's financial interests – The fight against fraud – Annual Report 1995, COM (96) 173 Final, p. 60.

822. Protecting the Community's financial interests – The fight against fraud – Annual Report 1994, COM (95) 98 Final, p. 58. The case in question concerned TIR carnets.

823. Protecting the Community's financial interests – The fight against fraud – Annual Report 1996 COM (97) 200 Final.

stamps etc., with the help of contacts in the various Member States, and in this way they are able to trade in goods without having to pay the customs duties or taxes which are due. There are the same consequences when certificates of origin come from non-Member States as is the case with certificates relating to preferential arrangements. In both circumstances it is an advantage for the criminal that the goods can be marketed within the EC through legal distribution channels without running a further risk of loss of value due to the goods being sold illegally.[824] The examples looked at above give reason to believe that in certain areas the irregularities against the Community's incomes are extensive, and that the fight against them is made more difficult by the fact that these irregularities have cross-border elements, so that to combating them requires co-operation between national authorities both inside and outside the Community.

17.1.3.2. Agriculture

There are many examples of irregularities connected with agriculture.

The so-called 'Italian beef case' is an almost legendary example of an irregularity against the EC's finances. The facts of the case were that cattle were imported to Italy under an arrangement for inward processing of live cattle from eastern Europe. The cattle should have been processed and sold as quality meat to Malta, but the meat was instead sold on the domestic Italian market, and containers with abattoir waste and low quality meat were sent to Malta. After a period in storage in Malta, the meat, which was formally described as quality meat, was re-exported to the Community. From here it should ostensibly have been exported to Croatia, but it was diverted and sold as quality meat, with export refunds, to various developing countries, primarily Gabon. To obtain the export refunds it was necessary for the Gabonese authorities to declare that there was indeed a shipment of beef. However, the authorities on the spot gave a precise description of the meat, so that the exporter had the compromising document replaced with local import certificates in which the meat was merely described as 'frozen beef'.[825]

There are several reasons for drawing attention to this particular case. First, the clearing up of the case required co-operation not only between the Commission and the authorities in Italy, but also co-operation and inspection visits in

824. Protecting the Community's financial interests – The fight against fraud – Annual Report 1995, COM (96) 173 Final, p. 49.

825. The facts of the case are reconstructed from the Commission's Annual Reports Protecting the Community's financial interests – The fight against fraud – Annual Report 1993, pp. 26-27, Protecting the Community's financial interests – The fight against fraud – Annual Report 1994, pp 48-49, Protecting the Community's financial interests – The fight against fraud – Annual Report 1995, pp. 53-54, as well as a report on the case by Per Brix Knudsen at a conference on fraud held in Copenhagen on 21st April 1995.

other countries such as Gabon, Croatia and Malta. The case illustrates that in order to combat cross-border irregularities it is necessary to have effective co-operation not only within the Community, but also with third countries. The case is also given as an example because it is believed to be the biggest single (solved) case of irregularities against the EC's finances. It has been calculated that the case involved the non-payment of taxes to the value of 18.5 million Euros and the payment of unentitled export refunds to the value of 24 million Euros. The total money involved amounted to 42.5 million Euros. 119 people were charged with organised criminality in connection with this case, for embezzlement of EC finances, smuggling, tax evasion, forgery and corruption.

Another, though less sophisticated, example of irregularity concerned the ostensible export of cheese, meat and other agricultural products from the Community to Jordan, Bulgaria and the Lebanon. In some cases export refunds were sought on the basis that the goods had been transferred to be consumed in third countries. In reality such claims were false since, after arriving in the third countries, the goods were sent back to the EC and sold in Greece. Behind this swindle there were a number of businesses in Denmark, Germany, Cyprus and Greece, which frequently changed name and constantly used new channels of supply and differing transport methods, but where the consistent aim was to obtain refunds by pretending to make exports. This system cost the Community something in the order of 5 million Euros before it was stopped.[826]

There are also examples of irregularities which only involved cross-border traffic within the Community's area. Thus, in 1997 in the Netherlands there was a surplus of about 200,000 tons of potatoes intended for starch. The potatoes could not be sold for processing since the national quota for starch had already been exhausted. At the beginning of 1998 UCLAF (as it then was) received information that the potatoes had apparently disappeared from the Dutch market. Investigations undertaken by UCLAF and the competent German authorities showed that large quantities of potatoes had been sent to Germany, where they had been delivered to German companies and turned into starch, using Community subsidies.[827]

What all the above cases have in common is that they all involve some cross-border element. But there also many agricultural irregularities which take place purely internally within a Member State. For example, in 1996 the Greek authorities found that a business which produced 5 litre containers for olive oil had written out a large number of false invoices to purchasers. Invoices for the purchase of containers together with invoices for the purchase of oil are two

826. Protecting the Community's financial interests – The fight against fraud – Annual Report 1995, COM (96) 173 Final, p. 51.
827. Protecting the Community's financial interests – The fight against fraud – Annual Report 1998, COM (99) 590 Final.

important sources of evidence for paying out production subsidies. The company had been paid for producing invoices for 10.5 million non-existent containers for the period 1992 to 1994, which gave the pretended purchaser the opportunity to obtain around 21 million Euros in subsidies for oil which had never been packaged.[828]

Also in the area of agriculture these examples give reason to believe that irregularities exist to a considerable extent, and that at the very least the opportunities for them exist. This applies both to purely internal transactions, as with supports for various forms of production, and to cases with a cross-border element.

17.1.3.3 The Structural Funds

About half of the irregularities connected with the Structural Funds consist of payments being made either on the basis of false documentation or totally without documentation. The next largest category of irregularities is where either there is a failure to comply with laws or conditions in agreements, or the proposed activities are either carried out only partially, wrongly or not at all.[829]

In 1995 the Commission undertook an inspection visit to Portugal in connection with some vocational education measures supported by the European Social Fund. This revealed that there had been overcharging on invoices so that the Fund had paid for costs which it should not have paid for. With the same Structural Fund it was discovered that a British business on the one hand lacked documentation for expenses paid and on the other hand had made double payment for some measures. As for the European Regional Development Fund, the French national authorities discovered an over-invoicing of 5 million Euros in connection with the manufacture of equipment for promoting technological innovation. Among other things, the investigation showed that the locally elected representatives had received an amount of between one half and one million Euros for manipulating the public offer.[830]

828. The example is taken from the European Parliament Committee on Budgetary Control's Report on the increased fight against fraud directed against the EC budget, PE 111.304/DEF. Another example of an irregularity without a cross-border element from the same report is that in 1979 the German state auditor reckoned that irregularities in connection with premiums for the slaughter of cattle in Lower Saxony, Schleswig-Holstein and Bavaria were up to 80%

829. Protecting the Community' s financial interests – The fight against fraud – Annual Report 1996 COM (97) 200 Final

830. All three examples are from Protecting the Community's financial interests – The fight against fraud – Annual Report 1995, COM (96) 173 Final, see p. 75 et seq. For other examples see Protecting the Community's financial interests – The fight against fraud – Annual Report 1996 COM (97) 200 Final.

The registration and analysis of irregularities connected with the Structural Funds seem to indicate that these differ from irregularities connected with the EAGGF Guidance Section and the EC's own resources in that they seldom have a cross-border element so that there is less of a need for cross-border co-operation or co-operation with the Commission. In addition to this the Community usually only participates in the financing of structural measures without taking on the whole of the expenses, which means that the central, regional or local authorities of the Member State are responsible for the rest of the financing and have a significant interest of their own in there being an effective control system and effective measures against irregularities.

17.1.4 Conclusions as to the extent of irregularities

On the basis of the available statistics it has been substantiated that it is probable that irregularities amount to at least 1 to 2% of the EC's budget and that there are reasons to believe that the percentage is in fact even higher. This view is supported both by the statistics and by the cases of irregularities reviewed above, which in various ways indicate that there are what may be called 'crime friendly' conditions such as the involvement of considerable sums of money, the limited risk of discovery, the lack of effective prosecution, and so on.

However, there are considerable problems in making an objectively correct evaluation of the extent of irregularities. It is even harder to evaluate their development. Therefore it is impossible to assess the effectiveness of the measures to combat irregularities on the basis of the criterion that there should be an inverse ratio between the extent of irregularities and the effectiveness of the measures against them.

17.2. Subjective evaluation of the effectiveness of measures to combat irregularities

Since there are considerable problems in establishing the extent of irregularities objectively and thus to evaluate the effectiveness of measures to combat them, an attempt is made here to define the effectiveness of measures subjectively. The essential criterion for seeing whether measures to combat irregularities can be considered as effective is defined as the attitude of the central agents to the question.

The interview research contained a question about whether irregularities were perceived to be a problem, as well as the interviewees' reasons for their answers to this. The answers to this question indicated whether the measures to combat irregularities were considered to be satisfactory and effective.

Of all those interviewed, there were only three who did not unreservedly believe that the extent of irregularities was a problem.

One answered that »irregularities are always a problem,« but went on to say that in his opinion »irregularities against the Community's finances are not nearly so great as they are sometimes made out to be.« The second answered in line with this: »they are definitely a problem but not nearly so great a one as the media would have people believe« and »it is a problem, but it is not an enormous problem. ... I don't look on it as being a serious problem.« Both these responses were given by representatives from Community institutions, and it is natural to assume that their answers are influenced by considerations of not reflecting badly on the Community. The third interview that did not unreservedly declare the extent of irregularities to be a problem was undertaken in a Member State, and the answer to the question was that »irregularities against the EC's finances are just like irregularities against any other public finances ... It is something that is culturally determined.«

Apart from these three interviews the replies are unanimous in believing that irregularities are unquestionably a problem. This also applies to those interviewed who, cf. above, are not able to assess the extent of the irregularities. For example when it was asked: »Even though you can't put a figure on how much disappears in irregularities, do you nevertheless say that it is a problem?« the answer was »Yes, I would certainly say that.« Or »Even if you cannot or will not give a specific percentage, are you sure that it is a serious problem?« to which the answer was »Yes.«

It is also worth noting that there was a difference of emphasis as to whether there was a problem, depending on whether, in answer to the previous question, the interviewee had estimated the extent of irregularities as 1% or as 20%.

The reasons why the interviewees believed that the extent of irregularities should be regarded as a problem were concentrated round three factors: that the money was not used for the purpose intended, that it is the taxpayers' money that is misused, and that popular support for the Community suffers because of irregularities.

On the basis of the interviews there is no doubt that irregularities are seen as a problem and that the measures to combat them are not regarded as sufficiently effective.

17.3. Conclusion

In this section it has been established that it is difficult to find an objectively quantifiable measure of the effectiveness of measures to combat irregularities. The obvious measure of the inverse ratio between the extent of irregularities and the effectiveness of the measures against them can only be used with difficulty because it is impossible to obtain sufficiently certain information on the extent of irregularities, even though there are reasons for believing that the

extent of irregularities is somewhat more than the two percent of the budget which can be established with reasonable certainty. Because of this problem, the alternative measure is used of assessing the central agents, views on the effectiveness of measures to combat irregularities. When this subjective measure is used, there is an unmistakable conclusion that the measures are not sufficiently effective.

CHAPTER 18

Determining factors for controls and sanctions and the combating of irregularities

In this section there is a description of the significance of the central agents and structures for establishing and applying the EC's regulations for controls and sanctions and the fight against irregularities in the Community's finances. The aim is thus to describe the socio-legal processes that surround the Community's controls and sanctions.

18.1 The agents as influencing factors

The aim of this particular section is to establish a picture of the significance of the agents for the socio-legal processes surrounding controls and sanctions and the combating of irregularities against the Community's finances.

In order to do this, first, there is a review of the role of each agent in the creation and application of regulations in connection with the fight against irregularities, i.e. the regulation of controls and sanctions. Next, there is a description of the attitude of the agents to controls and sanctions. Finally, the previously established analytical approach is used to describe the manifest functions, manifest dysfunctions, latent functions and latent dysfunctions of the agents through the measures combating irregularities and controls and sanctions.

18.1.1. The European Commission

The Commission is the central agent both in the making of rules and in their application in connection with combating irregularities against the EC's finances and the socio-legal processes which surround controls and sanctions. A representative from the parliament of one of the Member States expressed it like this: "Since the Commission both has the exclusive right to put forward legislation and carries out controls, the Commission is naturally active. It is altogether the most active institution."

This quotation precisely identifies what it is that gives the Commission a central role in the making of rules; the Commission has a virtual monopoly in the making of legislative proposals in the EC system.[831] The Commission's formal influence of the shaping of regulations for combating irregularities has been further strengthened in recent years. In 1990 the rules for the Community budget were revised so that in Article 3 of Regulation 610/90[832] a provision was included so that all proposals and all notifications which the Commission puts before the Council which can have budgetary consequences shall have a financial overview and "where appropriate, the Commission shall record in the financial statement any information regarding fraud prevention measures in the sector concerned." Among other things this provision has meant that since 1990, in preparing legislative proposals for agriculture and fisheries, the relevant branch of the Commission has sought to analyse the possibility for committing irregularities with a view to preventing them through the introduction of systematic measures for controls and sanctions. Furthermore, since 1992 a counter-fraud section has been included in all financial statements which accompany all legislative proposals which have budgetary consequences. In the internal guidelines on this section it is required that there shall be a statement of the control measures which the relevant branch plans to introduce.[833] This ensures that the question of controls and sanctions and measures combating irregularities are brought to the fore at an early stage in the legislative process, and that the Commission is alert to the issue.

But the Commission's influence on the legislative process does not end with putting forward proposals; the Commission takes part in the processing of legislative proposals both in the Council and in the European Parliament.

The Jacques Santer Commission adopted a plan of action which aimed to improve the Community's use of financial resources in three steps.[834] The first step was the improvement of the existing administrative and judicial framework. The next step concerned the Commission's internal organisation with changes to the financial regulations and changing the emphasis from prior control to subsequent control. Finally it was proposed to give a new vitality to the relations between the Commission and the Member States so that the use, control and auditing of Community finances in Member States should be improved, and their results evaluated.

831. The capacity of the Council and the European Parliament to request the Commission to submit proposals, under Articles 192 and 208 does not alter the fundamental position.
832. Regulation amending the Financial Regulation of 21 December 1977 applicable to the general budget of the European Communities (OJ 1990 L 70/1).
833. Annual Report from the Commission on the fight against fraud – 1992 Report and Action Programme for 1993 COM (93) 141 Final, p. 36.
834. Sound Financial Management, SEC (95) 477.

While the first of theses steps, and to some extent the second, is directed at the legislative process, the third concerns the application of rules. The point reflects the fact that in recent years the Commission has been increasingly aware that the development of co-operation with the Member States is necessary for combating irregularities. Even though the Commission is responsible for implementing the Community's budget,[835] the influence of the institutions on the final destination of by far the greatest part of the budget is strictly limited, since this is a matter for the Member States.[836] These circumstances make it very difficult for the Commission to establish an effective system of control. The Commission could not itself carry out even the most superficial control, even if it were given the authority to do so. This acknowledgement has led to the Commission frequently referring to a 'partnership' between it and the Member States. This co-operation is carried on both bilaterally, through contacts and meetings with the competent authorities in the Member States, as well as multilaterally, where several Member States are involved together.

In both of these relations there are both formal and informal contacts.[837] One of the interviewees from the central administration of a Member State gave an example of such bilateral relations: "It is my impression at [the Commission] wants to co-operate. Last week we prepared a kind of agreement, a 'gentlemen's agreement', that we should work together; it didn't contain anything about who should give instructions or that we should receive instructions from the Commission." The interviewed representative from another central administration said: "We made an agreement with DG XX to organise and co-ordinate our common problems with controls."

In order to get an overview of the measures taken against irregularities, the EC has set up the Advisory Committee for Coordination of Fraud Prevention (CoCoLaf).[838] The Commission has the chairmanship of the committee, which otherwise consists of delegations from the Member States. Co-operation between the Commission and the Member States includes seminars, conferences and exchanges of officials. Also, each year the Commission presents a report on 'Protecting the Community' s financial interests – the fight against fraud' with an accompanying plan of action for the following year. Both in this and in practically all its reports the Commission emphasises the need for effective co-operation between it and the authorities in the Member States. In 2000 a new

835. Article 274 EC.

836. An acknowledgement of this is revealed in Article 274 EC, to which the Amsterdam Treaty added the obligation that "Member States shall cooperate with the Commission to ensure that the appropriations are used in accordance with the principles of sound financial management."

837. Protecting the Community' s financial interests – the fight against fraud – Annual Report 1995, COM (96) 173 Final.

838. CoCoLaf was set up by a Commission Decision of 23rd February 1994.

strategy was adopted for fighting fraud,[839] in which the keystone is the partnership between the Community and the Member States. It would be wrong to say that combating irregularities against the Community's finances is centralised in the Commission, but it can reasonably be said that it is co-ordinated there.[840]

For many years the Commission's internal organisation of the fight against irregularities was divided between a number of sector specific Directorates General. But in 1988, on the proposal of the European Parliament, the Council and the Commission, UCLAF (The Unit for the Coordination of Fraud Prevention) was set up.[841] The aim was to promote the Commission's efforts to prevent and counter the clearly increasing number of irregularities.[842]

UCLAF was given the role of the co-ordinator, planner and initiator of the Community's efforts against irregularities, and to a large extent it was expected to play a leading role.

In 1999 the Community re-organised its measures for combating irregularities,[843] and since 1st June 1999 UCLAF has been replaced by OLAF (the European Anti-fraud Office), and at the same time a new legal basis was adopted[844] leading to an expansion and strengthening of the role of OLAF compared to that of UCLAF.

839. Communication from the Commission – Protection of the Communities' financial interests – The fight against fraud – For an overall strategic approach, COM (2000) 358 Final.
840. In support of this see The EC Budget: Ten Per Cent Fraud? A Policy Analysis Approach, by Dick Ruimschotel, Journal of Common Market Studies, Volume 32. No. 3, September 1994, p. 334.
841. Unité de Coordination de la Lutte Anti-Fraude (UCLAF) – The Unit for the Coordination of Fraud Prevention.
842. In the EC organisation UCLAF was placed within the Secretariat General of the Commission, reporting directly to the Commission's President. In the spring of 1993, in the Annual Report from the Commission on the fight against fraud – 1992 Report and Action Programme for 1993 COM (93) 141 Final, the Commission gave a more detailed description of the aims of UCLAF, cf. also the Court of Auditor's Special report No 7/93 concerning controls of irregularities and fraud in the agricultural area (implementation of Council Regulation (EEC) No 4045/89 and Council Regulation (EEC) No 595/91 accompanied by the replies of the Commission (OJ 1994 C 53/1). In 1993 the staffing of the Commission involved in the task of combating irregularities was 51 annual full-time equivalents in UCLAF, 40 in DG VI, 16 in DG XIX, 4 in DG XX and 27 in DG XXI. This was altogether 138 annual full-time equivalents. The figure includes both internal (90) as well as external (48) personnel. In 1994 UCLAF was strengthened by provision for a further 50 staff.
843. The decision to do this arose in part out of the European Council meeting in Vienna in December 1998.
844. The new legal basis consists of Commission Decision 99/352, establishing the European Anti-fraud Office (OLAF) (notified under document number SEC (1999) 802), (OJ 1999 L 136/20), and Regulations 1073/99 and 1074/99 concerning investigations conducted by the European Anti-Fraud Office (OLAF), (OJ 1999 L 136/1 and 136/8).

Regardless of the fact that OLAF is organisationally part of the Commission, it has been given a specially independent position, with budgetary and administrative autonomy, as a pre-requisite for operational independence. The Office's Director, who is responsible for taking initiatives for carrying out investigations, must neither seek nor accept instructions from Member States, the Commission or any other institution or body. A Supervisory Committee was also set up, which can be considered as a kind of board of directors for OLAF, and its function is to assist the Office in carrying out its tasks, while having a supervisory role over the Office, and being required to send a Progress Report to the Community's institutions at least once a year.[845]

The formal strengthening of measures to combat irregularities, which took place with the setting up of OLAF, was also accompanied by practical steps, with a considerable increase in the number of its staff. It is thus planned that by the end of 2001 the total staff working for OLAF shall be 300.

There is a widely held view among the other agents, both in the Member States and the EC institutions, that the attitude of the Commission is that effective measures to combat irregularities require considerably increased Community controls and sanctions, preferably with significantly increased executive powers for Community institutions. The interviews with representatives of national administrations included expressions such as: "The Commission has good intentions," "The Commission is interested in standing guard over the rules, and this involves a desire to impose sanctions." Everyone agreed that the Commission wishes to play and does play a significant role in the fight against irregularities. The same opinion about the Commission can be found in the other institutions. The representative from the Council said: "The Commission believes that greater efforts should be made by the Union, by the Community. That's why they suggest, for a start ... that controls should be exercised by the Commission and so on. The aim is to create common [controls and sanctions]. The Commission is the driving force behind measures to combat irregularities."

Many of the interviewees point out that the Commission increased its focus on the question of measures to combat irregularities under Jacques Santer's presidency. For example it was said: "There is a new Commission, and in our view, they are making progress." In particular it was emphasised that questions of combating irregularities fell under the remits of the Swedish commissioner, Anita Gradin, and the Finnish commissioner, Erkki Liikanen. For example it was said: "In the present Commission it is the two Nordic commissioners who together have responsibility for this, so it can be expected that the policy will be a bit stricter than previously," and another example: "On the question of finances and measures against irregularities, there are two new commissioners

845. See OLAF-Supervisory Committee's Progress Report for July 1999 to July 2000, (OJ 2000 C 360/1).

from two new Member States. It's not just Liikanen and Gradin, but Finnish Liikanen and Swedish Gradin from new Member States, which will have referendums, so they understand that, before the Community is given more power and more money, it is important that it actually uses its present powers and controls the use of its finances so that citizens can be sure that they get something for their money."

The Commission does not hide the fact that it would like to see considerably more integration on measures against irregularities, and it openly admits that its long term goal is to create truly integrated and comprehensive regulations to combat irregularities. This includes the view that the Commission's powers to undertake controls ought to be wider and that the Community ought to be able to apply criminal sanctions. However, it is acknowledged with a certain irritation that it is unlikely that it will be possible to persuade the Member States to go along with this. For example it was said: "Those over in off-shore Europe ... they're just against. It's become a political issue, and it's a question of national sovereignty – not that anyone has been able to explain to me what that means. ... It has something to do with judicial co-operation, and so all the legal philosophers from the justice ministries come along, and for them the idea of the European Union is a bit of a novelty which reminds them of some kind of football league. And the justice ministers get out of their depth when it is explained to them that in fact we have had an agricultural policy for the last 25 years, and if you look at the effects of some of the regulations, ... in reality they are criminal sanctions. I mean, if you chuck a farmer out of an agricultural programme, that's him finished. If that's not a criminal sanction, then I'd like to know what is. And when they say, have you really got something like that? – we never knew about that. And we say, well I'm very sorry but it was sent for consultation." And in another interview it was said of Regulation 2988/95:[846] "People could easily see that this was letting criminal law in through the back door. And we just looked all innocent and said that we didn't have anything to do with that, and that it all depends how you interpret it. ... It is a little bit unsatisfactory because it's not in our interests to distort the Treaty, but it is in our interests to get a solution. And if we think we need some criminal sanctions, then it's obvious that if the Treaty doesn't allow us to go via the direct route in the Third Pillar, then we have to try to get there via the First Pillar. But it's not the perfect solution it ought to be."

18.1.1.1. Manifest functions

Effective measures against irregularities leads to the Community's finances being used in accordance with their intentions, and, all things being equal, a greater level of success in achieving the Community's political goals. Simulta-

846. On the protection of the European Communities financial interests, (OJ 1995 L 312/1).

neously, the damage to the Community's reputation, which is the consequence of widespread irregularities, can be prevented or at least reduced if the measures against irregularities are effective. This is something which reflects particularly on the Commission because of its formal responsibility for the budget. Accordingly, a member of a national parliament said: "I believe the Commission recognises that irregularities are extremely damaging to the reputation of the Community, and therefore the Commission takes all possible measures against them." It can thus be seen that measures to combat irregularities through the use of controls and sanctions involves important manifest functions for the Commission.

18.1.1.2. Manifest dysfunctions

The highlighting of the problem of irregularities which the Commission has undertaken in recent years can risk rebounding on the Community and the Commission and hitting them like a boomerang. The reaction to it can be that the Member States do not wish to strengthen the Community institutions, but on the contrary may wish to cut down their power in favour of national institutions. In a couple of interviews with representatives from the Member States the idea was expressed that the publicity around irregularities can create a negative attitude towards the Community. For example, there is a hint of this in a statement that: "The Commission has admitted that irregularities are extremely damaging for the Union's image." If irregularities are presented as a significant problem that cannot be solved, it must be assumed that a considerable manifest dysfunction will be associated with this. It is assumed that this is something which the Commission is aware of.

18.1.1.3. Latent functions

The fight against irregularities has several important latent functions for the Commission.

Through active measures to combat irregularities the Commission obtains an expansion of its own powers, partially through influence on the Member States' exercise of their powers, and partly through direct responsibility for the exercise of powers. This fact is confirmed by the interview with the representative from the Council, who stated that the Commission's ultimate goal was the central administration of controls and sanctions. Interviewees from the Member States also supported this interpretation; one representative from a Member State said: "The Commission would prefer to do everything itself ... The Commission has a hidden motive to get more power for itself through fighting fraud and combating irregularities." The Commission is presumably not unaware of this view, but the representative from the Commission argues that the Member States: "owe it to themselves to think about how best to solve the problem that confronts us, which is, among other things, fraud against the EC's finances. But

there is also the whole business of other cross-border criminality. In my view the people from the justice ministries ought to pull their socks up, and make a rapid and thorough analysis of the situation, because what's happening at the moment is that the Mafia is already using the internet, and international electronic crime is having a field day while the laws and legal co-operation we have are just not working." This expression is interpreted as meaning that the Commission believes that the Member States ought to be more pragmatic in the struggle against irregularities instead of holding on blindly to national sovereignty. This is something which may lead to further integration and a more central position for the Commission. The interviewed member of the European Parliament also saw combating irregularities as a lever for winning further influence, however, on the basis that a proper solution to the problem of irregularities is a pre-condition for the Community obtaining further influence.

Another important latent function that follows from the fight against irregularities is that the Commission is able to present itself as capable of taking action. It is thus a form of activity which give legitimacy to the Commission. One representative from the central administration of a Member State thus accused the Commission of making a lot of noise without doing anything about the problem. A representative from another central administration complained that: "From time to time the Commission seems more interested in the media than in the Member States. For example, when the Commission has prepared its Annual Report on the fight against fraud, the first thing they do is to send it to the media rather than sending it to the Member States." The interviewee from the European Parliament also made a similar complaint: "The Commission talks about its blacklist initiative. But their blacklist initiative came three years too late, because it took them three years to follow Parliament's advice [on making a blacklist]."

A third and special latent function comes from the Commission's unspoken acceptance of the Member States' infringements of Community law, in other words the Commission's abstaining from imposing sanctions on Member States. The interviewed judge from the EC Court of Justice said of this: "Over the last ten to twelve years the Commission has had greater political influence and has been ready to make deals and to turn a blind eye to things which it would previously have acted on." Another interviewee said: "Every time you have a case which is reasonably big, straight away the whole thing becomes political, and then you get horse trading between the Commission and the government of the country in question. And the result of this is that the Member State says: Yes we acknowledge that we have cheated, or we acknowledge that our controls have not worked properly, and we acknowledge that the Commission is entitled to claim its money back. But it always ends in an agreement to repay some percentage or other of the amount which ought to be paid." A representative from a Member State said: "The Commission has an important

weapon – it can withhold payments. But so far it hasn't dared do that." In another interview: "When it is a question of what an individual farmer can get away with, it's reasonably easy for the Commission to see things in black and white. When it is a matter of a country which risks losing two or three billions, then it becomes a political matter. Then it becomes rather more difficult to see things in black and white." This situation is also recognised by the Commission: "There are other kinds of sanction. There can be withholding payments from the budget; that has never been tried because everyone knows that it is one thing to punish an operator or an official, but punishing a Member State brings the affair into the realm of politics, and there you will find some very interesting cases. ... But before you can do that you must have a case in which the whole political system has turned a blind eye to something, and which the country has failed to put right in spite of repeated warnings."

The quotations given above suggest that the Commission's policy on sanctioning Member States is guided by political considerations.

This difference between the treatment of government administrations of the Member States and those who are subject to the laws of the Member States can be interpreted as implying a latent function for the Commission. Since the threat of sanctions is insubstantial, the Member States accept that the Commission and the Community have formal powers to sanction them, which they would otherwise be unlikely to accept. In this way the Commission has the appearance of strength. Moreover, the imposition of sanctions on those who are subject to the laws of the Member States is an important action as it demonstrates the Commission's and the Community's willingness to combat irregularities.

This situation also explains why it is the EC Court of Justice which has powers to impose sanctions under Article 228.2 EC. It is the Court of Justice which has the objective legitimacy to carry out such a function.[847] This factor is also pointed out by several of the interviewed representatives from the Member States; for example it was said: "We don't like the idea that the Commission should have direct powers to cut subsidies or punish Member States if they don't stick to Community rules. This ought to be taken care of by the EC Court; that's the only thing we could accept." It is the view of the present writer that it is in the interests of the Commission that such powers to sanction should be given to the Court. This understanding is also expressed in and based on the slightly cryptic Article 7 of Regulation 2988/95[848] on the co-responsibility of those (officials) who have a duty to ensure that irregularities are not committed.

Measures to combat irregularities thus have important latent functions for the Commission. These concern the acquisition of further powers via further inte-

847. See Section 18.1.3

848. On the protection of the European Communities financial interests, (OJ 1995 L 312/1).

gration, and the strengthening of the Commission's legitimacy through presenting itself as a strong and capable institution.

18.1.1.4. Latent dysfunctions

On the question of whether the Community ought to have powers to undertake controls in Member States independently of national authorities, the representative from the Commission said: "I don't think that would be appropriate. ... I think that the way to go is to establish a set of rules which would mean that even the most self-interested of Member States is obliged to act quickly and loyally towards the Commission, so we can work together." This answer is interesting in relation to latent dysfunctions, because it implies that the real problem with the Member States is that they are not loyal towards the Community. Several of the interviewed representatives from the Member States expressed the view that the Jacques Santer Commission took the fight against irregularities very seriously and tried to create, or re-create, co-operation and trust within the Community. The interviewed representative from the media also gave the view that there really was a need for better co-operation between the EC institutions and between them and the Member States.

All these statements point towards the basic problem, that the required loyalty towards the Community does not exist. It should be remarked that the Commission also contributes to this lack of trust and loyalty. For example, when it is admitted that Regulation 2988/95[849] lets criminal law in through the back door, and that the Treaty is actively distorted in order to create the necessary basis for regulation, these are things which increase the mistrust of Member States towards the Commission.

The measures against irregularities taken through controls and sanctions may very well serve to present the Commission as active and capable, as stated above under latent functions. However, in reality it is an expression of dealing with the symptoms, while doing nothing about the underlying cause.

It must be assumed that in the longer term this will damage the Commission and the Community, thus acting as a latent dysfunction, while the true problem will be neglected, and even made worse by the Commission.

The Commission is split between, on the one hand, solving problems in relation to Member States politically, and on the other hand dealing with problems in relation to those who are subject to the laws of the Member States by legal process, as referred to above under latent functions. This disparity in its administration of the law is not only a latent function, but can equally be interpreted as a latent dysfunction, since the different treatment weakens the legitimacy of the Community. Thus, the interviewed representative from the special interest groups said: "If you ask the Commission if it is reasonable that there is

849. On the protection of the European Communities financial interests, (OJ 1995 L 312/1).

a rule, as we know there is, which means that you have to pay so much money because of a small infringement, and the Commission says that it prefers to see things in black and white. ... If the case just concerns an individual farmer, then it is easy enough for the Commission to see things in black and white. But if you have a situation where it is a whole country which can risk losing ... two or three billion Euros then the whole thing becomes political. It's not so easy to see things in black and white any more, and that's dangerous. We can do what we like with a defenceless citizen, but if it is a whole country, then we have to show political consideration."

This difference in treatment can also risk being a latent dysfunction for the Commission in another way. When the Commission treats Member States and citizens differently, then it is natural for some Member States to believe that there are differences between the treatment given to Member States. Thus, in the interview with the representative from the Greek central administration, referring to Case 68/88[850] and to the regulation that followed it, it was said: "The case gave the Community a chance [to come down hard] on a country whose protests aren't heard. Great Britain, Germany and France are big countries, and it's best to be on good terms with them, but we don't belong to that group." In another interview it was said: "In the final analysis it's a political decision. ... If you encourage them to take action against France they say – Oh no, France is a member of the club; their offence is not so bad.. ... There is a club with a number of states who say yes or no. The legal service is made to understand that they should come to a different conclusion. There is considerable scope for manipulation." In the interview with the representative from the Commission it was admitted that there are countries against which it would be problematic to impose sanctions, so there must be a very careful selection of cases which are proceeded with. Regardless of whether the suspicions are right, and the representative from the Commission gives cause to suppose that they are, they weaken the legitimacy of the Commission because the trust of the Member States in the institutions is weakened. This difference in treatment is a latent dysfunction for the Commission.

18.1.1.5. Conclusion

The Commission appears to be a very active agent in the fight against irregularities, and this applies both in relation to the making of rules and in applying them. It does this in order to meet its responsibilities on the budget, and to ensure that the political aims of the Community are achieved. But it also has the function that the Commission obtains further powers for itself and appears to be strong and capable. On the other hand, the considerable publicity given to irregularities and to the fight against them can risk undermining the position of

850. Commission of the European Communities v Hellenic Republic. [1989] ECR 2965.

the Commission if it does not succeed in doing anything about the problem. In parallel with this the Commission weakens its own legitimacy when the application of sanctions is influenced by political considerations.

18.1.2. The European Parliament

"The role of the European Parliament can be compared with that of the national parliaments" said one of the interviewees. This refers, among other things, to the fact that the European Parliament has much more influence on the creation of laws than on their administration.

The European Parliament organises its work using select committees, each with its area of responsibility. Originally questions of controls and sanctions, as well as the implementation of the EC budget, was dealt with by the Committee on Budgets. At the beginning of the 1970's a sub-committee was set up which, by the end of the 1970's, was split off as an independent committee with its own secretariat etc.; it became the Committee on Budgetary Control. Today the Committee on Budgetary Control is the committee responsible for dealing with the fight against irregularities relating to the EC finances.[851]

The committee often bases its work on reports from the Court of Auditors, but it can also produce its own reports. Speaking about the work of the committee, one of the national parliamentarians interviewed said: "They are quite strict [about the fight against irregularities]. When I hear people from the Committee on Budgetary Control ... they are hard people. But one should remember that in the European Parliament people tend to focus on the things that interest them, and the leading people in the Committee on Budgetary Control are, for example, British or Danish or suchlike. They are not highly vocal people who speak up and push things through the assembly. ... That is why you sometimes see the extraordinary situation where the committee come to the assembly with a report which is voted down." It is true that the Committee on Budgetary Control operates across party lines, but as for the latter comment, it seems that the interviewee has got it wrong, since experience shows that overwhelmingly frequently the reports of the Committee on Budgetary Control are accepted by Parliament.

The Committee on Budgetary Control is a low status committee, which means that the frequency of its meetings is perhaps less than could be desired, and that in reality it is left to a handful of committed members to lead the way for the European Parliament in this area. However there is a tendency for the committee to attract growing interest as the issue of the fight against irregularities moves up the political agenda.

851. This was acknowledged by the European Parliament with the adoption of a resolution (Doc 1-973/80) that led to the committee's first report in 1984 (Doc 1-1446/83) and two later reports in 1987 (Doc A 2-251/86) and 1989 (Doc A 2-20/89).

The influence of the European Parliament on the creation of laws varies according to the authorising provisions for Community legislation.[852]

The key legislation in the fight against irregularities is adopted under the authority of Article 235 of the EC Treaty (now Article 308 EC) only which gives the European Parliament the right to express a view before the adoption of legislation.[853] It is also the general view that the European Parliament's influence on the creation of laws is limited. One of those interviewed expressed it as follows: "The Council sends a proposal [to Parliament] which gives its opinion. If the Council disagrees, it says 'Thank you very much, we will keep your comments on file, and look after them, but we won't take any notice of them'".

However, Parliament's influence on the fight against irregularities is not limited to the adoption of secondary legislation. The Community's budget process also plays an important role in this connection. An interviewee from one of the other institutions said that Parliament "is the other arm of the budget authority, so that it feels not only that it ought to have control over what is put into the budget, but also on how the money is used."

The European Parliament has had growing influence both on the preparation of the budget and on the approval of the accounts. It is thus the European Parliament that, admittedly upon the recommendation of the Council, gives a discharge to the Commission in respect of the implementation of the budget. In other words, it approves the Commission's budget.[854] This discharge is based on the accounts which the Commission submits annually to the Council and the European Parliament relating to the implementation of the Budget during the preceding year,[855] as well as the annual report and any special reports of the Court of Auditors.[856]

The discharge decision includes recommendations to the institutions, primarily the Commission, on what steps should be taken to ensure a proper and responsible administration of the Community's resources.[857] In the Treaty it is

852. See for example Krarup, Ole; Europarlamentarisme – En vej mod Unionen, Københavns Universitet, Retsvidenskabeligt Institut B, Årsberetning 1994 and Rasmussen, Hjalte, EU-ret i kontekst, 3rd edition., 1998.
853. This is a situation which was changed by the entry into force of the Amsterdam Treaty, cf. Article 280 EC.
854. Cf. Article 276 EC. It should be remembered that it is the Commission which is the institution with budgetary responsibility, cf. Article 274 EC. The discharge is a formal procedure that completes the account, but it is also a political acknowledgement and a legal act.
855. Cf. Article 275 EC.
856. Cf. Article 276.1 EC.
857. Cf. Article 89.2 in Regulation 610/90 amending the Financial Regulation of 21 December 1977 applicable to the general budget of the European Communities, (OJ 1990 L 70/1).

laid down that "The Commission shall take all appropriate steps to act on the observations in the decisions giving discharge and on other observations by the European Parliament relating to the execution of expenditure, as well as on comments accompanying the recommendations on discharge adopted by the Council."[858]

In particular the wording to the effect that the European Parliament's observations are binding on the Commission is important. Taken together with the fact that the Commission shall, at the request of the Parliament or the Council, report on the measures taken in the light of the observations made in connection with the discharge,[859] then the observations attached to the discharge impose on the Commission an effective legal duty to take action.

It is the discharge procedure which the European Parliament uses to secure influence for itself in the fight against irregularities. In support of this Parliament uses a conditional discharge. In other words the discharge is not given before the Commission has either carried out or given assurances to carry out specific measures. While the Parliament is required to give notice of discharge by 30th April in the year following the accounting year, if the limitation period cannot be complied with it is the Commission that has the duty to take the necessary measures to remove the obstacles to the discharge,[860] so that the approach of setting pre-conditions is an effective one for the Parliament.

The interview research shows that both the Member States and the Commission are aware of the Parliamentary powers in relation to the discharge. On this, the interviewee from the Commission said: "[Parliament] can hold the budget hostage. If they discover that there are some items in the budget which have not been properly administered, it is the easiest thing in the world simply to block it. It may not be easy, but it is relatively easy. So they have the whip hand, and they can cause considerable problems for the Member States. It is not always very constructive."

The fact that Parliament is willing to use its powers of giving a conditional discharge is illustrated by the situation in 1994 when Parliament made its discharge conditional on the appointment of a further 50 people to work in UCLAF (now OLAF). The interviewee from the European Parliament said of this: "In general UCLAF has been strengthened by Parliament, not by the Commission. Parliament put another 50 people into UCLAF. Many people in the Commission tried to steal these appointments and use them for other pur-

858. Cf. Article 276.3 EC. There is similar provision in the earlier Regulation 610/90 amending the Financial Regulation of 21 December 1977 applicable to the general budget of the European Communities, (OJ 1990 L 70/1).

859. Cf. Article 276.3 EC.

860. Cf. Article 89.1 in Regulation 610/90 amending the Financial Regulation of 21 December 1977 applicable to the general budget of the European Communities, (OJ 1990 L 70/1).

poses, so we had to tell them that we would refuse them discharge. So UCLAF was strengthened by Parliament."[861]

At the start of this section it was said that Parliament's influence on the application of laws is limited, but this does not mean that it is non-existent. For example Committees of Inquiry appointed under Article 193 EC are significant in this respect.[862] One of the interviewees from the Member States said of this: "Parliament has started the first inquiry .... as far as I know it is about transport and customs, where there is a whole heap of irregularities. So they are being very active."

Those interviewed consider the European Parliament as one of the most active, if not the most active and integrationist agents on the question of the fight against financial irregularities and on controls and sanctions. For example the interviewed representatives form the Member States said: "The European Parliament has a clear attitude", "Parliament is the body which is most concerned about [irregularities]", "I would go so far as to say that the European Parliament has been the instigator of the new attitude of the Commission and also of the national authorities. I am convinced that Parliament has been the driving force behind the view that [irregularities] are unacceptable", "The European Parliament is very aware of this problem [of irregularities] and wants greater intervention by the institutions of the Community", "The European Parliament is the body which is the most positive", "The European Parliament has tried to increase security and responsibility". As the only interviewee from the EC institutions who expressed a view on the Parliament, the representative from the Council said: "The Parliament is very active in this area and wants to go further than the Council is prepared to go."

861. Another possible reaction of Parliament, as an extension of the conditional discharge, is totally to refrain from giving a discharge in relation to the budget. There have been discussions on whether the European Parliament can refuse to give a discharge or whether it can merely postpone it. Since there was a refusal in 1984 it must be considered as being possible. This does not automatically mean that there is a vote of censure on the Commission. If there is to be a vote of censure it must take place under the provisions of Article 201 EC, with the majority and quorum required in that Article. When in 1984 the European Parliament refused to approve the Commission's accounts, it encouraged the Commission member responsible to resign. The Commission remained and did not accept any censure, cf. Gulmann, Claus og Hagel-Sørensen, Karsten; EF-ret, 1988, p. 87 as well as Vesterdorf, Peter L.; Europa-Parlamentet og Europæisk Integration, 1983. This leads to the Parliament's third possible reaction which is more formal than real, which is to pass a vote of censure on the Commission, by which the Commission shall resign as a body, cf. Article 201 EC. On neither of the two occasions when a motion of censure has been voted on in Parliament has it been passed. The first time was in 1972, when the Commission had exceeded a time limit for putting forward a proposal to strengthen Parliament. The second time was in 1976, because of dissatisfaction with the administration of the agricultural policy.

862. See Section 9.1.

These statements are in general agreement with the European Parliament's own view of itself, so that those parliamentarians interviewed express the view that the Community ought to have powers to undertake controls both over the Member States and over those who are subject to the jurisdiction of the Member States, independently of the national authorities. Correspondingly it is considered reasonable that Community institutions should be able to impose sanctions on those who are subject to the jurisdiction of the Member States. As for the question of imposing sanctions on the Member States themselves, those interviewed expressed a certain reserve, since it was argued: "I am not so sure it is a good idea. Because if we start using sanctions on anyone other than the culprit, the only thing that happens is that it creates a motive for not reporting infringements. .... If I know that you will punish me because I have revealed the existence of an irregularity, I won't bother to report it. So you get the ludicrous position, which you can see in some of the EU's statistics where there are apparently zero irregularities in some countries, because not a single case has been reported."

On this basis the attitude of the European Parliament to combating irregularities can be called highly federal, with a desire to give Community institutions direct executive powers to control and to impose sanctions on the subjects of Member States, independently of the national authorities. This is so, even though the European Parliament recognises that the solution to the problem of irregularities against the Community's finances does not lie with controls and sanctions, but lies somewhere else altogether. Thus, on the question of the agricultural policy, one of the parliamentarians interviewed said: "I would prefer .... a policy which is more in line with supply and demand. If we had such a reform, we would not need to talk about how irregularities should be punished. The penalties are really an attempt to cover up a problem which I think it would be much more interesting to avoid entirely. In my view the irregularities are a symptom, not the problem." And in answer to the question of what should be done, it was said: "What is needed is a common definition, a common plan of action, and a common commitment from the fifteen Member States." The point about a common commitment is important. Finally one of the interviewees pointed out that the rules should be simplified, and commented: "It shouldn't be so difficult. In my view, too many bureaucrats have an interest in complicated regulations."

18.1.2.1. Manifest functions

The European Parliament's active steps, both in connection with the discharge procedure and through the adoption of secondary legislation, to promote the regulation of controls and sanctions and to reduce irregularities are manifest functions of the Parliament. The same applies to the statements, resolutions etc. which Parliament adopts on the subject, and the conferences which it arranges

signal the European Parliament's active measures in the area, and legitimise the continued existence of Parliament.

18.1.2.2. Latent functions

In several of the interviews the European Parliament's interest was not merely described as combating irregularities. The interviewee from one of the other institutions said: "Parliament is incredibly interested in these cases because Parliament has budget responsibility. There are many things Parliament can't really do anything about, but in this area it has some status, and this means that Parliament, Hensh and the others are really very active." A representative for one of the national central administrations said: "I am afraid irregularities .... are a big problem, and in my view there are many in the Community institutions who misuse the issue to make a lot of noise, but ... in reality they don't try to combat irregularities, because a lot of the time of the European Parliament and the Commission is wasted in discussion." The statements, resolutions etc. about the fight against irregularities which Parliament adopts, as well as the conferences which it arranges, all help to project the image of a Parliament which is doing something. In the same way the use of the powers given by the EU Treaty to set up temporary Committees of Inquiry is a function which legitimises the existence of Parliament. This is confirmed, among other things, by the quote given above where the interviewee emphasises the Committee of Inquiry as evidence for Parliament's activity in the fight against irregularities.

Parliament itself reinforces its function in this respect by emphasising its efforts in comparison with those of the other institutions. The statement of the interviewed MEP about the attempt of the Commission to misuse the 50 UCLAF posts is an example of this, which emphasises that Parliament is active in the fight against irregularities. The same applies to the idea of drawing up a blacklist which, at least according to the view of Parliament itself, originated in the Committee on Budgetary Control. The interviewed parliamentarian said of this: "The Commission talks about their blacklist initiative. But their blacklist initiative was three years too late, because it took them three years to follow up on the recommendation of Parliament [to make a blacklist]".

Thus, the European Parliament comes to be seen as the defender of the budget *par excellence*. It is the institution which does not accept irregularities. The issue of the fight against irregularities is used by Parliament to show that it is capable of taking action. The fight against irregularities is thus an important function in legitimising the existence of Parliament.

Another important latent function of the European Parliament which arises out of the fight against irregularities is that Parliament, just as the Commission, seeks in this way to obtain greater powers for itself and for the Community. For example, one of the representatives of a national administration said in interview: "The European Parliament can be a good ally, but it plays politics too

much and wants to increase the EU's influence too much." Similarly, another said: "The European Parliament is very aware of this issue [of the fight against irregularities], and wants greater intervention by the Community institutions." A third said directly: "They want to go further. They want more power for themselves."

The role which the European Parliament, and particularly the Committee on Budgetary Control, has taken upon itself as the guardian of the EC budget should also be seen in the overall political context. It has always been the case that Parliament, with the support of the Commission, has worked more or less openly for a steady increase in the EC's budget. This is because an increase in the budget without a formal increase in the powers of the Community gives the basis for a development of the political importance of the Community, and because it is always easier to initiate new activities than to cut down on existing activities. When it is not necessary to set priorities, then it will generally be easier to initiate new Community initiatives. Seen in this light, the focusing on the control over the correct use of the Community's resources looks like a legitimising smokescreen, which presents the European Parliament as a guardian of the proper use of resources, rather than as an institution that is trying constantly to increase the EC budget. This deflection of attention is a latent function.

18.1.2.3. Latent dysfunctions

Since the European Parliament was given powers to set up temporary Committees of Inquiry, and thus become actively and directly involved in the implementation of rules in a way which can, according to the circumstances, bring it very close to the Member States,[863] there has been criticism of the European Parliament on this topic from the Member States. In reviewing the role of the European Parliament, one of the interviewees from one of the Member States said: "Everyone has to play their part ... We can't all play all the parts, and that's what is happening at the moment. Everyone wants to do everything." The representative for another of the Community's institutions confirmed this in saying: "If you have some cross-border budgets, and have different possibilities for imposing penalties and different ways of exercising control, then it will go wrong. So Parliament is a good institution for confronting a Member State and saying 'Look here! This is what's happening', and summoning them to a hearing and so on. The Member States hate it." But there are also other ways in which the European Parliament can cause friction with the Member States. The European Parliament has a special status among EC institutions with regard to its capacity for criticising the Member States. While the EC Court of Justice, the Commission, the Council and the Court of Auditors have restricted scope

863. Cf. the review of this in Section 9.1

in this respect, the European Parliament is only bound by the political limitations to gathering support for statements etc. A representative for one of the Member States said of this: "In my view the European Parliament already has a long tradition of criticising irregularities and criticising national administrations." While another explained how the European Parliament is used in this respect: "At the latest meeting of the working group the Commission said to us: the European Parliament says so on and so forth, and you have to accept it. I think the Commission was trying to use the Parliament's statements in support of its own opinion."

These confrontations create animosity between the Member States and the Parliament and it can be argued that they operate as a latent dysfunction. On the other hand, the criticism creates a practical purpose for the European Parliament, since everyone can see that Parliament is determined to do something about the problem (latent function), even if (perhaps especially when) this involves conflict with the Member States.

Another important latent dysfunction arises from the fact that the strong focus on the fight against irregularities helps to disguise some of the more important problems of the Community. The statement of the interviewed MEP that: "What is needed is a common definition, a common plan of action, and a common commitment from the fifteen Member States" points straight to the heart of the matter, that the requirement for loyalty, on which the Community is built and which is expressly stated in Article 10 EC, in fact only exists to a very limited degree. Instead of being a co-operation built on trust, the EC is a co-operation of mistrust. The true problem remains unsolved while exaggerated attention is paid to controls and sanctions. It is the same with the interviewed MEP's statement on the agricultural policy: "I would prefer .... a policy which is more in line with supply and demand. If we had such a reform, we would not need to talk about how irregularities should be punished. The penalties are really an attempt to cover up a problem which I think it would be much more interesting to avoid entirely. In my view the irregularities are a symptom, not the problem." Sanctions are used to deal with the symptoms, the irregularities, while the real problem, the regulation of agriculture, remains untouched. The same applies to the third problem referred to by the MEP interviewed: the complexity of the regulations.

The focus on, and efforts put into, the pseudo-problem, the irregularities, and the distraction of attention from the real problem is, at least in the medium and long term, a latent dysfunction for the Community, including for the European Parliament, since confidence in the EC is weakened. This was also referred to in the interviews with the representatives from the Member States. It was most clearly expressed by one national parliamentarian: "The [European Parliament] is currently very hot on this [the fight against irregularities] with its fraud conference in the Parliament. But I think it is very revealing that they have

appointed a temporary Committee of Inquiry, and the only thing they dare look at is customs. They don't dare get to grips with the Structural Funds, which are very vulnerable ... Their role is a bit ambivalent." And he added later: "Every investigation has a political dimension, and there's nothing wrong with that. But I would be more impressed by the Parliament if it would concentrate on the Structural Funds."

18.1.2.4. Conclusion

The European Parliament's strong interest in the issue of combating irregularities against the EC's finances should be seen in the light of a coming together of at least three interests. First there is the legitimate interest in reducing irregularities so that the Community's means are used in accordance with their intended purposes. Secondly, this question serves to legitimise the European Parliament as being an institution which can take action, both because Parliament itself has chosen to take up the question vigorously, and because it has to a large extent been turned into a budgetary issue, on which Parliament has considerable influence. Thirdly, the question has been used to argue for a further integration and strengthening of Parliament's influence. On the other hand, Parliament does not approach the problem in a way that is calculated to solve the problem. The focus is on expanding controls and sanctions rather than on correcting the mistaken regulation in other areas, so the basic problem of the lack of trust and co-operation is not dealt with. In the longer term this will show up the European Parliament as being ineffective, and its desired status as an active player will be lost. Furthermore, the European Parliament's strong commitment to the question creates a risk that it will be involved in a confrontation with Member States in such a way that it will lose an important ally in its fight to increase its own influence.

18.1.3. The EC Court of Justice

The principal role of courts is to interpret and apply the prevailing law which places courts first and foremost as implementers of the law. However, it is undeniable that courts are also relevant in the framing of laws. When the focus is moved from courts in general to the EC Court of Justice in particular, then its role as a framer of laws is very clear.

It is generally acknowledged that the EC Court has an activist and creative interpretative style, in the direction of closer integration of the Community.[864] The fight against irregularities in the Community's finances is no exception to

864. See, for example, Rasmussen, Hjalte: On law and policy in the European Court of Justice, A Comparative Study in Judicial Policymaking, 1986, and Rasmussen, Hjalte; EU-ret i kontekst, 1995.

this.[865] The Court's creative function is not something it tries to hide. The judge of the Court interviewed said: "The basic laws of the Community are found in the Treaty and in various acts of secondary legislation, and the prime role of the Court is to interpret these texts. The Court also has an important function in going beyond the text in some respects. One [function] is to go beyond and behind the text and to lay down general principles that are applicable to the interpretation of the text. A second [function] is to deal with situations which are the subject matter of the texts. The first Advocate General, Marc Blanche, said that the Court's function is to interpret the text, but if the text is clear there is no need for interpretation. Interpretation is a judicial activity which includes things which are outside the text, because if the text is clear there is no need for interpretation. One thing is if the text is not clear and therefore needs interpretation, but it is something different if those who write the text have not foreseen the actual situation, so the text does not cover it. A third situation is where there is a hole in a regulation. The classic example is the liability of Member States to pay compensation. ... The Community legislators did not consider whether or not there is such a liability, and here it is the job of the Court to decide whether there is a rule and, if so, what the content of such a rule might be."

There are some Member States which are aware of the activist and creative function of the Court. One interviewee said: "I wouldn't say that the Court used to make laws off its own bat, but it was an important player in the creating of laws, and in indicating the direction for future legislative developments, and I believe that if there is a judgment [on irregularities] it won't be muted." Another of those interviewed said: "We strongly support the working of the Court and its tradition, including its creative role."

But by far the majority of the those interviewed from the Member States and from the other institutions said either that the EC Court of Justice operates just like every other court or that it was not important in the making of laws and their application. For example, it was said by one of the other EC institutions that: "The Court is not really in the vanguard in this area. It is there when a conflict has to be resolved, and it just has to say what the law is if someone brings a case before it.", and she continued: "[The Court] is the guardian of the Treaty, and that is an important function. .... It is not my impression that it has any political function, and I'm glad about that." Another said in his interview: "[The Court] plays an important role, as it should, because, just as with other

865. Examples of this can be seen in Case 68/88, Commission of the European Communities v Hellenic Republic, [1989] ECR 2965 and Case C-240/90, Federal Republic of Germany v Commission of the European Communities [1992] ECR I-5383. For further discussion of this see the section of this thesis on legal theory which gives a detailed review of the significance of the EC Court of Justice on the regulation of controls and sanctions in EC law.

courts, it must act when asked. It cannot do anything on its own initiative." On the question of whether the Court acts politically, the same interviewee answered: "I don't think so, but in some ways it could be accused of it."

Finally, there is a third group of interviewees who said that they did not have any opinion about the role of the Court of Justice, which gives reason to believe that the EC Court only attracts the limited attention of the other players.

As stated above, most people said that the Court has either limited significance or no significance other than in deciding on the actual cases that are brought before it. This discrepancy between the EC Court's own view of its role and the view of the other agents of the role of the Court is strange and, as will be apparent from the analysis made below, it is important.

The fact that the Court does not typically hand down final judgments, but often gives preliminary rulings, is highly relevant. For example it was said: "The only way the EC Court can be significant in this situation [the fight against irregularities] is through Article 177 [now Article 234 EC]", or "Basically I think the Court can only decide on individual sanctions." The feeling about this aspect of its work is undoubtedly linked to the feeling that the EC Court should not be allowed to act in any way like a Supreme Court. This is a question which the judge interviewed from the EC Court rather underplayed as follows: "If you are talking about a sanction imposed on individuals or companies, then it is neither a greater or lesser problem than when a Member State imposes a sanction on individuals or companies. Some get caught, and others don't."

The EC Court's attitude to controls and sanctions and the fight against irregularities reflects the generally integrationist line of the Court.

18.1.3.1. Manifest functions

As can be seen from the Court's own statements, it retains the activist approach which the EC Court has had through recent decades. Controls, sanctions and the fight against irregularities are no exception to this. The increasing integration, which is a consequence of the practice of the Court, leads to a strengthening of the Community and at the same time leads to a further strengthening of the Court's own position as having a central role to play. It applies to the Court, as to the other Community institutions, that the effective fight against irregularities, as well as the regulation of controls and sanctions, help to strengthen the Community and the individual institutions, especially when this is based on the practice of the Court.

18.1.3.2. Latent functions

The fact that so little attention is paid to the rule-making function of the EC Court, and its inherently political role, means that in this respect the EC Court can go further than the Commission, for example. A representative for a Mem-

ber State, who expressed support for the Court's rule-making function put it as follows: "When the Commission puts forward a proposal, we put all our efforts into looking at the position between them and us. We don't just look at what they have written, but at what they want to achieve but do not put in writing. We try to uncover what they are hiding. There really is a problem of trust between the Commission and the Member States. However, the Court ... can sweep some problems out of the way." A probing question was asked: "If I understand you correctly, the Court can go further than the Commission because the Member States are more suspicious of the Commission than they are of the Court", to which the reply was: "That's right, absolutely right." An area of regulation which can illustrate this is criminal law. As argued in the section above on legal theory, it can no longer be argued that criminal law is a purely national matter. It is remarkable that, while the Member States have shown considerable interest in avoiding criminal regulations from the Commission, the Court has, under a thin disguise of a lofty concept of justice derived from existing laws, not least Article 10 EC, played an active role, which has either been accepted or not noticed, and which has secured the Community some influence over national criminal laws.

The Court thus finds itself in a position where it acts as a law maker and in this way promotes the integration of the EC, strengthening the position of the Community at the same time its own legitimacy. Both of these are latent functions.

18.1.3.3. Latent dysfunctions

A review of the Court's latent dysfunctions should start from the position of the two following quotations from representatives of the Member States: "The Court supports the interpretations of the Commission" and "The Court is the tool of the Commission .... because it always supports the Commission." The quotations point out that at least some of the Member States have begun to be aware that the Court has a significant role in the making of rules and political significance for the integration of the Community. If this awareness develops and spreads, the active law making will have consequences for the legitimacy of the Court as an independent and objective forum, which will, in the long run, lead to measures which will undermine the function of the Court. There have already been factors which indicate the existence of such a dysfunction. Three examples of this are given below.

At the Intergovernmental Conference which resulted in the Amsterdam Treaty in 1997, the UK put forward a proposal which would involve a significant weakening of the position of the Court. This included a suggestion that the Council should be able to act quickly in cases where the Court gives a judgment which the ministers find is not in accordance with the original purpose of some regulation. The proposal was not adopted, but the mere fact that it was made

confirms the Member States' increasing mistrust of the EC Court and exemplifies the dysfunctions for the Court which can be expected.[866]

The second example relates to the Convention on the Protection of the Community's Financial Interests, which was signed at the meeting of the European Council at Cannes in June 1995. The question was based on the then applicable Article K3.2 in the EU Treaty, which raised a question about the role of the EC Court of Justice.[867] In the original proposal for the Convention[868] in Article 11 the Commission proposed that the EC Court should have powers to make preliminary rulings to interpret the provisions of the Convention, under a procedure corresponding to that made under Article 234.2 and 3 EC, and in the same way the Court should be able to decide in cases where there was disagreement about the implementation of the Convention. However in the final version of the Convention the status of the Court was considerably weakened. The option of preliminary rulings vanished. Disagreement about interpretation or application of the Convention was to be a matter for the Council, and only if six months elapsed without a solution would it become a matter for the EC Court, and only in cases covered by Article 1 or 10 of the Convention. Among other things this means that the Court will not have any real powers to adjudicate the budget related questions which arise in this connection.[869] A part of the explanation for the reluctance of the Member States to grant such powers to the Court is presumably because there was a desire not to see the basis of the convention undermined by the judicial practice of an active Court.

The third and last example to illustrate the latent dysfunction which arises from the EC Court's active and political approach relates to the appointment of judges. If the Member States have a view that the Court is not an objective resolver of conflicts in the traditional sense, but is in reality a political player with considerable influence on the integration process, it is to be expected that the appointment of judges will be politically motivated. In the autumn of 1995 Belgium nominated Melchior Wathelet to be a judge of the EC Court of Justice.

866. There is an example of a political initiative carried through in reaction to a decision of the EC Court. In the negotiations on the Maastricht Treaty the Member States agreed on Protocol No. 2 to the treaty establishing the European Community, which set limits to the effect of the Court's decision in Case C-262/88, Douglas Harvey Barber v Guardian Royal Exchange Assurance Group, [1990] ECR I-1989. In Case C-327/91, French Republic v Commission of the European Communities, [1994] ECR I-3641, the Court had already taken account of the protocol, though it can be assumed that this only happened because it was obvious that a political intervention was in preparation.

867. Cf. Article K3 (replaced by Article 34 EU)

868. COM (94) 214 Final, Proposal for Council of The European Union Act establishing a Convention for the protection of the Communities' financial interests (OJ 1994 C 216/14).

869. COM (96) 173 Final, Protecting The Community's Financial Interests – The Fight Against Fraud – Annual Report 1995.

Up to the time of his nomination, Wathelet, who has a Masters degree in law, was the Belgiam Minister for Defence and had for many years played a central role in Belgian politics.[870] While Wathelet's political qualifications were thus beyond question, his practical legal experience was somewhat limited. If the Belgian nomination is seen as the first sign that the Community has adopted a new practice, where countries make political appointments, then in the longer term the Court will be seen as a resolver of political conflicts, but the risk is that its solutions will be based to a much higher degree on political desirability than on an interpretation of the applicable law, and its legitimacy as an objective arbitrator will disappear.

Any prognosis of the effects of latent dysfunctions in the longer term is naturally full of uncertainty. But if the Court continues with its intergrationist line, and especially if a custom should be established for judges to be political appointees, and if the Member States' distrust of the Court increases, it is possible to predict the need for a fundamental redefinition of the role of the Court.

18.1.3.4. Conclusion

On the question of the fight against irregularities and the regulation of controls and sanctions, the EC Court has adopted an activist approach. It has treated these as very important matters and has strengthened the Community as such. This approach has been accepted by the Member States because the Court has been and continues to be seen as independent and objective. Meanwhile there are signs that the continuation of this activist approach could lead to a relative weakening of the Court.

18.1.4. The Court of Auditors

The auditing of the Community's income and expenditure was originally dealt with by an Audit Board.[871] The Audit Board was of limited significance; it was envisaged that it should only meet once every other month, and that the members of the board would serve on a part-time or voluntary basis. In 1977 the Court of Auditors was set up to replace the Audit Board, and the Court of Auditors has been raised to the status of an institution[872] in line with the Council, the European Parliament, the Commission and the Court of Justice.

870. See Det Fri Aktuel newspaper for Monday, 11th September 1995, p.11.
871. Cf. Article 206 in the original Rome Treaty.
872. Cf. Article 7 EC and Article 5 EU, as amended by the Amsterdam Treaty, where the Court of Auditors is now also referred to.

The Court of Auditors consists of 15 members, one from each Member State.[873] The members are appointed for a six year period, and can be re-appointed at the end of that period. The appointment is formally made unanimously by the Council after consulting the European Parliament, cf. Article 247.3 EC. The role of the Council, taken together with the principle that there shall be one member from each Member State means that in reality each Member State has sovereignty over the appointment of one member of the Court of Auditors. The European Parliament has criticised the appointment procedure and has suggested that Member States have nominated unsuitable candidates, and that the Council has made appointments without having regard to professional competence or the need for independence from the Member States.[874] But the reality of the procedure is underlined by the fact that in 1993 the Council appointed a candidate despite the Parliament having made a negative recommendation about the person in question. As with the Commissioners, there is a requirement that the members of the Court of Auditors should carry out their duties completely independently, and they may not take instructions from any government or any other body, cf. Article 247.4 EC.

The Court of Auditors has about 450 staff, of whom a significant number are employed as interpreters or in administration, and each of the 15 members of the Court of Auditors has a further 5 people in their personal cabinet.

The task of the Court of Auditors is to "examine the accounts of all the revenue and expenditure of the Community. It shall also examine the accounts of all revenue and expenditure of all bodies set up by the Community insofar as the relevant constituent instrument does not preclude such examination" cf. Article 248 EC. This means that the Court of Auditors shall audit the EC institutions, and the national, regional and local authorities which take part in the management of the EC's resources, as well as those which receive supports, both in the Member States and in third countries.[875]

873. According to Article 247.1 EC the Court of Auditors consists of 15 members. The Treaty does not include any requirement that there shall be one member from each Member State, but this has been the case in practice. At the meeting of the European Council in Brussels on 10th and 11th December 1993 it was confirmed that there should be one member from each Member State, and it was agreed that the number of members of the Court of Auditors should be increased in line with the addition of new Member States of the European Union.

874. Cf. European Parliament: Resolution on the procedure for consulting the European Parliament on the appointment of Members of the Court of Auditors (OJ 1992 C 337/51) and European Parliament: Resolution on procedures to follow when Parliament is consulted in connection with appointment of Members of the Court of Auditors (OJ 1995 C 43/75).

875. Cf. Articles 246 and 248 EC as well as Articles 84 to 87 in Regulation 610/90 amending the Financial Regulation of 21 December 1977 applicable to the general budget of the European Communities, (OJ 1990 L 70/1).

In connection with the fight against financial irregularities and the question of controls and sanctions, it is especially important that the Court of Auditors should be able to undertake audits in the Member States since it is the national administrations that are responsible for the management of the overwhelming proportion of the EC's budget. However, the Court of Auditors does not have free access to undertake audits in the Member States. Article 248.3 EC includes the following Treaty provisions on this; "The audit shall be based on records and, if necessary, performed on the spot in the other institutions of the Community, on the premises of any body which manages revenue or expenditure on behalf of the Community and in the Member States, including on the premises of any natural or legal person in receipt of payments from the budget. In the Member States the audit shall be carried out in liaison with national audit bodies or, if these do not have the necessary powers, with the competent national departments. The Court of Auditors and the national audit bodies of the Member States shall cooperate in a spirit of trust while maintaining their independence. These bodies or departments shall inform the Court of Auditors whether they intend to take part in the audit." The Court of Auditors is thus required to give advance notice of an audit to the relevant national audit body. In addition to such on the spot control, Article 248.3 also provides that " ...the national audit bodies, or if these do not have the necessary powers, the competent national departments, shall forward to the Court of Auditors, at its request, any document or information necessary to carry out its task." By this authority the Court of Auditors shall have access to financial records and administrative documents, including electronically stored information, concerning transactions involving the Community's budget.[876]

As for supports paid by the Community to recipients who are not part of the institutions, these are made conditional upon the recipient giving written permission to allow the Court of Auditors to undertake controls of the use of the subsidies.[877] In this way the ability to exercise control over those subject to the jurisdiction of the Member States is secured.

The audit can take place before the closing of the accounts for the accounting year in question, in other words while the administration of the finances is taking place. Thus the audit does not always take place after the event.

The Court of Auditors audits the accounts of the Community's revenues and expenditure, examines whether all revenue has been received and all expendi-

876. As for the duty of the other institutions to make information available to the Court of Auditors, refer to Articles 84 to 87 in Regulation 610/90 amending the Financial Regulation of 21 December 1977 applicable to the general budget of the European Communities, (OJ 1990 L 70/1).

877. Cf. Article 87 in Regulation 610/90 amending the Financial Regulation of 21 December 1977 applicable to the general budget of the European Communities, (OJ 1990 L 70/1).

ture incurred in a lawful and regular manner and whether the financial management has been sound, cf. Article 248. This means that there is an investigation into whether the due revenues have been established and paid, what commitments have been entered into, whether the expenses have been incurred in accordance with the provisions of the relevant regulations, directives, authorisations, contracts etc., and whether the required resources exist etc. In addition to this the Court of Auditors is empowered to examine whether the financial management has been sound, cf. Article 248.2. In other words there is an administrative audit which aims to establish the extent to which the aims laid down in the regulations have been achieved and at what cost, as well as to point out whether the objectives of the policies are difficult to define, vague and/or self-contradictory.

In carrying out its administrative audit the Court of Auditors can lay itself open to criticism for crossing the threshold between carrying out an audit and behaving politically, and thus exceeding its powers. The Commission has been the standard bearer in its criticism of the increasing use by the Court of Auditors of administrative audits[878] by pointing out that political questions are a matter for the Commission, the Council and the Parliament. The interviewed representative of the Commission said of this: "The Court of Auditors has tried to play a political role but .... it can't, because no-one is interested in the Court of Auditors becoming a new police force or a new control authority or a mini-Commission, which gives its opinion on how the policies should be conducted." The representative for the European Parliament supported this criticism in his interview, and said: "In my view the Court of Auditors has become too political. .... I would rather see a more professional accounting management ... the political voice on financial control ought to be Parliament's." The representative interviewed from the Council said much the same: "The new President, Hr Friedmann[879] believes in a very active role [for the Court of Auditors] probably wider than the responsibilities and powers granted to the Court of Auditors under the Treaty." On the other hand, none of those interviewed from the Member States criticised the Court of Auditors for being too political in its administrative audits.

The work of the Court of Auditors is seen first and foremost in the publication of an annual report,[880] but in addition to this the Court of Auditors can at any time submit observations on special questions, normally in the form of

878. An example of the kind of criticism made by the Commission can be found in "Report in response to the conclusions of the European Council", (OJ 1983 C 287/1).

879. Since 18th January 1999 the President of the European Court of Auditors has been Jan O. Karlsson.

880. Cf. Article 248.4 EC.

special reports.[881] In its annual report the Court of Auditors summarises its comments on the administration of the Community's finances in the preceding year. The report is a mixture of a traditional financial audit and an administrative audit and it thus contains comments on areas where improvement is possible and desirable. When the Court of Auditors has reached its preliminary conclusions in the audit, it sends to the institutions concerned, as part a normal procedure for a right of reply, those comments which it believes should be included in the annual report. Thereafter, all the institutions have the opportunity to reply to the criticisms made, and to justify their administrative policies.[882] The Court of Auditors shall take note of the comments made before adopting its annual report, and the responses of the institutions are printed with the annual report which is then published in the Official Journal.[883] The institution which is most affected by the annual report is the Commission, because it is the Commission which is responsible for implementing the EC's budget,[884] including that part of the budget which is administered by the Member States. The procedure with the annual report is thus arranged so that the other institutions send their comments on the annual report to the Commission as well as to the Court of Auditors.[885] The quantitative relationship between the Commission and the other institutions and bodies can be seen in the fact that the Commission's responses fill over 100 pages in the annual report, while the responses of the other institutions and bodies fills about 10 pages.

The most important function of the report is to be the cornerstone of the subsequent approval by the European Parliament (and the Council) of the

881. Cf. Article 248.4. It was paid down by the EU Treaty at Maastricht that the special reports should also form part of the basis for evaluating whether to give a discharge in respect to the budget, cf. now Article 276.1 EC. Each year the Court of Auditors shall give a declaration to the European Parliament and the Council with "a statement of assurance as to the reliability of the accounts and the legality and regularity of the underlying transactions", the so-called DAS declaration, cf. Section 17.1.1.5.
882. In relation to the Commission this procedure for the right of reply also includes a meeting between the Commission and the Court of Auditors. Since 1995 there has been a meeting at the very highest level, in other words between the Commissioners and the Members of the Court of Auditors.
883. The other institutions also have a right to have their replies published with the annual report of the Court of Auditors. cf. Article 248.4 EC. On the other hand, the institutions do not have a right of reply as referred to, either under the Treaty or the finance regulations,. But it must be assumed that the basic legal principles of the Community on the right of reply will apply in any case.
884. See Article 22 in Regulation 610/90 amending the Financial Regulation of 21 December 1977 applicable to the general budget of the European Communities, (OJ 1990 L 70/1), as amended by Regulation 2548/98 amending the Financial Regulation of 21 December 1977 applicable to the general budget of the European Communities (OJ 1998 L 320/1).
885. Cf. Article 88 in Regulation 610/90 amending the Financial Regulation of 21 December 1977 applicable to the general budget of the European Communities, (OJ 1990 L 70/1).

Commission's execution of the budget. This is set out in Article 276 EC, which states as follows: "The European Parliament .... shall give a discharge to the Commission in respect of the implementation of the budget. To this end [it shall examine] the annual report by the Court of Auditors together with the replies of the institutions under audit to the observations of the Court of Auditors, the statement of assurance referred to in Article 248.1, second paragraph and any relevant special reports by the Court of Auditors."

From the above it appears that in many ways the Court of Auditors plays a significant role for the effectiveness of Community regulations and the application of its rules since the Court of Auditors has powers of control in relation to all the Community's revenues and expenditure in all its institutions, Member States and third countries. One of those interviewed from a Member State parliament said of this: "As for the practical application of the rules it is naturally principally the Commission and the Court of Auditors that are important."

The influence of the Court of Auditors on the making of regulations is more indirect. The representative of the media who was interviewed said: "[The Court of Auditors] is very important because it undertakes on the spot investigations. In my view it is important, and it can influence the argument not only about irregularities .... but on whether money is used properly." It is particularly the last part of this quotation which hints at the influence of the Court of Auditors on the making of regulations and in helping set the agenda. The representative of the Court of Auditors himself said: "We don't have any actual legislative authority .... But the proper legislative institutions, the Commission, the Parliament and the Council use the annual report to back up their arguments. .... So, direct influence – No, but indirect influence – Definitely." The representative for the Commission said: "We use the Court of Auditors very much as beast of burden to get amendments to laws through. We use its critical comments .... to knock the Council on the head." It is possible to point to other circumstances, other than in the interviews, which confirm the influence of the Court of Auditors on the making of laws; for example in the preamble to Regulation 386/90[886] it says that the reason for introducing the regulation on physical controls is because "in its annual report concerning the financial year 1987,[887] the Court of Auditors drew attention to a number of shortcomings in certain Member States in the monitoring of agricultural products[888] for which refunds or other amounts are granted on export." On he other hand, the influence of the Court of Auditors on law making must not be exaggerated. Two of the interviewees from the Member States expressed the view that the greatest problem for the Court of

886. Regulation 386/90 on the monitoring carried out at the time of export of agricultural products receiving refunds or other amounts. (OJ 1990 L 42/6).
887. (OJ 1985 C 215/1)
888. (OJ 1988 C 316/68).

Auditors was the lack of impact of its reports. Thus, one of them said: "[The Court of Auditors] is very strict. I think it has been particularly useful in relation to the Commission. ... [But] there has never been a proper follow-up of all its strong criticisms." Another said:"[The Court of Auditors] does a good job, but its problem is that no-one really listens to it. .... If it dealt with national matters, any of its annual reports would provoke a parliamentary investigation or set some great political scandal."

What is characteristic, and this is something which comes through in these two interviews, is that the Member States have a very positive opinion about the Court of Auditors. Not one of the interviewees from the Member States who expressed a view on the Court of Auditors failed to have a positive view of it. Expressions such as "The Court of Auditors does a very good and entirely necessary job, and the annual report is impressive," and "The Court of Auditors has a very important role in criticising the Member States and the institutions," were quite standard. There were occasional criticisms of the work method of the Court of Auditors or some other aspect, but these are merely supplementary to an otherwise positive view, as for example: "I am a devotee of the Court of Auditors, even though it has dropped a clanger from time to time." This is in marked contrast to the opinion of the other institutions to the Court of Auditors; as indicated above, their view is considerably more mixed, with a clear tendency towards dissatisfaction with the arguably political role which the Court of Auditors plays.

The attitude of the Court of Auditors is very much in line with that of the other EC institutions when it comes to controls and sanctions and the fight against irregularities; in other words it is far more integrationist than the Member States. For example the interviewed representative from the Court of Auditors suggested that the Community ought to have powers to impose sanctions on the Member States and on those subject to the jurisdiction of the Member States, and that the sanctions regulations in the Member States ought to be harmonised. In view of this it may be surprising that the Member States have so positive an attitude and the other EC institutions so negative an attitude towards the Court of Auditors. The explanation for this lies in its latent functions.

18.1.4.1. Manifest functions

The primary task of the Court of Auditors is to audit accounts rather than to combat fraud. However, particularly with administrative audits, it is clear that there is a grey area between these two elements so that in practice they cannot be separated. The first time that the Court of Auditors referred to irregularities against the Community was in its 1977 annual report.[889] After that it there were

889. (OJ 1978 C 313/8).

six years during which the question was only touched on superficially before the Court of Auditors took up the issue again in 1983. In its report for 1986 the Court of Auditors has a whole chapter on fraud and irregularities, and since then the issue has been dealt with regularly. In carrying out its audit the Court of Auditors thus reveals actual or potential cases of weakness and irregularity, which it then draws to the attention of the relevant authorities or bodies. It also points out where the provisions for controls are unclear or inadequate. The Court of Auditors thus has important manifest functions in the fight against irregularities.

In addition to this it is the case that, for the Court of Auditors as for the Community in general, an effective fight against irregularities constitutes a manifest function, along with Community regulation of, and implementation of, controls and sanctions.

18.1.4.2. Latent functions

When, in connection with its annual report, the Court of Auditors sends its preliminary conclusions of the audit to the institutions concerned, together with the comments which it believes should be included in the annual report, it is customary to send the comments on all the institutions to all the institutions. This takes place even though there is no legal requirement to do so, indeed, on the contrary, Article 88.1 of Regulation 610/90[890] states that the comments shall be considered confidential, and the statement of the purposes of the regulation state that the institutions ought only to receive comments on matters relating to them. However it can be argued that the comments are sent to the Commission because of its responsibility for the budget, and to the European Parliament's Committee on Budgetary Control, since this is the responsible committee of the European Parliament with regard to the question of the later discharge and can therefore have a reasonable interest in following the proceedings closely. But the European Parliament, let alone the committee, does not have a formal legal right to receive the preliminary observations of the audit.[891]

In carrying out the procedure for a right of reply via its preliminary report, the Court of Auditors exercises special care because experience has shown that the content of the preliminary report sent to the Committee on Budgetary Control is forwarded from the Parliament to the media, which are happy to use the material, because the annual report contains good stories on irregularities with the Community's resources. The interviewed representative from the media indirectly indicated this since he said, on the relations between the Court of Auditors and the European Parliament: "Parliament ought to know if some-

890. Regulation 610/90 amending the Financial Regulation of 21 December 1977 applicable to the general budget of the European Communities, (OJ 1990 L 70/1).

891. Cf. Article 276.1 EC.

thing goes wrong. They ought to be told immediately, otherwise billions of ECU's could be lost." This means that the most important media interest in financial irregularities occurs when the Commission has had no chance to study the draft report, let alone to prepare comments or otherwise give a qualified reply to the criticisms made by the Court of Auditors. The typical elapse of time involved illustrates this. The Court of Auditors' preliminary report is ready in June or July. It is sent to the other institutions for their comments in early autumn. The replies from the institutions are ready in October/November, and then the final report is published. When the contents of the preliminary report comes to the attention of the media around September, the Commission appears to be ineffective and to lack the will to fight against financial irregularities. Meanwhile the Court of Auditors appears to be effective in combating irregularities, which is a function which legitimises the Court of Auditors, since the need for an effective audit is thereby emphasised.

This is something which members of the Court of Auditors consciously exploit. In an interview on the front page of the Swedish newspaper Svenska Dagbladet on 23rd October 1995, (after the media knew about the preliminary report, but before the Commission's responses were ready) the Swedish member of the Court of Auditors, Jan O. Karlsson demanded "more power to the European Court of Auditors."[892]

There is evidence in several of the interviews of use of the right of reply to the Court of Auditors' annual report in the way indicated. The interviewed representative of the special interest groups said: "The Court of Auditors writes a report each year, which it tries, whether consciously or unconsciously, to get good press coverage for, even though this is at a time when it has not even been made public; this is a source of great irritation." Even though the representative for the Court of Auditors did not want to confirm this, he said that the Court of Auditors does work consciously to get positive media coverage,[893] and he also confirmed that the annual report is ready in June or July and is then sent to the institutions. On this he said: "We are very careful to avoid material getting out, but if an official or a Commissioner talks to a journalist and says that the administration in Copenhagen will be criticised, and the journalist gets further information ... We try to make the system watertight, but it's impossible to make it absolutely watertight." He gave the names of several members of the European Parliament who pass on material to the media.

The European Parliament supports its legitimacy, in the same way as the Court of Auditors, by the premature discussion of the contents of the preliminary annual report.

892. Jan O. Karlsson was later appointed President of the Court of Auditors.
893. See also Section 18.1.7.

This interplay between the Court of Auditors, the European Parliament and the media works for the mutual strengthening of the two institutions partly at the expense of the Commission. There is no doubt that the positive attitude of the Member States towards the Court of Auditors is linked to this, as one of the interviewees said: "There are some things it has done which have helped to open people's eyes, so things don't go round in small circles." This can readily be interpreted as meaning that the Member States consider the Court of Auditors to be an ally, which is not the case with the Commission and the European Parliament.

It is generally known that relations between the Commission, with its then president Delors, and the Court of Auditors, with its then president Middlehoek, was more than usually tense. The interviewee from the Commission said of this: "The previous Commission was rather critical of [the Court of Auditors] which was partly justified and partly not. There were some commissioners who thought it was very irritating that there was a Court of Auditors at all." The Commission under Jacques Santer made a partially successful attempt to stop the shenanigans referred to above with the preliminary annual report. The interviewed representative from the Commission said of this: "In January [1995] the whole Commission went to visit the Court of Auditors. For the first time there was contact and dialogue between the commissioners and their opposite numbers on the Court of Auditors. We could explain to them that we needed to create a proper basis for working together. If we continued to spread around unconfirmed stories, this would be counterproductive not just for the Commission, but also for the Court of Auditors, and maybe eventually there would be no Union. We also said to the Court of Auditors that it would be great to co-operate, because when they discovered something, we would like to know about it. We would like to have some warning, because there is no reason to sit on information about some fraud or swindle for six months, just to put it in the annual report; it is much better to start an investigation. This is now tied down by an exchange of letters between Anita Gradin and Friedmann." Apart from indirectly confirming the interpretation given of the latent function of the Court of Auditors, it is interesting to see how the Commission tried to change the situation, and that it felt the problem to be so serious that it was necessary to clear it up by an exchange of letters. In fact the Commission succeeded in limiting the problem for a couple of years, but the media still continued to get hold of information about the contents of the preliminary annual report.

It should also be noted that after the problem had been tackled at Community level, there are indications to show that something similar has begun to happen with the Member States. As one of those interviewed from a national administration said: "In[the national] Parliament we have had three or four sessions when the Court of Auditors has made its annual report, and where there have been demands for the government's reaction to the report, on what the Commu-

nity is doing to stop the irregularities, what the government is doing to take more effective steps against the irregularities, and what the government is doing in this country to stop EC irregularities. There is a lot of political pressure."

The Court of Auditors achieves an important latent function through premature media discussion of the preliminary annual report, derived from the procedure for a right of reply.

18.1.4.3. Latent dysfunctions

As noted above, the Court of Auditors is made up of one member from each Member State. The Court's members typically have experience in their national audit offices, or something corresponding to them. They each come from their national tradition of auditing, with widely diverging views as to what the auditing task is in relation to the public sector.[894] For example there are considerable differences between Member States as to whether there should be a purely financial audit, or whether some form of administrative audit should be included, and whether the audit should take place after the end of the financial year or during the course of it.[895] These differences are remarked on because they show that there is no uniform frame of reference for the Court of Auditors that can define the starting point for the audit to be made. Of course, these differences can be dealt with to some extent by both the external behaviour and the internal organisation of the Court of Auditors. Outwardly the Court of Auditors behaves as a loyal body, which it is by definition, and its reports are published as being from the Court as a whole. Likewise, the Court as a whole adopts its annual work programme. But the internal organisation of the Court is not so uniform. On the contrary, each member is responsible for a particular area of the Community's activities and proposes the work programme for his own area of work. As a result of this it is hard for a member of the Court to evaluate the work programme in areas other than his own. This also means that individual members of the Court decide for themselves their individual roles, which is often done in the light of the different national approaches to the role of an external auditing body. Therefore the auditing of the Community has something of the nature of a kaleidoscope of different national traditions, rather than the work of a homogeneous body. This means that the Court of Auditors

894. Harden, Ian, White, Fidelma and Donnelly, Katy; The Court of Auditors and Financial Control and Accountability in the European Community, European Public Law, Winter 1995.

895. The differences are immediately reflected in the different names which the various Member States give to the Court. Some names seem to indicate a broader view of the Court (Court of Auditors and Revisionsretten) while names given by other States indicates an approach closer to traditional financial examination (Corte dei conti and Cour des Comptes).

does not achieve the desired effectiveness and impact. The different cultural approaches to auditing constitutes a latent dysfunction.

This also means that, in spite of the otherwise positive attitude of the Member States, certain unnecessary problems arise. One of the representatives of a national administration said of this: "The Court of Auditors came to carry out some control, and I realised that they didn't understand our system. They spent most of the time they should spent in doing the control in trying to understand our organisation. They had simply misunderstood our regulations and organisation. They ought to have been better prepared before they came." One of the other interviewees said: "The Court of Auditors fouled up by categorising cases where the accounts didn't balance as some sort of swindle, but they weren't. What had happened was that, for example, under the different accounting principles of different countries, money had been entered in different accounting years, so obviously the accounts didn't add up the same. The Court of Auditors thought this meant there was some kind of fraud going on. But there was nothing of the kind, and that rather damages the credibility of the Court of Auditors, because if they say that there is something fraudulent going on, then there really ought to be something fraudulent going on, and not just some administrative fault, or even worse, just some difference in the rules."

The Court of Auditors undermines its own legitimacy in this way, so that this situation is a latent dysfunction. The situation is made worse by its highly media-focussed approach. The representative from the Council said: "[The Court of Auditors] has often pointed an accusing finger at some irregularity, but from time to time they have done this in a way which is strong on media appeal but weak in substance."

However, it should be noted that the Court of Auditors has attempted to correct the lack of uniformity in its approach to auditing. Thus it has introduced a procedure whereby the members meet in five smaller groups to plan and review their work before it is put to a plenary meeting of the Court. The Court of Auditors has also introduced a system of 'devil's advocates' where proposals put forward by one member are subject to a written evaluation by another, before the group takes a view on both proposals.

Finally, it should be noted in connection with latent dysfunctions that, even if there is an alliance, as referred to above, between the Court of Auditors and the European Parliament in connection with the Court's annual report, the picture is not so clear-cut. There is no doubt that Parliament would prefer to see the Court of Auditors more in the background, concentrating on the auditing of accounts, perhaps with the opportunity for Parliament to instruct the Court to look into specific matters, rather than it being an independent institution with its own part to play in the interplay between the institutions. The same applies both to the Council and the Commission. This makes it likely that if the positive

attitude of the Member States towards the Court of Auditors changes, then the other institutions will try to weaken the position of the Court.

18.1.4.4. Conclusion

The desire for an effective fight against irregularities is in the interests of the Court of Auditors, partly because it has in fact taken the question very seriously and has worked on it, and partly because the Court of Auditors has very cleverly realised how to position itself so that it appears to be the central agent in the fight against irregularities. This has been particularly successful in relation to the Member States. The role of the Court of Auditors is more problematic in relation to the other institutions, and the question of irregularities has been deliberately used by the Court of Auditors to strengthen its own legitimacy at the expense of the Commission. Since the Member States and the Court of Auditors are such important allies, it is a problem that the internal workings of the Court of Auditors are so arranged that they are liable to give rise to conflicts between them.

18.1.5. The Council

"The Council is very important because it is the principal maker of laws," said one of the representatives from the Member States. In the Council legislation is adopted by a simple majority, a qualified majority or unanimously. The interviewed representative from the Council expressed it as follows: "The Council's function is as a law maker, sometimes in conjunction with the European Parliament, but not in this area [the fight against irregularities]; here rules are adopted on the basis of Article 235 (now Article 308 EC), which merely requires a simple consultation with the European Parliament. .... [We] take the views of the European Parliament into account to a greater or lesser extent. .... We expect the co-operation of the European Parliament in this connection [the fight against irregularities] because it is just as important for them as it is for us." While the Council is of central importance in the making of rules, it is of no significance for their implementation. It has thus been said: "The Council has no direct role to play, other than adopting rules for combating irregularities. The practical implementation of the rules is naturally undertaken by the Commission and the Court of Auditors." And to the question: "What is the role of the Council once regulations have been adopted?", the representative for the Council answered; "In fact that's where the Council's role ends."

The personnel of the Council changes all the time since the Member States send different ministers to represent them, according to the topic being dealt with. In the Council the fight against irregularities is dealt with by the meeting of the economic and finance ministers (ECOFIN). It is thus one of the most important of ministerial meetings with responsibility for the question. The interviewed representative from the Commission described it like this: "Well,

the fight against irregularities is a bit of a hobby horse with them [the economic and finance ministers] ... they take it very seriously. .... It suits them very well to sit there in the European Council, together with the foreign ministers and prime ministers. It means that they get to draft a communiqué of a meeting which is their own and which may not be what the agricultural ministers want at all, and it suits them very well to get their foot in the door like that."

In particular, in 1995 the European Council gave some clear political signals of the importance of the fight against irregularities,[896] and in recent years the economic and finance ministers have been very active in the fight against irregularities in the Community finances.[897] Within the first pillar of the EU two important regulations have been enacted, Regulation 2988/95[898] and Regulation 2185/96,[899] and within the third pillar a Convention on the protection of the European Communities' financial interests has been signed.[900]

Even though ECOFIN is the part of the Council responsible for combating irregularities, it should be borne in mind that a significant part of the development of the law in this area has taken place in other contexts; in particular the agricultural ministers have created considerable regulations for controls and sanctions in their area of responsibility.

The interviewed representative from the Council (from the Council's secretariat) confirmed the seriousness with which the Council views the question of combating irregularities, and the willingness of the Council to undertake regulation of controls and sanctions, and the desire for further integration. On the other hand she also pointed out that the Member States must go along with this, for example, it was said of the regulation of sanctions: "The aim now is to create a general regulation for sanctions to cover those areas where there is no sectoral regulation. I don't exactly know what the attitude of the Council is, because there is not yet a Commission proposal. But I believe there will be long discussions, because when you start to get to grips with the question of sanctions, you touch on the highly sensitive distinction between administrative and criminal penalties. So I predict there will be long discussions. However, it is part of the overall strategy [to undertake the regulation of sanctions]." Apart from the positive attitude towards sanctions, which is implicit in this quotation,

896. Conclusions from the Council meeting in Cannes in June 1995.
897. Mendrinou, M.; European Community fraud and the politics of institutional development, European Journal of Political Research, Volume 26, No. 1, July 1994, s. 93.
898. On the protection of the European Communities financial interests, (OJ 1995 L 312/1).
899. Concerning on-the-spot checks and inspections carried out by the Commission in order to protect the European Communities' financial interests against fraud and other irregularities, (OJ 1996 L 292/2).
900. Convention on the protection of the European Communities' financial interests, (OJ 1995 C 316/48), prepared on the basis of the then applicable Article K.3 of the EU Treaty.

this is interesting because the interviewee distinguishes between the attitude of the Council and the attitude of the ministers meeting in Council. This is an important distinction which is dealt with in more detail below.

18.1.5.1. Manifest functions

The effective combat of irregularities and the enactment of regulations for controls and sanctions is a manifest function of the Council. When the interviewed representative from the Council says that the way to combat irregularities is "through legislation, which is what we do. It is the right way," it emphasises that the Council still wants to be a key element in the fight against irregularities, with the manifest function which follows from this.

But combating irregularities by more indirect means is also a manifest function of the Council. The above quotation of the interviewed representative from the Council can be interpreted on the one hand as the view of the Council, and on the other hand as the view of the ministers gathered in Council. A number of the other interviews confirm this ambivalence of the Council. A representative from one of the national administrations said: "One can't say that the Council is merely a reflection of national interests." Another said that the Council is positive towards the regulation of controls and sanctions, but that on the other hand the Council also "sees problems in making common rules, because there are such enormous differences in the constitutional, administrative and legal systems of the Member States." The Commission view is that: "[The Council] is to a lesser and lesser degree just a collection of countries sitting down together." The interviewee from the European Parliament said: "In my view there are several Member States that are quite happy to see some irregularities and inefficiencies, because it allows them to develop an almost schizophrenic stance where they can say .... 'Look at those idiotic bureaucrats in Brussels'. As if they weren't a part of it. But look at the people who take the decisions. The people who take the decisions are in the Council, but they never say 'Look what we have done', it is always 'Look what they have done', as if they're not part of it. That's what ministers from all the Member States do. They talk of Santer, or before him Delors, but neither of them have ever been allowed to vote on a single piece of legislation in the Council." The representative interviewed from the Council (a staff member from the Council secretariat) naturally approached the question with great care, but nevertheless said: "The Council is made up of ministers, so naturally the decisions reflect the attitudes of the Member States. .... But because there are fifteen Member States who have to agree about a single text, everyone has to agree to compromise ... and bargain for their point of view." Apart from the statements in the interviews, the ambivalence is confirmed indirectly by the objective circumstances in connection with the Convention on the protection of the European Communities'

financial interests,[901] since all the Member States signed the convention in 1995, while it had still not entered into force because not all of the Member States had taken the necessary national measures.

On the basis of these statements it is probably not too much to argue that the Council has one attitude and function, and that the national ministers gathered in the Council have another attitude and function. It is a manifest function of the Council that it develops its own identity independently of the individual Member States. Among other things this means that the Council can work actively in obtaining compromises, as suggested in the quotes above. This function is recognised by the Member States, as one interviewee said: "Compromises are necessary in Brussels. Compromises are made which don't really suit our original intentions," and another said: "The Council of Ministers can't do anything if just one person says 'No'. They can block everything, just by being passive." In this way the Council, as opposed to the ministers gathered in Council, acquires an important active function as an institution, which succeeds in getting representatives from the Member States to take decisions, which give it an invaluable legitimacy. In addition to this, as stated in the interview reproduced above, the Council appears as an active agent in the fight against irregularities.

18.1.5.2. Latent functions

Quite often different ministers from the same Member State have different attitudes to the same question. Consequently, different compositions of the Council have different attitudes to the same question. Several of the interviews confirmed this: "In one Council of Ministers the opinion can be one thing, and in another Council of Ministers the opinion can be quite different, even though they come from the same countries. .... I have myself listened to a German agriculture minister demand higher prices, and later the German finance minister voted against them," "Of course you see countries in different Council meetings adopting different positions. What the French agriculture minister says and what the French finance minister says aren't necessarily the same. It's not very well co-ordinated", "If you ask those who administer the agricultural regulations, they are not too keen on [independent control by the Commission]. They say that the Commission's control would not be very good because you have to understand the circumstances. .... At a higher level, for example the finance ministers, they will say that the Commission should have independent control powers, because if advance notice is always given, countries will hide things," "There are different attitudes in different departments and different administrations", "Every country that comes to negotiate has a pretty clear idea

901. Convention on the protection of the European Communities' financial interests, (OJ 1995 C 316/48).

about which countries are represented by their justice ministries and which are represented by their finance ministries. [The attitude] is often the result of hefty discussions in the respective capitals. The traditional starting point for justice ministries is to put greater emphasis on the national legal system, with less willingness to co-operate and less willingness to bargain. .... We from the finance ministries are maybe a bit more rough and ready. It doesn't worry us so much if somebody questions us closely about how the money is used." The interviewed representative from the Commission said: "The Council of Ministers is increasingly seen as being split into a number of different bodies. So there is a Council of Finance Ministers, which looks after the money, a Council of Agriculture Ministers, which looks after the farmers, a Council of Fisheries Minister, who looks after the fishermen, and so on. In other words, some interesting alliances are formed. ... There is often an alliance of finance ministers against all their other ministerial colleagues in all the Member States, and they feel like a club, which is important in the fight against fraud. In fact we have used the finance ministers to pioneer a number of initiatives in the areas of controls and sanctions. ... In fact, the other ministers, and thus the other Council meetings have a great deal of respect for the finance ministers. You can get quite far just by mobilising them and getting them to fire off a few missiles at their ministerial colleagues in their own governments." To illustrate this the interviewee told a little anecdote about how the Commission had problems with a British agriculture minister who "would neither listen nor understand," so they went to the finance minister who "threw up his arms and with a broad smile asks 'What did these bastards over there tell you? What kind of lies are they up to now?'". With direct reference to the work of the Council he said: "[It is easy for the national ministers] to come [to Brussels] with a ... policy and to be backed into position, and then go home and say 'But it was the others who did it, and it's very regrettable'; they themselves have been party to the decision but that isn't something they shout about. That's the game."

These quotes show that the Council acts as a breakwater against solid national attitudes. This is possible because, as argued in connection with the manifest functions, the Council is partly considered as a body in itself and partly as representatives of the Member States gathered in Council. The fact that regulations can be enacted in this way is in itself a latent function of the Council, while strengthening the position of the Community, and thereby the Council, at the expense of the Member States.

18.1.5.3. Latent dysfunctions

The distinction, commented on above, between the Council and the ministers gathered in Council, not only has functional consequences, but can also give rise to considerable dysfunctional consequences. As can be seen in the quotation above from the member of the European Parliament, this situation makes

it possible for Member States to distance themselves from the Council, which in turn means that the Council does not have the same strength as if the Council appeared as a solid unit. It legitimises the fact that Member States look after their own interests in Council rather than the interests of the Community. A representative of one of the national administrations said: "[The Council] was once a unified institution, but more and more account is taken of national interests. The concept of sovereignty is making increasing inroads in the Community."

This fact is obviously a contributory factor in making regulations so complicated. It was said, among others by a member of a national parliament: "The agriculture regulations are so desperately complicated because of all the political compromises." The interviewee from the special interest groups said: "When such a proposal has been through the mill of Council compromise it often looks very different, and is usually no easier to control or administer."

This complication of rules in order to obtain a compromise which all the Member States can accept is a big problem and a latent dysfunction of the Council. But the problem which lies behind it is much greater, and this is that the required loyalty, on which the Community is based, does not exist in the Council, so Member States look after their own narrow interests rather than the interests of the whole, and the legitimacy of the Council is weakened, which is a significant dysfunction.

18.1.5.4. Conclusion

As is the case with the other institutions of the Community, the Council gives high priority to combating irregularities. However, the analysis shows that the Council should be seen partly as the Council and partly as the representatives of the Member States meeting in Council. This has given the Council its own identity, which has enabled the Member States to take many decisions to a great extent setting aside their national point of view. On the other hand, because of this ambivalence, it allows Member States to look after their own national interests in the Council and thus there is acceptance of an absence of loyalty on which the Community is based.

18.1.6. The Member States

Through the Council the Member States[902] are the Community's central decision makers and thus decisive in the making of laws. But their influence on the making of regulations starts much earlier, and the Commission involves national administrations when preparing its legislative proposals. For example, the proposals for both Regulation 2988/95[903] and Regulation 2185/96[904] were dealt with in working groups in which representatives for the different Member States took part. The interviews confirm that the national administrations of the Member States consider their early involvement in the preparation of regulations to be an important source of influence. This also means that the Commission can get an idea of the opinions of the Member States and adjust their proposals accordingly, and in this way the Member States have greater responsibility for the proposals. This last factor can be illustrated by the following statement from the interview with the representative from the Commission concerning the preparation of the adopted horizontal regulation for the protection of the Community's financial interests: "The justice ministries were in fact left out. They were told: 'Look chaps, we've had an agricultural policy for the last 25 years and if you look at the effects of the sanctions, realistically speaking, they're criminal law sanctions. I mean, if you throw a farmer out of some agricultural programme, the man's dead in the water. If that's not a criminal penalty, I'd like to know what is.' And they say: 'Oh dear! Is it like that? We didn't realise that.' And they were told: 'We're very sorry, but it was discussed, and you approved it yourselves.' To which they reply: 'Oh gosh! We didn't know about that.' They are totally out to lunch, and now they are running after the train, trying to find out where it's going, and what it's all about, but before they climb on board it has to brake, of course." Later in the same interview the

902. The influence of the Member States on the creation and application of regulations for controls and sanctions for combating irregularities against the EC's finances has both an internal and an external aspect, see Section 2.2.1. The external aspect refers to the influence of the Member States, as understood when the Member States are looked at externally and considered together as a single agent. The internal aspect refers to the distinctions that can be drawn between the Member States as agents, and the relations between them. Looked at internally, distinctions can be made between individual Member States, groups of Member States, and between the national administrations of Member States and their parliaments. Even if the other agents, with the possible exception of the Council, are considered purely externally and thus considered as one agent, on the basis of the information given in the interviews, it is thought best to include internal perspectives so that the roles of the Member States in the socio-legal processes surrounding the regulations of controls and sanctions and the combating of irregularities is described and analysed.
903. On the protection of the European Communities financial interests, (OJ 1995 L 312/1).
904. Concerning on-the-spot checks and inspections carried out by the Commission in order to protect the European Communities' financial interests against fraud and other irregularities, (OJ 1996 L 292/2).

interviewee added: "There are some ministries, especially the justice ministries, which are now discovering that they have themselves approved something which they haven't realised before, and of course they think this is damned irritating."

The way in which individual Member States have organised their approach to making regulations varies. However, it is characteristic that the influence of the Member States is solely concentrated in the central administration, with the government at the head. The permanent representation in Brussels typically has a key role, though naturally under the direction of the home government. This is illustrated in the following quote from an interviewee from a national administration: "Today, at half past eight, I sent a fax to my colleague in the permanent representation in Brussels. He had informed us that the German representative had made a proposal to amend the proposal put forward by the Commission, and he wanted our view on this. I replied that the amendment was quite alright."

The influence of national parliaments on the enactment of Community legislation is limited. While parliaments are the primary legislators and have a decisive influence on national legislation, they have only an indirect role in the enactment of Community laws, as they only have influence on governments and thus the attitudes of the national administrations in the legislative process.

The precise role of the national parliaments varies according to the constitutions of the respective Member States. However, it is possible to divide the parliaments into three broad categories.[905]

The first category consists of those parliaments that can give national ministers a negotiating mandate which the ministers are politically bound to follow in the Council. The Danish parliament, led by its European select committee, belongs to this group of parliaments which has the greatest influence. The fact that, seen through European eyes, the Danish European select committee has a very strong influence on the Danish government's activities in the EC law making process can clearly be seen in this statement from the interviewed Danish parliamentarian: "When there were only twelve Member States, Jacques Delors said that there were thirteen, meaning that the thirteenth was the Danish parliament's European committee. But this is no longer the case, with qualified majority voting there are limits to what we can decide. ... We have decided to get involved in the processes at an early stage. We may not be able to achieve so much nowadays, but insofar as we get involved early and influence the minister and the minister's officials to follow a particular negotiating line, then

905. As well as the interviews, what follows is based on Koch, Henning; Parlamenternes Europa, Årsberetning, Retsvidenskabeligt institut B, 1994 and European Parliament; Europa-Parlamentet og medlemsstaternes parlamenter, parlamentarisk kontrol og samarbejdsmuligheder, July 1994.

to that extent, we can be involved in the negotiating process." The Danish approach to the role of parliament has been a model for the latest Member States to join, Sweden, Finland and Austria, which have introduced procedures in which their parliaments' influence is very much like the Danish, with the central point being that parliamentary committees give ministers a negotiating mandate in advance of Council meetings. The interviewed representative for the Finnish parliament, former chairman for their Stora Utskott, equivalent to the Danish European committee, said of this: "Naturally we used the Danish system as a kind of model. But we introduced two changes, which did not exist in the Danish system, which have now been introduced in Denmark, but which originated in Finland. These are that the committees for particular areas of responsibility are involved in dealing with EC questions, ... and also we try to develop a policy at as early a stage as possible, and not just when something comes up in the Council, because that is normally too late to influence the content, and it is usually possible to influence the government's voting in the Council, but not the content of a proposal."

The second group of parliaments consists of those where the government takes soundings of the view of parliament before something is dealt with in the Council, but where the government is not bound by the answers given. There are, of course, differences of detail in the different countries about the obligation to consult, including whether the matter concerns the second or third pillar, but, for example, Belgium, the United Kingdom and Germany belong in this group. The interviewed representative from the Belgian parliament gave this description: "In Council meetings the ministers act upon their own responsibility, ... but they usually listen to what parliament says."

The last group consists of those countries where the parliament merely has the right to be informed, either before or after, about the government's actions in the Community . Spain, Greece, Italy, Luxembourg, Portugal and France belong in this category. However, in 1992 France introduced provisions according to which the government shall put proposals for EC legislation before the national assembly and the senate. On this, the representative from the French national assembly said: "The government has decided that the provisions are not legally binding ... The government can do what it wants, but the system is better than nothing ... There are two situations. There is one where parliament and the government have different opinions, and the government acknowledges that such-and-such is the view of parliament, and then ignores it ... The second situation is where parliament and the government agree, which is usually the case with our electoral system, and then it is good for the government to have parliament's view, so it can say to the other Member States that this is the French view on things, and parliament agrees, and we can't go against parliament. It is a political game."

The weak position of parliaments is linked to the fact that EC co-operation was originally considered to be a traditional foreign policy issue, which is a view which has long since been at odds with reality. Since the beginning of the 1990's there has been a tendency to strengthen the position of national parliaments, and also internationally parliaments have experienced a growing strength, as evidenced by the setting up of the co-operating body COSAC,[906] in which the representatives of the European committees of the national parliaments meet together twice a year in the country which holds the presidency of the Community. At each meeting COSAC discusses two or three specific topics; in February 1995 the question of irregularities against the EC finances was discussed. Decisions are taken on the basis of a majority of those taking part, and using this procedure the conference has, among other things, rejected a French proposal that the EC should have a second chamber, alongside the European Parliament, consisting of members of the national parliaments. The Maastricht Treaty[907] strengthened the position of the national parliaments, and their position was further strengthened in the Amsterdam Treaty.

The interviews clearly show that the national parliaments find their weak role unsatisfactory, and unsurprisingly this applies in particular to those parliaments which merely have a right to be informed; thus on the question of setting up a second chamber the French representative said: "It is natural that we do not want the European Parliament to have comprehensive legislative powers; we want to preserve our own powers. The idea of the COSAC delegation was to create a system that would bind national parliaments closer to the European project, because the current position is unsatisfactory." Furthermore, as discussed above in connection with the Court of Auditors, national parliaments have begun to be more aware of EC initiatives and to use them more actively. For example, this applies to the annual report of the Court of Auditors, as confirmed in the following statement in an interview: "I know that the European Parliament has a Committee on Budgetary Control that works well, but most countries are much less interested in [the EC budget] than in the adoption of their own national finance law. Some change is needed so that national parliaments have more control, and this will also put pressure on governments to push through regulations for the distribution of finances etc."

Once the Community rules have been enacted, their administration, the control of compliance with them, and penalties in cases where they are not complied with, are matters for the Member States, as described in the section above on legal theory. In a reference to the issue of customs, the interviewed representative of the Commission said: "the administration is the Member

906. Conference of European Community Affairs Committees.

907. Declarations accompanying the Treaty of Maastricht: Declaration 13, On the role of national Parliaments in the European Union.

States, and we can't do a thing unless we have a very, very close co-operation with them," and a representative from one of the national administrations said: "When a regulation is adopted, it is up to the Member States to see that it is put into practice."

So it is the Member States that do the practical business of applying the rules, including providing the necessary conditions for applying the rules in the form of resources, administrative structures etc.

The importance of resources is underlined by the Court of Auditors'[908] investigation of the Member States' implementation of Directive 77/435.[909] Among other things it appears from the reports that there were significant differences in the provision of resources. For example, Denmark had one controller per 3 million ECU of expenses while Greece only had one controller per 140 million ECU of expenses. It is obvious that such factors are important for the effectiveness with which the control is carried out. Similarly there were found to be significant differences in the extent to which personnel received training for the tasks they were required to do. One of those interviewed from a national administration touched on the question of resources, seen from the point of view of a Member State: "The better the control we implement, the more it costs us. It's a big problem for us, because as our obligations to carry out controls increase, our expenses for travelling, testing, salaries and so on grow. Some people spend their whole time carrying out controls and nothing else."

The importance of administrative structures in the Member States, both for the implementation of the regulations and their control, was referred to in several interviews. Among other things it was said: "What if you don't have the structures? ... Without the necessary structures it's impossible to exercise control", and another said: "Some countries' systems are not so developed. ... The court of Auditors has named Greece and Italy as countries that don't follow the rules." An interviewed parliamentarian gave the following example: "Many years ago I studied the health and safety laws in Italy in comparison with the Danish. I found, to my great surprise, that their laws are very similar to the

908. Special Report of the Court of Auditors on the implementation of Directive 77/435/EEC on security by the Member States of transactions forming part of the System of financing by the EAGGF (Guarantee section), (OJ 1984 C 336/1), as well as Court of Auditors – Annual Report concerning the financial year 1987 accompanied by the institutions' replies (OJ 1988 C 316/1).

909. On scrutiny by Member States of transactions forming part of the system of financing by the Guarantee Section of the European Agricultural Guidance and Guarantee Fund, (OJ 1977 L 172/17). This Directive has since been replaced by the important Regulation 4045/89 on scrutiny by Member States of transactions forming part of the system of financing by the Guarantee Section of the European Agricultural Guidance and Guarantee Fund and repealing Directive 77/435/EEC. (OJ 1989 L 388/18).

Danish. I couldn't see how this fitted in with the reality I found when I travelled in Italy. What I found was that there were virtually no controllers in Italy, while we in Denmark have a well developed system with not just the health and safety executive, but also with safety representatives in the work place."

The interviews also indicate that the different legal cultures are relevant to the impact of regulations. As stated, the fifteen Member States have different interests, different expectations, and different administrative systems. The fact that German law does not recognise objective responsibility in connection with administrative sanctions is an illustration of this. The representative of the German national administration said of this: "This system of sanctions without culpability is new for Germany, so we haven't really embraced it. It has been in a regulation, and unfortunately we've lost a case at the EC Court which confirmed that the Commission can make such a sanction, and Regulation 2988/95 has confirmed it as valid law." This quotation clearly implies that, at least up to the time of the judgment of the EC Court, Germany had not lived up to its obligations, because they were foreign to its system.

Apart from the circumstances referred to above, it is natural that Member States, whether consciously or not, will exercise a certain selectivity in their fight against irregularities. This will be linked to motivation and the general attitude towards the fight against irregularities, the possibilities for following up on suspicions, collecting further evidence, the legal process, the giving of judgment etc. It can be assumed that there will be a significant winnowing out cases along the way, not least because cases dealing with irregularities against the EC's finances are often very demanding on resources.[910]

With the examples given it must be concluded that it has been demonstrated that the Member States play a decisive role in the implementation and impact of Community regulations.

As for the attitude of the Member States to controls and sanctions and the combating of irregularities, the representatives interviewed from the national administrations and the parliaments agreed that the Community ought to undertake the regulation of the controls that are to be exercised. It is clear from the interviews both in the Member States and with the other agents that the Member States are generally very supportive of the idea of allowing the Community to be given powers to exercise controls.

All those representatives of the Member States who were interviewed, and who expressed a view on this, think that the EC ought to have powers to undertake control over the Member States. It is worth selecting a few quotes: "Our control systems are quite good, ... but it is possible it is different in other Mem-

910. In support of this, see: The EC Budget: Ten Percent Fraud? A Policy Analysis Approach, by Dick Ruimschotel, Journal of Common Market Studies, Volume 32, No. 3, September 1994, p. 327.

ber States, and I can well understand that the Commission wants to control their money and want to stop some of the things that are going on" , another interviewee said: "I am sure that a critical analysis would show that, compared with any other European country, we have a good system. ... For me it's not a problem if the EC looks at what we are doing. It's up to them," and the third quotation: "It's obvious that national authorities don't have a strong motive to carry out controls. There's nothing worse than a system where people control themselves ... Therefore they [the Commission] should have powers to carry out controls without advance warnings. Right now I think they have to send written notice."

The Member States are also generally positive on the question of whether the EC ought also to have powers to exercise controls over those who are subject to the jurisdiction of the Member States. In fact there were only two interviewees who thought it was a bad idea. The other 28 interviewed representatives of the Member States were positive, but the majority stressed that the Community's authorities ought not to have powers to carry out controls independently of national authorities. There should be some form of co-operation. It was expressed as follows in three different interviews: "The Commission would like to carry out controls without the assistance of national authorities, but we couldn't accept that. Controls by the Commission must take place in co-operation with and co-ordinated by the national authorities," "It is essential that they [the Commission] work together the Member State. ... It is the Spanish view that we must protect the role of the Member States," and the third interview: "We cannot imagine a control which the Commission would carry out by itself." Only two of the interviewees from the Member States left open the possibility of independent Community control, though in the case of one of these it was with a certain reservation: "Purely from the point of view of the finance ministry it is not important that the national authorities take part in the control. ... It would be reasonable to be informed about the control before hand, but it is alright by us if they [the Commission] can work on their own, if they want."

The overall impression of the attitude of the Member States to the question of control is thus in line with drawing the boundaries between the competency of the Community and national competency which follows from Community law, that is to say that to the extent that the Community is given powers of control over those subject to the jurisdiction of the Member States, the control must be undertaken in co-operation with the national authorities, and not independently of them. This means that considerable resistance is to be expected to any proposal to increase the control powers of the Community in this area.

There were also several interviews confirming the attitude shown in the Spanish interview given above, that the Member States are strongly opposed to surrendering further powers. Among other things it was said that: "Every power

that is given at international level is taken from the national level", "The question is – what does sovereignty mean? The Member States stand by their sovereignty. The Community is a highly integrated co-operation between sovereign states", and another view from a Member State: "The Member States have some powers which must be defended and preserved." There is also a feeling in the interviews that the acceptance by the Member States of Community control of national authorities is based on the idea that this will mean that Community control over those subject to the jurisdiction of the Member States will then be avoided. This expressed was follows: "I prefer the solution, [where the EC controls the controls of the Member States, and the Member States control those subject to their jurisdiction], so that in this way the Member States retain their sovereignty," "I can understand that notice must be given. You shouldn't give a warning when going out to some business to find boxes full of documents, but that's not what I think EC controls should be about. They should go in and control an authority and its method of carrying out controls," and further: "There should be some connection somewhere or other, and in my view it would be best if it were between the national and the European authorities." This also reflects the basic approach, influenced by regard for national sovereignty.

When the focus of the interviews moved from controls to sanctions, the Member States were much more ready to dismiss the idea of Community powers. It was generally accepted that the Community regulates administrative sanctions, for example it was said: "As for administrative sanctions, in my view it is not a problem." As for the regulation of criminal penalties, the Member States are much more dismissive, with statements such as: "Criminal law must naturally fall within the area of the competence of the Member States," "Countries know best how to prosecute crime. ... I think that the imposition of criminal penalties should be reserved to the Member States. ... The same goes for the regulation of criminal penalties," as well as a third interview from a Member State: "Criminal law is something different [from administrative sanctions]; it is more serious. The effect of a criminal sentence is serious. The Community should be very cautious about regulating this, and there are widely different criminal systems in the different countries which make this very complicated." One of the Community institutions confirms this point of view with the following description: "When it comes to criminal law, where there are the powers of the courts and police powers, it is very sensitive. ... The Member States have always been very careful in this area."

If one goes a step further to the question of concrete imposition of sanctions on those who are subject to the jurisdiction of the Member States, the interviewees give a clear view that this is a national matter which the Community should not get involved in. This also applies to administrative sanctions: "I don't think there is any problem with having [administrative sanctions] at Community

level. ... But when it is national authorities that uncover irregularities, it wouldn't be very clever of them if they went to the Commission and said 'Please will you apply the proper penalty?'", and another said: "I think it is only reasonable that the local implementation of the rules is undertaken by the local authorities in co-operation with the EC." One of the national parliamentarians said: "We shan't have EC police or EC prisons, so when it comes to it, if there is to be a regulation it should be enforced by national authorities on behalf of the Community." Even those interviewees who just before had expressed the view that the Community should undertake the regulation of sanctions are dismissive when it comes to the question of imposing sanctions: "No, that would be going too far. The imposition of sanctions is an important part of sovereignty," and another said of this: "When there are Community rules it is only natural that there should also be rules for enforcement and sanctions at a European level, but the enforcement itself ought to be at the national level. But the rules can very well contain some provisions aimed at creating a uniform level of sanctions." Of all the interviews in the Member States there was just one person who replied positively to the idea of giving the Community powers to impose sanctions on those subject to the jurisdiction of the Member States.

As for any possible powers for the Community to impose criminal penalties on those subject to the jurisdiction of the Member States, all the interviewees rejected the idea.

The only point on which the Member States react positively to the idea of the Community having powers to impose sanctions is on the issue of the Community imposing sanctions on individual Member States. Among those representatives of the Members States' national administrations and parliaments who expressed a view on this, a large majority were in favour of the idea, with statements such as: "one can imagine EC sanctions on a Member State that does not ensure the proper implementation and application of EC laws."[911] It was also said that: "It's Europe that pays, so Europe must have the powers to sanction Member States. Maybe the countries are not directly responsible, but they are at least indirectly responsible. ... We have ourselves been subject to critical analysis, and from this Commission argued that there is 10% misuse. Therefore they have imposed a kind of 10% fine on what we have transferred, bringing the total up to about 120 million. We are talking to them about it now; we can maybe accept half. It was not the Community that discovered the situation, it was us, because we want a good reputation in the Community." Another of

911. See also Section 15.1 for a more detailed consideration of the possibility of applying sanctions under Article 228.2 EC, as well as the application of this in Case C-387/97, Commission of the European Communities v Hellenic Republic, [2000] ECR, in which for the first time the Court gave judgment in which a sanction was imposed under this provision.

those interviewed said: "That's alright. No problem. Among others it's France that will pay. The Community can already impose sanctions on Member States, which in principle could be developed further, but this could cause problems with Member States. There are undoubtedly Member States that would not accept such a judgment from the EC Court of Justice." Others emphasise that such powers to impose sanctions should be given to the EC Court[912] and not the Commission, saying for example: "We don't like the idea that the Commission can cut subsidies or impose sanctions on Member States if they don't live up to Community regulations. We think that this should be a matter for the EC Court. That is the only acceptable way," and another: "Most Member States have said that under no circumstances can they accept the imposition of sanctions by the Commission on a Member State." In only a single interview did the interviewee directly reject the idea of the Community having powers to impose sanctions on Member States, and this rejection was on the grounds that such would essentially be a political question.

Altogether it can be said of the attitudes of the Member States that they accept the Community's regulation and exercise of controls but are much less ready to accept the same in relation to the imposition of sanctions. In both instances it is more difficult to accept powers of controls and sanctions over those subject to the jurisdictions of the Member States than over the Member States themselves. It is the issue of sovereignty which lies behind this considerable resistance, and the application of the law to its own citizens is *par excellence* the actualisation of a Member State's sovereignty. As for the combating of irregularities, the Member States find themselves in somewhat of a dilemma between, one the one hand, national sovereignty, and on the other hand, the desire for an effective fight against irregularities.

18.1.6.1. Manifest functions

The fight against irregularities in the EC's finances has to a large extent been based on further integration by means of expanded regulations for controls and sanctions by the Community. This means that for the Member States, as distinct from the Community institutions, the fight against irregularities has not in itself been a manifest function. This has provoked a reaction in the Member States. In the interviews conducted in the Member States it was said, among other things: "Let's have some general principles, but on the other hand, let's not regulate everything down to the last detail," and "We want a better Europe that works together better, and where there are better controls, but there is a feeling among people and in the country in general that Europe can't be everywhere and control everything," " We want to be sure that the principle of subsidiarity is applied and applied correctly. This is important because it is a way of holding

912. See also Section 18.1.3 on the legitimacy of the EC Court of Justice.

onto power, and not losing a grip on the situation" and finally: "For us there is no doubt that all members of parliament defend the role of the national parliament. In fact the Community would never have come into existence if it hadn't been that the national parliaments had got together in an economic community; the national parliaments are the parents of the Community."

The above statements from interviews on the attitudes of the Member States show that the Member States attach a lot of importance to their national sovereignty, and that there is a resistance to any further loss of power to the Community. Because of this, in recent years the regulations and efforts against irregularities have generally been more nationally oriented, and this is a manifest function

18.1.6.2. Manifest dysfucntions

The political pressure to do something to combat EC financial irregularities has grown in the Member States. As referred to in the section dealing with the Court of Auditors, this has in part been the result of the national parliaments' use of the annual reports of the Court of Auditors, which has led to the Member States accepting greater powers for the Community to regulate for controls and sanctions in the area, regardless of the fact that this involves a manifest dysfunction for the Member States, since the national powers in this area are thus reduced. One of those interviewed from a national administration said of this: "The political pressure is much greater and we realised that more should be done. In this way things changed a lot. We have never said that it is a question of sovereignty. What is important is effective control, but it is obvious that for the legal process itself, things that today are the responsibility of the Minister for Justice will continue to be so; the Commission has nothing to do with that. But as for the preceding phases, the control and investigation of what is actually going on, where we have previously been more reserved, it is there that we have seen a change." The interview signals a clear desire to keep a hold on powers in national hands, but it also contains an acknowledgement of a weakening of the position of the Member States. In other words developments in the fight against irregularities have brought with them a manifest dysfunction for the Member States.

18.1.6.3. Latent dysfunctions

Many interviews undertaken in the Member States indicate that basically the Member States seek to look after their own national interests rather than the common and Community interests. It was said: "In a way it is more legitimate to try to use EC money for some purpose other than the intended. I think it is regarded as being in the national interest to try to get as much money as possible out of the EC, regardless of whether it is strictly legal or not," "Everyone thinks of EC finances as being money that must be used anyway ... it is not in

anyone's interest to save money. The only thing people look at is how much they themselves will get out of it, as if it was money that came from some distant country," "We talk about the Community and the European Union, but the interests of Spain or Portugal are quite different from those of Denmark, Belgium or Luxembourg. So, when there is some regulation, the Italian government look at it to see what is in the interests of their own people, and the French are interested in what is good for Frenchmen. There isn't really any community or any union," "Europe's big problem is that there is a lot of central regulation, but the control is decentralised, and there is a lack of political responsibility," and the final example: "We think one should begin to improve the Union along the lines of the Swedish model." The interviewees representing the Community's institutions also confirm that the Member States have a very nationally oriented view of the Community: "On the part of the Member States there is resistance to any form of Community meddling in their territories," and later in this same interview: "The Member States manipulate the system for their financial advantage." The representatives from two other institutions said: " Member State controls in relation to the Community expenses are less rigorous than their controls over their own expenses," "Member States do not consider that the money they collect for the Union is very interesting," and "The Member States are not very interested in doing anything about the so-called transit fraud, where over the last four years the amount of money that has vanished could have paid for [a major infrastructure project]. It's a lot of money, it's something like 1 billion Euros. The money vanishes out of the EC finances ... so it must automatically be financed via the Gross National Product scale, in other words it must come from the national finance ministries." The interviewed representative from the media said: "Regional authorities ... were not so interested [in carrying out controls] because it was EC money" and further: "The national customs authorities said it was just EC money," and the representative for the special interest groups said that there was a lack of loyalty between the Member States and the EC: "Especially in areas where national finances are not involved, some Member States are not as careful as they ought to be."

Collectively the interviews give a picture of the Member States working to look after their own national interests which means, among other things, that in their legislation the Member States adjust Community regulations to fit their own requirements, and in their implementation of regulations each Member

State tends to give lower priority to the respect for Community regulations[913] and higher priority to achieving the biggest economic benefit for themselves. These factors constitute a latent function for the individual Member State. The national orientation of the Member States, and the consequent downgrading of the fight against irregularities, also means that the Community's legitimacy is weakened so that it becomes easier for the Member States to prevail with their points of view based on national sovereignty. This increases the probability of their continued existence and is thus a latent function. One of those interviewed from a Community institution said of this: "It is my opinion that several Member States are quite content with the existence of some irregularities and inefficiencies," precisely because it gives them grounds for criticising the Community. This means that, regardless of their assurances to the contrary, the Member States are not interested in and do not ensure that the fight against irregularities in the Community's finances are as effective as possible.

Despite the immediately preceding statement, it is official policy in all Member States that the fight against irregularities is important. As already referred to, the countries have frequently stressed the importance of the problem, for example in the European Council, and the representative from the Council who was interviewed said: "At the political level there is a great deal of support [for combating irregularities], primarily from the European Council, but also from ECOFIN. It has been a top priority since 1994." But the interviews with the Member States leave the impression that such declarations serve a symbolic purpose, where the value of the signal is more important than any consequent activity. One of those interviewed from a Member State described this as follows: "I have had the pleasure of meeting representatives from the other Member States nearly every week. To start with they all gave the impression they thought that [combating irregularities] was very important, and supported it in principle. But, when we discuss new provisions for controls, there are a number of Member States which have requirements for an effective control system to have a lot of things, and before we have these things we can't make any progress. ... There are a number of countries that are happy to support general principles, but when it comes to the detail they get very picky so, quite simply, the whole process grinds to a halt. ... There are countries which are in fact indifferent, but with the growing scepticism in all Member States there is

913. It should be pointed out that the immediate effect on the national economies of Member States that reveal irregularities is that fewer Community resources are directed to the national business sector in question, and the risk of being obliged to repay money to the Community is increased. In support of this, see: The EC Budget: Ten Percent Fraud? A Policy Analysis Approach, by Dick Ruimschotel, Journal of Common Market Studies, Volume 32, No. 3, September 1994, p. 327, and R. Levy; Audit and Accountability in a Multi-Agency Environment: The Case of the Common Agricultural Policy in the UK, Financial Accountability and Management, 1994, 10(I).

a need to show that we are in control of how [the resources] are used." Another interviewee said of this, rather sceptically: "The important thing is not what you say but what you do." Against this background, the stated demand of the Member States for an effective fight against irregularities can be interpreted as a latent function, in which the demand is primarily symbolic and merely serves to show that something is being done: a function of activity. The following statement supports this view: "in order to combat irregularities, instead of making new regulations it would be better to use those we already have." This statement is particularly interesting when it is remembered that the Member States have a decisive influence on the implementation of regulations, but not the same influence on their making.

18.1.6.4. Latent dysfunctions

There are no reasons to believe that the Member States alone will act as a unified body or ought to do so.[914] It has been reported above that the Member States work for what best suits their own national interests.

According to the interviews it is possible to distinguish between those countries that are net contributors to and those that are net beneficiaries from the EC's finances; the net contributors see themselves as being more interested in fighting irregularities than the net beneficiaries. Among other things it was said that: "It is the Member States that pay that want a more effective fight [against irregularities]," "For us net contributors it is naturally very important [that there should be proper control]," and: "It is noticeable that the net contributors are more inclined to make compromises which involve greater departures from national systems than the net beneficiaries," and other quotes on this: "Some Member States, for example, have no interest in combating irregularities because they receive money from the Community. ... We are more active because we are net contributors," "Since we are net contributors it is very important for us to have controls to see that the money is used properly." This distinction is emphasised partly because it confirms the fact that the Member States focus on their own interests, and partly because the statements quoted show that the Member States do not trust one another. Those who pay are convinced that those who receive money turn a blind eye to irregularities. This mistrust is in distinct contrast to the duty of loyalty expressed in Article 10 EC and the requirement of good faith on which the Community is based.

Another division revealed by the interviews is on the question of whether there are differences in the fight against irregularities between northern and southern Europe. Most of the Community's institutions that expressed a view on this gave the impression that there is no such distinction. For example it was

914. See also the reference in the introductory part of the section on the internal and external aspects, and see Section 2.2.1.

said: "I think it is necessary to state that there is room for improvement in all Member States and there are no Member States that are 'good', there is not a North-South divide. ... It is not as if northern Europe is good and southern Europe is bad." Only one of the interviewees from the Community's institutions expressed the view that irregularities are greater in southern Europe than in the north. However, this latter view is shared by a number of northern European countries. It was most clearly expressed by a parliamentarian from a Scandinavian country: "It is obvious that there are different approaches to controls, not so much in what people say, but we can see it in practice, and there is no doubt that the countries that are more honest ... are mainly in the north, and that it is a bit more tricky further south." Another interviewee said: "If you go to the south, that's where the problems are. ... This is because the political culture is different in southern Europe than in the north." This view was expressed in the interviews from at least five of the eleven most northerly Member States, but in only one interview was the view expressed that the extent of irregularities is the same in the north and in the south. On the other hand, of the southern European countries (Greece, Italy, Spain and Portugal) three of them absolutely reject the alleged difference. One said: "There is a difference between the countries in the north and the countries in the south. The countries in the north who give money to us think that irregularities only take place in southern Europe. ... This view of the north contra the south is wrong." Directly asked: "When I have done interviews in some of the other Member States, there seems to be a clear view that most of the irregularities take place in southern Europe," the reply has been: "No, that's not true." The interviewee from a single southern European country reacted differently: "In general Member States prefer to carry out their own controls with the least possible involvement of the Commission. Generally all the Member States say that their systems are just fine and don't need the Commission's meddling ... even those states which we know don't have as good controls as they claim ... There are certain Member States whose control systems are not as thorough as ours, for example Greece and Italy."

In support of the assumption that there are more irregularities in southern Europe it was argued that: " Greece and Spain get a lot of money from EC funds, particularly the Structural Funds, and where there is money there are irregularities." This is an argument that was followed up in part by one southern European country as follows: "We undertake very, very thorough [controls], and we don't believe that other countries do, so maybe we have more irregularities than other countries because our controls are better. ... If you look at the different figures for irregularities in the different countries, you will see we that have more irregularities because we get more support from the funds and because our controls are better than those of other countries." There was a somewhat similar argument from an interviewee from another southern European country who claimed: "There are differences, and these are mainly due to

the different economic structures. 20% of our population is employed in agriculture." Apart from the explanation that most of the EC's budget is used in southern Europe, it is also argued by both northern and southern countries that the administrative system is not developed to the same extent as in northern Europe: "There are always rumours about the lack of control in some countries. ... People are always talking about Greece. ... This is because there isn't the necessary administrative structure, which in turn is due to the differences of culture and mentality." Finally there is a third group of explanations which is based on the idea that southern European simply wants to get as much money as possible from the Community, and only thereafter considers whether this includes obtaining money by means of irregularities: "Some Member States are interested in hiding corruption, ... because even if the money does not go directly where it ought, at least it is the citizens of the country that get it," "We pay a lot, and we get less than we pay into the EC budget. But it is the other way round with the southern European countries. I think it is a matter of indifference to them whether the money is used properly, and this is a shame and it is stupid because the money should be used properly when it is we who are paying" and "I believe they have a more relaxed attitude in southern Europe, and they don't think it is any great sin if somebody or other has done something wrong. In our countries it would be a great scandal."

It is right to look more closely at the three explanations for the allegedly greater number of irregularities in the south. The first explanation, that there are more irregularities because more money goes to southern European counties, expresses some mistrust between countries. The second explanation, that the administrative structures in southern Europe are too weak to administer EC regulations, ought to prompt questions as to whether the existing regulations are appropriate, and this is a question which is discussed below in connection with the structural conditions. However, this explanation does not necessarily express mistrust between countries, even though the reference to cultural differences could easily be interpreted as mistrust. The third explanation, that there are arguably more irregularities in southern Europe reflects the mistrust between Member States.

It is clear that the interviews do not give a basis for judging whether the northern Europeans' accusations are correct, or whether the defence of the southern Europeans is right. But the interviews leave an impression of mistrust between Member States which conflicts with duty of loyalty and the requirement of good faith on which the Community is based, as referred to above.

Apart from the distinction between net contributors and net beneficiaries and between northern Europe and southern Europe, there are a large number of statements in the interviews which confirm the Member States' basic mistrust of one another and of the Community's institutions. The following quotes are just a selection of these, since on average each interview contained more than

one statement which indicated that the Community is a co-operation based on mistrust: "In Belgium the authorities do everything they can to uncover any irregularities. It's not like in Italy or Greece where irregularities are all part of government, together with the mafia and so on," "Officials from the Commission have told us that Greece is one of the countries which is very open to controls, and we deliver all the materials to the people [from the Commission]who do controls, and they have told us that this isn't the case in all countries," "We can't leave [controls] to the Member States. It is one of the things which can definitely not be left to the Member States," "There are certainly some places where the control system does not work well enough, so I think it is important that the Commission controls them" and "We do a lot of controls, and reveal many irregularities, which we report, and therefore we are at the top of the list. Nobody can accuse us of not controlling or reporting, but the other countries are more dubious because none of them really tells the truth."

The mistrust within the Community is set out in such detail because it is precisely this that has had such an important influence on the regulation of controls and sanctions. When loyalty and trust fail, this leads to the Member States accepting controls and sanctions so as to ensure control over the others which they mistrust. The following quotes which illustrate this come from interviews with representatives from the national administrations and parliaments: "Our starting point has always been that we are content with the existing system where the rules are administered by the national authorities, including the payment from the various arrangements for subsidies and the follow-up if there is any fraud, as well as controls to see that there is no fraud. But this gives rise to conflict if anyone has a suspicion that the authorities don't control well enough, or if, for the sake of argument, they themselves are involved in some swindle. So you have to ask yourself if you are willing to give up the principle," "In some situations it can be in everyone's interest if there is someone impartial involved, looking over the shoulders of the Member States," "Who's controlling who? How do we know what controls they have in other countries? And how does the Commission know what controls we carry out? We think it is right for the Commission to be able to [carry out controls]. It ought to happen here, and it ought to happen in other countries. The main aim is that irregularities ought to be dealt with appropriately, and as well as that, they should be dealt with in much the same way in all the countries," "I am not sure that controls are independent in every country. I don't know. That's why I think it is something the Commission ought to keep an eye on." The following comment from the French parliamentarian relates to the proposal dealt with by COSAC: "All [the French] delegation's members said it was OK for the Commission to carry out controls. ... When they said this they weren't thinking about France but other countries such as Greece, Italy and Spain."

This situation explains why the Member States are generally more positive about controls than they are about sanctions. Controls are acceptable because it makes it possible to keep an eye on the other Member States which are not to be trusted. However, the Member States do not have such an interest in sanctions, which conflict with their interests based on sovereignty: "Control and administration are very important. If you can be sure of good controls and a good administrative structure, we could reduce the number of irregularities. Sanctions are important, but we shouldn't start with sanctions. .... What happens if there is no-one to do the controls? You can have all kinds of sanctions in theory, but if there is no-one to go out and catch the culprits the sanctions will be useless."

Altogether the situation in the Community is that the Member States work for their own national interests and not for what is in the best interests of the Community. The principles of trust and loyalty on which the Community should be based, are replaced by mistrust. To monitor the others which they do not trust, the Member States will accept that the Community should undertake the regulation of sanctions and in particular controls, as well as accepting that the Community should carry out controls, particularly on the Member States. The considerable regulation of controls and sanctions which is the result of this is a latent dysfunction for the Member States, because, other things being equal, it reduces the probability of the continued existence of the Member States. This is summed up in the following answer to a question on whether there is a need to give officials from the Commission powers to carry out controls in the individual Member States: "It's not something we would feel too keen on because we think our authorities are pretty reliable, but ... we know that there are a number of other Member States which have a much weaker adherence to the rules we have. It's quite a problem, because if we say that we think Italy should be controlled, then we have to accept that we should also be controlled."

The fact that controls and sanctions are used and accepted in order to deal with irregularities is a result of the Member States' lack of trust in one another. But the irregularities are a symptom of the problem, and not the problem itself. The real problem is that the necessary trust and loyalty do not exist.

In other words, the Community's regulation of controls and sanctions deals with the symptom and not the cause. Several of the Member States as well as the institutions pointed out this problem in the interviews. On the question of what should be done to combat irregularities in the Community's finances, answers were given as follows: "There is a need for co-operation between the EC and the national control agencies. ... All the inspectors involved should pull in the same direction, which they don't do today", "Co-operation between the Commission in the centre and the Member States," "There is a great need for co-operation between the national administrations," "Only when the officials and those responsible for administration are convinced that there are problems,

and have the opportunity to discuss their experiences on similar cases with colleagues from other countries, and build up some kind of team spirit [can the problem be solved]," "The Union has to trust the Member States. There has to be reciprocal trust," "The regulation of controls and so on is all very well, but it will never do anything about the causes of the irregularities." The whole problem was very well summed up in the following quote from one of the interviewed parliamentarians: "More control does not create a common purpose. ... There's no easy solution to anything here in life. The project we are engaged in is very important and very long term. It has imperfections, as is the case with all important projects. The European Union consists of many different countries with different problems and different histories. You have to give it time. We must not stop trying to investigate things that are wrong, but we have to understand that it takes time to develop a common consciousness. We have to build bridges between the rich and the poor, between those who have advanced technology and those who don't, and we have to weave together different political and administrative systems. It takes time, but we must not stop trying to make things better. We must not believe that the European Union won't work. ... In my view, the only way we can reach the goal is through developing genuine co-operation and trust. It doesn't exist yet. Today we have irregularities which the whole Union allows to happen. No-one believes that the other Member States will really help to remove the differences between the rich and the poor. And because they don't believe this they try to get money from here or there by one means or another. And the others allow this to happen because they're doing the same. ...We have to build trust in the idea that we are all fighting on the same side, Germans, Spaniards, Italians, Greeks, Austrians, Swedes and Danes, so there are no poor people anywhere in Europe. Unless we believe in our common interest, and don't behave as nationalists, and unless we develop this loyalty to the Community, I think it matters not a jot how much we try to combat irregularities, because it will be too difficult to succeed."

When the Community thus fails to solve the true problem, and the people involved know this, it mean on the one hand that the legitimacy of the Community is weakened in the longer term, because the belief in the established structure of the Community is weakened, and on the other hand the fight against irregularities will not be as effective as it would be if the true problem were solved. Irregularities against the Community's finances will thus presumably continue to be a problem in future, which will also damage the legitimacy of the Community, and this is a tendency which will only be further accelerated by the fact that so much prestige has been invested in solving the problem in recent years. Trust in the Community will thus also be reduced. The weakened legitimacy will presumably lead to the Member States working to an even higher degree to protect their narrow national interests, rather than taking care of the

Community's interests. In this way a vicious circle of latent dysfunction is established.[915]

Apart from the complex of problems reviewed above, which is referred to here as a vicious circle of latent dysfunction, there are also other dysfunctions, several of which are partially covered in the basic problem reviewed, but which should nevertheless be noted independently, to draw attention to them.

The fact that the Member States cannot be considered as being a unified body, but they seek to promote their own national interests, gives rise to a latent dysfunction for the Member States' interests as a whole, in relation to the Community institutions, when regulations are revised and enacted.

Also, in several interviews it was pointed out that controls and sanctions do not solve the problem, but that the root of the problem is to found somewhere else entirely, somewhere other than in the lack of loyalty. It has been said that if irregularities are to be dealt with, there must be a simplification of the rules and changes made to the Common Agricultural Policy. From a large number of quotes, the following few are chosen to illustrate this view: "I believe that irregularities could be restricted if the regulations were simplified. ... The system encourages irregularities; some sectors encourage irregularities," "More attention should be paid to prevention, ... and the best way to prevent [irregularities] is by simpler regulations," "It is important that the legal basis for the implementation of the rules ... is framed in such a way that it is absolutely clear what they are about, who shall receive [supports], and upon what conditions," "First of all they create a financial system, which in my view is 90% unnecessary, and then of course irregularities occur, which it should have been possible to predict. But these irregularities make it necessary to harmonise administrative and criminal regulations. ... In my opinion the whole business of agricultural subsidies ought to be changed," "In fact the only way is to make the rules simpler. ... Make them less detailed – I think that's the only way." The quotes stress the fact that in one way the regulation of controls and sanctions can be considered as a latent function, an active function, and in another way, in the longer term, they can be a latent dysfunction, along with the failure to solve the problem of the lack of trust and loyalty.

915. In reality this refers to dysfunctional effects for the Community and its institutions. This situation is nevertheless put in this section dealing with the Member States because the Community is not treated as a single agent, and because it includes significant dysfunctional effects for the Member States.

18.1.6.5. Conclusion

The Member States want to put emphasis on national sovereignty in the fight against irregularities. There is thus some resistance to any loss of power to the Community on the question of controls and sanctions. On the other hand, Member States mistrust each other and the institutions of the Community, and therefore accept further integration of controls and sanctions. At the same time this enables the Member States officially to support the effective combat of irregularities in the Community's finances. In parallel with this, the Member States constantly try to look after their own narrow national interests, without regard to the Community as a whole, so that compliance with Community regulations and the fight against irregularities are given lower priority, and national sovereignty is strengthened. However, the basic problem is that the loyalty and trust which are necessary for the Community do not exist, and the regulations for controls and sanctions are an expression of tackling the symptom but not the true problem. This not only weakens the legitimacy of the Community, but also means that the fight against irregularities is ineffective. The solution to the problem of irregularities against the Community's finances cannot be found in controls and sanctions alone, and the longer it takes for the Community to understand this, the worse the problem will become.

18.1.7. The media

Many of those interviewed expressed in different ways the idea that the media, whether written, radio or television, have some significance for the making and implementation of regulations related to irregularities against the EC's finances. For example it was said: "The media? ... It's rather complicated. They can make you a hero, and they can cut you down to size; they can support an idea or they can kill an idea." Another interviewee said: "Yes, they have [a lot of influence], they always have a high political priority," and a third: "I'm not entirely comfortable with the media's influence. It is a fact that the media have enormous influence, and this should be compared with their willingness to stick to the facts."

Apart from the more general kind of statement, which indicates the view that the media are an important agent, there are a number of interviews which describe the influence of the media on both the making of regulations and their implementation.

As for the making of regulations, it was clear from several interviews that the role of the media is indirect but clearly important. It was said: "The media have an important role to play, and we have seen it several times. From the moment when there has been some programme [on irregularities] on the BBC or some other television channel, there has been great political interest." A national parliamentarian said: "[The media] play a big part. As with so much else in politics they can push something up the agenda both in the European Parliament

and in different national parliaments. Yes, they are very important." The idea that the media have an informal role in the creation of regulations in the Community is supported by the fact that there are over 700 journalists from 40 countries[916] following the daily business of the institutions.

As for the implementation of regulations, according to the interviewed representative of the media the role of the media is first and foremost as a disseminator of information from the Community to its citizens, so it was said: "[The media] are interpreters of EC regulations to the general public, to local authorities and at all levels of the Member States. In my view this is the prime function of the media." It is presumably correct that the media have an important function in communicating Community regulations to its citizens. However, it is accepted that the role of the media in the implementation of regulations does not stop there. This is apparent from the following quote from the interviewed member of the European Parliament: "Instead of employing ten extra staff in UCLAF [OLAF] they should think about employing ten or fifteen good investigative journalists and letting them loose to see who could uncover the most information. ... Some of the investigative journalists are very good. ... There was a very good programme made by two Belgian journalists for the Belgian programme Panorama, which is being shown in Belgium now and is also going to be shown in other countries. It's about irregularities in the beef sector, and it includes evidence from people who have taken part in irregularities."

The media also have an important part to play in the grey areas between making laws and implementing them. It consists of drawing attention to particular cases. This can lead to changes in the handling of the cases in question, and to new regulatory initiatives. One interviewee described a rather unflattering instance of the former kind of media influence on the construction of an airport at Athens: "One [of the tendering companies] did not win a tender, and it paid a tabloid newspaper, which no-one respected, to put the story on the front page. They took it to Brussels and said, "'There's something wrong here', ... and the business was taken up at the highest level, at minister level."

The only interviewee who expressed a view on the role of the media and who disagreed with the idea that the media have influence on the making and implementing of regulations was, strangely enough, the representative of the media, who said: "I don't think the media have a great influence on politicians or bureaucrats. They have a limited role; it shouldn't be exaggerated." Regardless of this last quote, the interviews in general support the idea of the media having some importance both for making laws and implementing them in connection with the fight against irregularities in the EC's finances.

916. Cf. Ungdommens Europa. Nyhedsbrev fra Europa-Kommissionen i Danmark. No. 2 February 1995.

The media are considered to be an agent (from an external point of view), which is indifferent to the regulation of controls and sanctions and the fight against irregularities. However, it should be stressed that this vacuum in the attitude of the media only applies when the media is considered as a whole. There are, of course, parts of the media which have a very clear opinion on the question of the fight against irregularities and controls and sanctions, but the available material does not give a basis for further analysis of this internal point of view of the media.

18.1.7.1. Manifest functions

In the view of the media, its prime manifest function comes from its role as the 'fourth estate' of the constitution, if it is possible to use such a concept in the context of the EC, or as the protector of democracy. What the interviewed representative of the media said was: "We can remind [the political elite] what they have said and what they have in fact done or failed to do."

One of the interviewees from a Member State said: "The media focus on irregularities so that most people think that a lot of taxpayers' money disappears into illegal channels, so they become Eurosceptics. But this is presented as part of democratic transparency, and it's the job of the media to report it. ... On the one hand I would like to see more information given, but on the other hand I see a danger in Euroscepticism." However the majority of the interviewees did not believe that media interest in irregularities is based on a romantic ideal of democracy, but has more to do with circulation and viewing figures, which is truly a manifest function. Several of those interviewed thought that the motivation behind media interest in irregularities can be found in the saying: "Bad news is good news, and good news is no news at all." Others gave the same reason, merely expressed differently: "[The media] are more and more interested. It's always a good story, how the EC is wasting taxpayers' money," "Cases of fraud ... are always very interesting, seen through the eyes of the tabloid press," "It's a favourite topic of the media, to say that X billions of taxpayers' money is being wasted, because the EC institutions or the Member States are too stupid."

On this basis it can be argues that the manifest function of the media is primarily to survive through having a high circulation figures etc., and that in this connection the media are willing exponents of irregularities. However, the media do not have a manifest function in promoting the fight against irregularities.

18.1.7.2. Latent functions

One of those interviewed from the Member States said of the media: "They create a feeling that 'something must be done'," and another: "A number of big cases have been reported in the media. ... It gives a strong motivation to do

something about the better enforcement of existing rules and to improve the rules." Other interviews with people from the Member States confirm that media discussion provokes Member States' acceptance of further regulation of controls and sanction, and thus further integration, and this is a latent function for the Community. In the present context, with the focus on the media, it is interesting that this situation also means that the media is an important partner with the Community's institutions and that both thus strengthen the probability of their continued existence. Media discussion, and the interplay between the media and the Community's institutions which results form it, are thus latent functions for both parties.

The Court of Auditors quite consciously works with the media, particularly in connection with media reporting of its yet unpublished annual reports, as discussed above.[917] This is also stressed in the following quote from the interview with the representative of the Court of Auditors: "We aim to get a more positive reporting of the conclusions [in the annual report]. ... First, we worked for, and got, public presentation [of the annual report] by our President in a plenary session of Parliament in the presence of the Commissioner responsible for the budget. That has given us better publicity and was an important step. Now we present the annual report in November each year, with a following debate in Parliament. That was the first step. The next step ... was to hold a press conference immediately after the presentation to the European Parliament, since we are in the Parliament building which has all the necessary infrastructure, TV, national radio, newspapers and hundreds of journalists. We tried this for the first time in November 1995, with the annual report for 1994. We were a bit nervous – how many journalists would be interested? The first year, more than 150 came, and last year (1996) more than 200 came. And this was important because in the days that followed the newspapers and television were full [of reports]. It's the best publicity we can get. It is a great help for us in putting pressure on people who commit irregularities, because they know it can be referred to in the annual report, and thus in the media. This is dangerous for administrations, private individuals and mafia-like organisations."

It is not only the Court of Auditors which uses the media to strengthen its own position. The Commission also works consciously on this. As the interviewee from the Commission said: "You can play up to the media at some Council meetings and things like that, so the finance ministers can yet again say 'Yes, we are tackling irregularities, and it's very important,' and so on." This is also confirmed by one of the representative interviewees from the national administration of a Member State: "The Commission works a lot on publicity so they can claim more powers by influencing the people and peoples' attitudes. ... They put pressure on the Member States, political pressure." The Member

917. See Section 18.1.4.2.

States also expressed some irritation about the Commission's exploitation of and fascination with the media, as in this quote: "From time to time the Commission [seems] to be more interested in the media than in the Member States. For example, when the Commission has prepared an annual report on the fight against irregularities, the first thing they do is to send it to the media rather than sending it to the Member States. They want it channelled through the media so as to put pressure on the Member States." The interviewed representative of the media himself illustrated the Commission's use of the media with the following statement: "There are many other cases dealt with by UCLAF [OLAF] which are strictly confidential; they don't write about them in the reports to the members of the [European] Parliament. In previous years there have been occasions when I or my colleagues have been better sources of information for members of Parliament."

The European Parliament also uses the media to promote its own interests. This happens, for example, in connection with the annual report of the Court of Auditors.

To a certain extent the same applies with the national parliaments. This is shown in a couple of quotes from interviews with representatives from Member States: "The media are important. Take the annual report of the Court of Auditors ... it is presented in November, and the journalists write about the waste of money – millions or billions straight down the drain etc. These reports create pressure which is applied directly from the public to parliament, which reacts to it. Sometimes things get a bit out of proportion." An interviewed member of a national parliament said: "[The media] have a duty to tell the people about such cases [of irregularities] at national and European level, and, as politicians, we must be ready to draw the appropriate conclusions."

Media discussion of irregularities, and the resulting interplay between the media and the Community institutions, and between the media and the national parliaments gives the media a central position in the political processes surrounding the fight against irregularities, and it implies an important latent function for the media.

18.1.7.3. Latent dysfunctions

Regardless of the mutual dependence between the media and the other agents, there is a widespread view among the other agents that the media are superficial and are scandalmongers. The following comment was made, among others, by an interviewee from a Member State: "The media are quick to make judgements, but the real research comes afterwards, by which time the circus has moved on" and "The media are a particular problem because they paint a bad picture of the Community and they stir up scandals too much. They don't act responsibly." This is a view which is shared by the Community's institutions. The interviewed representatives from the institutions said: "Just once in a while

I would like to see the media be more analytical and less concerned with scare stories. I think the media could do a lot of good if they analysed problems and causes instead of just waiting for some sensation to turn up," and "There are very few in the media who really go into things in any depth. ... Where the media go wrong is in their investigative or comparative journalism. For example, in [some national parliaments] you have journalists who may interview a member of the government, and then they go and cross-check what has been said. ... It is very difficult for journalists [in Brussels] to learn the same skills, and only a few of them have managed to do so – very few."

The fact that the media are superficial and scandalmongers helps to keep them in a position where the other agents concentrate on using them to serve their own interests, which, as hinted at in the interviews with representatives of the Community's institutions, means that the media limit their own effectiveness in influencing the making and implementing of regulations, as well as limiting their effectiveness in the role of guardians of democracy, to which the media themselves attach importance. In other words, because of the way in which they deal with questions of irregularities against EC finances and controls and sanctions, the media do not have the role which they would like to see as their manifest function.

In this discussion of the media there are two further latent dysfunctions which should be pointed out.[918]

The first of these latent dysfunctions is encapsulated the following statement: "It is a problem for an international organisation such as the EC that there is not any truly European media, because, whether you like it or not, the role of the press is very important in a democracy. ... [But] there isn't any such media at a European level. You have the press of fifteen countries but a European press only exists to a very limited extent." As was said in another interview, this means that; "One can say that the media remain national, so they drag the political process in one or another nationally oriented direction." This situation was confirmed by the interviewed representative of the media in the following: "When you are posted to Brussels you begin to understand the European context. .... After a while one focuses more on European integration, and one no longer thinks and feels the whole time in a national dimension. Here there is a possibility of becoming a European, whatever that means."

The fact that the media remain nationally oriented strengthens and legitimises the narrow national approach of the Member States noted above, and increases the gulf between that and the trust and loyalty which is necessary for the Community. This is a latent dysfunction for the EC.

918. This does not concern the media in isolation, but rather the Community as such. Nevertheless it is dealt with here because it derives from the media.

The second latent dysfunction for the Community which arises from the role of the media is a result of the manifest function previously referred to, and is reflected in statements such as: "Bad news is good news, and good news is no news at all" coupled with the tendency, which has also been referred to, for the media to be superficial and scandalmongers. Together these factors mean that, as pointed out in a number of interviews, the media typically report on irregularities against the EC's finances in a way that reflects badly on the Community. It has been said: "The media focus on irregularities so that most people think that a lot of taxpayers' money disappears into illegal channels, so they become Eurosceptics," "A number of big cases have been reported in the media. ... This gives a strong motivation to do something about the better enforcement of existing rules and to improve the rules, but on the other hand it undoubtedly also leads to increasing dissatisfaction with ... the process of European integration," and "[The media] ought to be used in another way. It should report that there are problems, but it also to report that something is being done, ... otherwise the general public will believe there is nothing but irregularities."

As suggested in some of the interviews quoted, the negative reporting means that the probability of the Community's continued existence is diminished – a latent dysfunction for the EC.

18.1.7.4. Conclusion

The media use irregularities against the Community's finances to promote circulation and viewing figures. At the same time they see themselves as guardians of democracy, which is a function which the other agents regard as being contradicted to a large extent by the superficial and scandalmongering way in which they deal with the subject. Regardless of the differences of opinion on this, it is uncontested that the media are parties to some important interactions, particularly with the various institutions of the Community; this means that the media have an important role in the fight against irregularities, and in this way they further their own position. It is also noted that the media often deal with questions of irregularities in a way which shows the Community in a bad light. Furthermore, the media are nationally oriented, so that the political processes surrounding the combating of irregularities is also nationally oriented.

The media thus help to strengthen national sovereignty and undermine trust in and loyalty towards the Community.

18.1.8. Representatives for special interests

It is impossible to give a precise number of representatives[919] of special interests with links to the EC system, partly because there is no central register of them, and partly because their number fluctuates. But a number over 10,000 is by no means unrealistic.[920]

While the actual number cannot be determined with certainty, there is agreement that the number of representatives has grown rapidly in recent years.[921] One of those interviewed said: "There are thousands and thousands of lobbyists in Brussels and their number is growing every day. Every day you can see new lobbyist offices opening, sometimes two or three in one day. There are now more lobbyists in Brussels than there are officials in the Commission concerned with drafting and applying EC regulations."

The representatives of special interests who seek to influence the Community are first and foremost national or European organisations, but the composition of the body of special interest representatives has changes considerably in recent years. In 1980 about three quarters of the representatives consisted of national or European organisations for agriculture and industry; by the middle of the 1980's this proportion had fallen to about a half, and at the start of the 1990's it was down to about a third; it is probably even lower today.[922] The new groups of representatives for special interests that have displaced the agricultural and industrial organisations are representatives for local government and regional bodies, as well as those working on behalf of individual firms. Thus, all the big European companies and most of the American and Japanese multinationals have offices in Brussels. However, most of the special interest organisations that are represented today are not organisations that primarily represent economic interests, but rather education, culture, the environment, working conditions and so on. It should also be noted that the representation of special

919. The use of the term 'special interest representatives' rather than 'special interest organisations' is deliberate. Special interest representatives are defined as representatives for one or another special interest that seeks to establish a temporary or permanent contact with those agents directly involved in the EC's processes for making or implementing regulations for the purpose of influencing the decisions taken by the Community in a given direction. The term 'special interest representatives' is thus wider than 'special interest organisations'.

920. See Andersen, Svein S. and Aliassen, Kjell A.; EU Lobbying: Innflytelse og demokrati, Arbejdsnotat 1995/4.

921. Bartholomew, Michael and Brooks, Tinger; Lobbying Brussels to Get What You Need for 1992, The Wall Street Journal (1989). Zagorin, R; An Expanding Game, Time Magazine (1989). Newmann, D; Lobbying in the EC. Business Journal, February (1990).

922. Philip, A. Butt; Pressure Groups in the European Community and Informal Institutional Arrangements, Experience in Regional Cooperation (1987). Beuter, R. and Taskaloyannis, P. (eds): Maastricht, EIPA. Andersen, Svein S. and Eliassen, Kjell A.; EU Lobbying: Innflytelse og demokrati. Arbejdsnotat 1995/4.

interests has developed into a profession of its own, with lawyers and consultants who make a career out of promoting some particular view within the EC system.

Special interest representatives influence the decision processes in the Community in a number of different ways, which can be placed in a broad spectrum between two extremes. At one end there is actual lobbying, which can be characterised as being a specialised, case by case and informal ad hoc influence, often in competition with other interests. At the other end there is a form of influence that takes place with the representatives formally taking part in the decision process in the Community with routine contact with the Commission or other EC institution, and participation in committees, conferences, working groups and so on. The advisory committee set up to help the Commission in putting into practice the rules on supports from the Structural Funds[923] is an extreme example of this form of participation. These committees are overwhelmingly merely advisory. The number of such committees grew from around 200 in the mid 1980's to around 1000 at the start of the 1990's.[924]

Among those who were interviewed and who expressed a view on this, there was agreement that the representatives for the special interest groups are very significant for Community regulation, and among other things it was said: "Lobbyists are a very strong factor here in Brussels. In my view they are number one or two in the hierarchy of power." The influence concerns both the framing of laws and their application, as illustrated in the following quotes from the interviews: "The representatives for the special interest groups have a lot of influence. It's due to the pressure from environmental organisations that a lot of things [have been enacted] which would not otherwise have been taken up. .... Representatives for special interest groups have an important role to play in a modern democracy," "I can remember, some years back, that it surprised a number of consultants that one particular consultant got a lot of money for his research projects. While others thought it was incredibly difficult to succeed

923. Cf. Article 17 in Regulation 2052/88 on the tasks of the Structural Funds and their effectiveness and on coordination of their activities between themselves and with the operations of the European Investment Bank and the other existing financial instruments, (OJ 1988 L 185/9), as well as Article 28 in Regulation 4253/88 laying down provisions for implementing Regulation (EEC) No 2052/88 as regards coordination of the activities of the different Structural Funds between themselves and with the operations of the European Investment Bank and the other existing financial instruments, (OJ 1988 L 374/1). Apart from representatives from the Commission and the Member States, the committee referred to two representatives from workers and employers organisations respectively in each Member State. The legal basis for the committee is in Article 147 EC.

924. See Sargeant, Jane; Corporatism and the European Community, The Political Economy of Corporatism (Macmillan, London, 1985) and Greenwood, J., Grote, J.R. and Ronit, K., Organised Interests and the European Community (Sage, London, 1992).

with their applications, this one consultant got masses of money; and then they realised that this researcher used to play tennis with one of the Directors General in the Commission," and "Lobbyists play an important part in getting things done. In the EC system you can have a Head of Unit sitting behind a desk heaped with applications for something or other, and then someone comes and knocks on the door and says 'When are you going to do something about this?', so they pull it out and get it dealt with, because it's the squeaky wheel that gets the oil."

The different objectives of the special interest representatives mean that the agents they seek to influence also vary. It can be said that the Commission is the EC institution which is the most courted. One of those interviewed said of this: "Lobbyists have more influence on the Commission than they do at national level." Apart from the Commission, the European Parliament receives the most attention from the special interest representatives, and this is something that has grown in proportion with the growth of the political influence of Parliament.[925] On the other hand the interviewed representative of the Council said: "Here in the Council we don't notice [the special interest representatives] so much. Maybe you should ask the same question at the Commission or at the Parliament, because they are more in touch with people from the special interest organisations and lobbyists. ... We don't see so much of the work of the [the special interest representatives]." Even though it may be difficult to generalise on which special interest groups try to influence which decision-makers, there seems to be a tendency for special interest representatives working on environmental and consumer issues to turn to the Parliament, while business interests primarily refer to the Commission.[926]

The interviews and other sources of information referred to uniformly indicate that special interest representatives are significant for the socio-legal processes surrounding Community regulations. This is emphasised because it is in sharp contrast to the opinion about the importance of the special interest representatives for the regulation of controls and sanctions and the combating of irregularities in the EC's finances. The clear majority of those interviewed expressed the view that the influence of the special interest representatives in relation to this is limited or non-existent. It was said: "I wouldn't say that they play an important part," "No, I can't see how they could be relevant" and "It's my impression that the special interest representatives haven't shown any

925. In this connection, reference should be made to Parliament's participation in the co-operative procedure for the adoption of legislation laid down in Article 252 EC, as well as the co-decision procedure, cf. Article 251 EC, which gives Parliament an effective right of veto. The (limited) right of initiative which the European Parliament is given under Article 192 EC should also be mentioned.

926. Andersen, Svein S. and Eliassen, Kjell A.: European Community lobbing, European Journal of Political Research 20(2), (1991).

interest in this." This last quote in particular points out the significant fact that the special interest representatives are primarily interested in other things, meaning that the most important thing is obtaining money. Thus it was said: "The most important thing for them is to get money; everything else is further down their scale of priorities," but several of the interviewees also pointed out that the special interest representatives find themselves in a somewhat ambivalent position on the question, which can explain their lack of interest in the issue.

The attitude of the special interest representatives, or their lack of attitude, in relation to controls and sanctions and the fight against irregularities was commented on in a number of interviews. It was most concisely said by one of the representatives from a national administration: "The special interest representatives play a role particularly in relation to the European Parliament and the Commission. Those who receive money don't particularly want controls. On the other hand the special interest groups know very well that if there are too many irregularities the well will run dry and the system will change." Another expressed the same idea in the following example: "If you take the example of the lobbyists for the cigarette industry and the rules to counter irregularities with cigarette taxes, one can imagine different approaches. On the one hand they can be indifferent, because the same number of cigarettes will be smoked, with or without irregularities. On the other hand, it can't be in their interests that the good reputation, whatever that may be, of the cigarette manufacturers is ruined because people say not only are cigarettes ruining our health, but they are also ruining our national budgets." The interviewed representative from the Commission pointed out the same: "It is clear that there are a number of conflicting interests, and many of these can exist within the same organisations. ... Transport firms would like to eliminate transit fraud ..., they want to eliminate the situation where some cowboys come in and provide transport, do some transport swindle, and as soon as the transport documents have to be declared, they go bankrupt or hop off to Switzerland with the money. They don't want the market to be undermined, but if you go to them and say 'OK, we'd like to do something about this, but this means that your lorries must drive along certain fixed routes, and you must make sure that the customs papers are sent to the destination by computer, and everything must be completed in so and so many days, and so on', then they start backing out of it, they don't want to take part after all. There is pressure for more control, but not much more control." The interviewee from the special interest groups said much the same thing in the following way: "There are a number of reasons why we have no interest in fraudulent activities with agricultural subsidies. One of the most important is that if there is too much fraud with agricultural subsidies, there will be stronger reasons for doing away with them."

It is presumably due to this ambivalent attitude as well as to the fact that the interests of the special interest representatives are primarily elsewhere, that their direct influence on the fight against irregularities is limited. However, as will appear below, the special interest representatives do play an indirect role in the fight against irregularities.

18.1.8.1. Manifest functions

It is assumed that the special interest representatives do exercise some influence on the socio-legal processes surrounding the fight against irregularities by means of controls and sanctions, particularly where the regulations are sector oriented. But as referred to, there is no uniform or clear approach to the question of the fight against irregularities among the special interest representatives. There is no special interest representative for whom the combating of irregularities against the EC's finances is the prime area of operation. Against this background it is probably not too much to say that in the combating of irregularities, there are only very limited intended objective effects from the work of special interest representatives, taken as a group, which increase the probability of their continued existence.[927]

18.1.8.2. Latent functions

As stated above, a large number of committees etc. have been set up through which the special interest representatives obtain some degree or other of formal influence on the framing and implementation of regulations. This means that the Commission has the possibility of establishing a network which can counteract the national orientation of the Member States which is referred to above, via the special interest representatives' principals in the Member States. There is thus a form of internationalisation which includes a tendency for alliances to be made between the representatives of special interest across national boundaries.[928] For the special interest representatives, apart from the possibility of promoting their immediate interests, participation in the work of committees gives them the advantage of increasing their influence in general. Both the Commission and the special interest representatives thus obtain a latent function through setting up and participating in committees etc.

This also applies where the committees are concerned with combating irregularities and the regulation of controls and sanctions particularly sectoral regulations, and even if this is not their main activity, as is sometimes the case.

927. However, this will only be the case for individual special interest representatives (the internal aspect).

928. Andersen, Svein S. and Eliassen, Kjell A.; EU Lobbying: Innflytelse og demokrati, Arbejdsnotat 1995/4.

18.1.8.3. Latent dysfunctions

The influence of special interest representatives on the framing and implementation of regulations implies a risk of their being distorted, since it is only those interests that can afford to be represented that can obtain any influence. The judge for the EC Court of Justice who was interviewed, having noted that representatives of special interests are a part of modern democracy, said: "One should be careful not to glorify this situation too much. What we have is representatives for interest groups, in other words people who represent a particular interest, and this means that politicians should understand this and take it into account." This a situation which also concerned the member of the European Parliament interviewed: "There should be very clear rules for representatives of special interests. I would be very angry indeed if I had spoken to somebody or other in my office under the impression that he was somebody or other, and later found out that he was working for some economic interest or something. I expect representatives to give information about who their clients are and what their interests are before we start discussions."

The fact that there are certain groups who can afford to be represented and to influence the framing and implementation of regulations, to suit their requirements, implies that there is some distortion of them, which in turn implies a deterioration of the Community's legitimacy, since trust in the established system will be weakened. The interviewed member of the Greek parliament drew attention to this in connection with the making of laws, saying: "In southern Europe people are not organised. The farms are small, they have maybe from twenty up to a hundred or two hundred sheep; they are not big businesses able to compete, with a strong lobbying influence in Brussels, milking the system legally," and he added that the rules were framed in a way that suited the larger agricultural interests. The interviewed representative of the Commission confirmed this distorting effect with an example of the effect on the implementation of regulations at the highest level: "There are certain political parties that are financed by business channels. In the famous case of the Argentine beef ... all of a sudden twice as much hilton meat came in as was allowed. There was quite a lot of money involved, because it came in without taxes and without customs duties. I don't know how much it was, but maybe it was £5 per kilo, and you don't have to have many hundred tons of it before it costs the Community a fortune. The company in question had its headquarters in Munich and was a big contributor to the CDU/CSU party. Then one day we got a letter signed by a German finance minister saying that we shouldn't get involved because it was too complicated, but when we got involved anyway we received strange telephone calls; someone was trying to apply pressure."

In this way the influence of the special interest representatives on the framing and implementation of regulations helps to undermine the legitimacy of the Community and consists of a latent dysfunction for the Community.[929]

18.1.8.4. Conclusion

It is the general view that the representatives for the special interests play a not insignificant role in the socio-legal processes surrounding Community regulations in general. However, this is far from applying to the same extent when considering the narrower issue of irregularities against the EC's finances and controls and sanctions. Among other things this is because the representatives for the special interests are more interested in other issues. However, it should be noted that the influence of the representatives for the special interests does bring with it the risk of the distortion of Community policies, which in turn implies a weakening of the legitimacy of the Community and that irregularities become accepted.

18.1.9. Conclusions concerning the agents as influencing factors

On the face of it, it would seem obvious that all agents must want and work towards the minimisation of irregularities in the Community's finances, so that the resources are used for their proper purposes and the Community achieves its political goals. However, a review of the roles of various of the most important agents in the socio-legal processes surrounding the combating of irregularities against the EC's finances shows that this is not the case.

There are some agents which are indifferent to combating irregularities, (the media and the representatives for the special interest groups). The Member States, taken together, are an important agent which, despite assurances to the contrary, have to a certain extent an interest in the continued existence of irregularities, while the other agents, the institutions of the Community, all wish to minimise irregularities.

But regardless of the attitude which the agents adopt and work to support, this review shows that it is probable that all agents have other goals than those they claim to have. For example there can be: a desire for further integration or the opposite; a desire to strengthen the agent's own legitimacy through effective activity or otherwise, possibly to some extent at the expense of other agents; the desire of the agent to place itself at the centre of the decision making processes; the desire for increased circulation or viewing figures, and so on. All these are factors that are relevant to the fight against irregularities.

929. This situation is considered in this section on the latent dysfunctions of the special interest representatives because the situation arises from the special interest representatives.

However, the fundamental problem is that the trust and loyalty which are necessary to the existence of the Community do not exist. On the contrary, the Member States and the Community institutions both accept that each agent looks after its own narrow interests. As long as this situation continues, the regulation of controls and sanctions and the other measures to combat irregularities are merely dealing with the symptoms and not tackling the true basis of the problem. It also means that considerable obstacles stand in the way of the fight against irregularities. This is not to say that controls and sanctions are of no importance, but that there are limits to how far it possible to go in the fight against irregularities using these means.

18.2. Structural influences

As stated in Section 2.2.1 the structural influences are included in this thesis to the extent that they are revealed in connection with the analysis of the influences of the agents. As a result, two kinds of structural factors will be discussed in what follows: the decision processes of the Community and the cultural differences between countries.

18.2.1. The decision processes of the Community

Many of those interviewed expressed the view that the problem of irregularities against the EC's budget is more due to the complexity of the regulations than to any lack of control or sanctions. On the other hand the agents can in general only have a very limited interest in the regulations being complex and opaque. As a consequence, many of the interviewees suggested that simplification of the regulations would be one way to reduce the number of irregularities. It was suggested: "The whole business of regulation is very complicated. ... It's because the regulations are so bad that there are irregularities," "Of course, controls and so on are useful, but they can never do anything about the causes of the irregularities. ... [which] are primarily due to the complexity of the regulations," and "The problem is, we have too much regulation. Even those of us who work with it every day have to admit, it is very complex."

Many of those interviewed agreed that the decision making process in the Community is the reason why the regulations have become so complicated. This is particularly so with the political negotiations, not least in the Council, of which it was said: "Every agreement on agriculture is not just one agreement, but each member makes fourteen bilateral agreements with each of the others. This means that the end result is an uncoordinated regulation in which everyone has been bought off with a little bit here and a little there, so criminals can just drive a truck through the middle," "I think more efforts should be made to prevent problems. ... The basic and the best method of prevention is to simplify

the regulations. But making simple regulations in a complex society is not easy. ...The Commission intends to propose simple regulations, even though it does not always succeed, once the proposals have been worked over. ... The proposal gets sent to the Council, where the Member States sit, and they say 'It looks fine, but we would just like this bit here and that bit there changed', and in the end the regulation or directive is not so straightforward. The Council is largely responsible, and to get the Council to focus on the needs of the fight against irregularities and the need for simplicity at all stages of their negotiations is not easy, not easy at all;" the interviewed representative from the Commission said: "We have to make sure that the late night negotiations they have over at the Council don't lead to absolutely Byzantine rules which are impossible to administrate. It's not just the Council that makes idiotic rules, though they have strong motives to do so because they have to find compromises, but the Commission must also think things through, particularly at the early stages." Some of the interviewees also suggested that with the growing influence of the European Parliament in enacting legislation it will not become any easier to keep regulations to the point. It is also necessary to take account of their amendments, particularly in situations where Parliament has a right of veto.

Thus, the highly complex decision process, with the right to initiate things in one place, and the right to adopt things somewhere else, combined with the need to satisfy a large number of different interests, in itself serves to promote the complication of rules and thus of irregularities in the EC's finances.

18.2.2. Cultural differences

As the words of the heading suggest, 'cultural differences' covers a wide scope. In the present context it refers to some essential culturally based differences in how far it is in fact possible to combat irregularities in the individual Member States.

The culturally determined conditions constitute structural barriers which are primarily relevant to the implementation of regulations. Several of those interviewed refer generally to this saying, for example: "There are two quite different cultures" or "Of course, it's difficult to get these different cultures to fit into the same accounts and budgets." Others of those interviewed were more specific referring to more specific elements such as differences in religion, living conditions, the administrative structure and the legal systems. It is these latter two which were most frequently mentioned in the interviews and it is therefore these which shall emphasised in the present context to illustrate the importance of cultural differences in the fight against irregularities in the EC's finances.

The differences between northern and southern Europe have already been discussed above in Section 18.1.6 in discussing the Member States; in certain countries there are arguably deficiencies in administrative structures which are necessary for combating irregularities against the Community finances. It is worth citing a few further quotes from interviews which refer to the fact that it is a culturally determined structure which is significant to the ability to combat irregularities against the Community finances: "I think that the administrative structure is decisive for the effectiveness with which a Member State can use and control its finances. This applies to all finances, including national finances. ... If you look closely, you will see that usually the same control processes are used for EC finances as for national finances; there's no great difference. Basically, they're the same," and another interviewee said: "Because of culture, mentality and maybe other factors, the necessary structures are not there, and if you don't have the structures, you can't cope with [the fight against irregularities]," and a third said: "You need to see whether the national infrastructure etc. is at all suited to dealing with such a detailed system, ... and one may as well recognise the fact, that it isn't."

The quotes given do not, of course, constitute documentary evidence for whether the administrative structures are sufficient in certain Member States. But it must be acknowledged that several interviewees hold these opinions, and that the structural factor is referred to and that this is regarded as being significant for the possibility of combating irregularities.

As for the significance of the differences in the legal systems, it was said, among other things: "Maybe things are different in Common Law countries. We just can't understand one another; there is a different approach. It's not the same with France or Germany; they have the same legal structures as we do," and "The basic laws come from the centre and must be administered locally. It is a very complex system of laws that have to be applied in fifteen different jurisdictions, each of which has its own ideas, and that's not going to change."

These statements imply that the differences of approach of the legal systems are significant to the impact of regulations.

18.3. Conclusion

The foregoing is a comprehensive review of how different factors, in particular the different agents, are important to the Community's controls and sanctions and the combating of irregularities. The review includes the different attitudes to the fight against irregularities in the Community's finances. It is pointed out that controls and sanction, and the behaviour of the various agents in relation to them, is far from being merely a question of the fight against irregularities. All the while in the background there are attempts to promote the agent's own

interests. There is a basic problem that the loyalty and good faith, on which the whole of the Community must be based, are not respected. This is quite clear from the review of the various agents and is confirmed in the short review of some of the more important structural influences. As long as the condition of trust does not exist, there will be obstacles to the fight against irregularities, and no amount of controls and sanctions will be able to deal with this.

EPILOGUE

CHAPTER 19

How the Community should combat irregularities

This section considers whether Community law helps the fight against irregularities in the EC's finances in the best possible way, what changes may be possible, and how they might work. It is against this background that a recommendation is given as to what the Community should do to combat irregularities.[930]

19.1. The need for change

Controls and sanctions are the means which the Community has mainly, but not exclusively, used to combat irregularities. The evaluation of whether there is a need for a change of approach is a reflection of whether the existing approach is regarded as satisfactory.

The problems of determining the effectiveness of the fight have been set out above; it is impossible to obtain sufficiently reliable information about the extent of irregularities and their development. However, when the adequacy of the efforts is judged on the basis of the opinions of the main players, there is no

930. With analyses of legal policy there must be an identification and choice of the initial premisses for the analysis, since every recommendation of legal policy must be based on a fundamental value system or ideology of the person making the recommendation. To avoid, or at least counteract, this source of a potential problem, the present writer believes it is necessary to point out that the recommendations of legal policy are naturally based on this thesis's sections on legal theory and legal sociology, and thus on the socio-legal interpretative paradigms on which these are based.

doubt that the fight against irregularities against the Community's finances is not effective enough, and there is a need for change.

19.2. The possibilities for changes on the regulations

The Community's regulations for and use of controls and sanctions has grown strongly in recent years.

Today it is clear that the Treaty and the basic legal principles have had considerable influence on the question of controls. Also, regulations for controls have been made to an increasing extent, both in depth and in breadth, through secondary legislation. The trend of developments has unmistakably been towards an increase in the influence of the Community both in the regulation of and the implementation of controls.

As for sanctions, the powers of the Community in relation to administrative penalties have formed the basis for a comprehensive development of the law. This has principally been with regard to the sanctions imposed by the Member States on those who are subject to their jurisdiction, and it applies to regulations made in secondary legislation. There is nothing to suggest that this development will not continue. On the other hand it can be noted that sanctions imposed by the Community on those who are subject to the jurisdiction of the Member States are of limited importance, but that Community sanctions imposed on national authorities may become more important.

The legal position of controls and sanctions, which has developed in recent years, receives a lot of support from the institutions of the Community, which, according to the interviews made, believes that they can be developed further. Seen with the perspective of a lawyer, this is right. Even if, today, there are already considerable regulations for controls or sanctions, such regulations have not yet reached a stage where they have a uniform and coherent character based on a well thought out and conscious set of principles. There are several central elements in both controls and sanctions that are still entirely unregulated; for example, this applies to cases of attempted irregularity or complicity in an irregularity. There are thus plenty of opportunities which the Community could get to grips with. What puts a brake on this continued development is presumably the Member States. This refers not so much to the issue of controls (generally speaking the Member States have a very positive attitude to Community regulations for and implementation of controls) as to the issue of sanctions, where sanctions imposed by the Community on those subject to the jurisdiction of the Member States are in particular rejected. Imposition of regulations of a criminal law nature are also rejected.

Even though the Member States have a certain reserve in their attitudes, it is nevertheless true that in practice, both legally and politically, there is a basis for the development of Community law in relation to controls and sanctions.

19.3. The possibility that changes will limit irregularities

Having noted that there is a need for a change in the fight against irregularities in the Community's finances, and having pointed out that the trend and the attitudes of the central players indicate that there is still a possibility for changing the regulation of controls and sanctions to become more comprehensive, both in depth and in breadth, it is natural to assess whether possible future changes will lead to the desired reduction in irregularities.

There are reasons to be believe that changes and the tightening up and adjustment of the regulation of controls and sanctions will lead to the discovery and prosecution of more irregularities and thus help to limit irregularities to some extent.

However, irregularities cannot be dealt with through the regulation of controls and sanctions alone. Thus other factors have been referred to, such as the need to make regulations less complex, and in particular the need to make changes to regulations in some areas, such as agriculture.

But the most important thing of all is that steps taken to promote the combating of irregularities should take account of the social context in which they are to be applied, including the manifest and latent functions and dysfunctions that have been shown. If this is not done, then the chances of success for such steps will be minimal, because of the negative reactions of significant agents.

Among other things it must be recognised that while controls and sanctions may try to combat irregularities, these irregularities against the EC's finances are to a large extent the result of and symptom of the lack of trust, loyalty and good faith between the various agents.

Only when trust and loyalty have been established (or re-established) will a significant part of the cause of irregularities be laid open and removed, and the regulation of controls and sanctions and other measures will arguably have the greater impact desired, and that in general a better basis for the fight against irregularities will be established.

19.4. Conclusion

If irregularities against the Community's finances are to be reduced, the first requirement is that the problem should be seen in a much wider context than

merely seeing that the regulations are adhered to, or sanctions imposed if they are not. Controls and sanctions are important, but they cannot stand alone.

In the opinion of the present writer, the essence of the fight against irregularities in the Community's finances is contained in the following quotation, which is repeated here, and which makes a fitting conclusion to this thesis: "There's no easy solution to anything here in life. The project we are engaged in is very important and very long term. It has imperfections, as is the case with all important projects. The European Union consists of many different countries with different problems and different histories. You have to give it time. We must not stop trying to investigate things that are wrong, but we have to understand that it takes time to develop a common consciousness. We have to build bridges between the rich and the poor, between those who have advanced technology and those who don't, and we have to weave together different political and administrative systems. It takes time, but we must not stop trying to make things better. We must not believe that the European Union won't work. ... In my view, the only way we can reach the goal is through developing genuine co-operation and trust. It doesn't exist yet. Today we have irregularities which the whole Union allows to happen. No-one believes that the other Member States will really help to remove the differences between the rich and the poor. And because they don't believe this they try to get money from here or there by one means or another. And the others allow this to happen because they're doing the same. ...We have to build trust in the idea that we are all fighting on the same side, Germans, Spaniards, Italians, Greeks, Austrians, Swedes and Danes, so there are no poor people anywhere in Europe. Unless we believe in our common interest, and don't behave as nationalists, and unless we develop this loyalty to the Community, I think it matters not a jot how much we try to combat irregularities, because it will be too difficult to succeed."

Appendix 1

INTERVIEW
Name:
Institution:
Date:
Place of interview:

Which factors are determining for the shaping and impact of the EU's regulations on controls and sanctions?

1. What role do you (the agent which the interviewee represents) play in the shaping of regulations and their application (the formal role as well as the actual role)?
- Application of controls and sanctions which are related to EU regulations?
- The significance of the availability of resources for controls and sanctions?
- Communication of laws to those subject to them?

2 What is your view of the regulation of controls by the EU? (negative, neutral, positive)
- Controls carried out by the EU in the Member States?
- Controls over the Member States carried out by the EU?

3. What is your view of the regulation of sanctions by the EU? (negative, neutral, positive)
- Sanctions imposed by the EU?
- Sanctions which the EU imposes on the Member States?

4. How are these views reflected in practice?

5. What is your view of the roles of the other agents in the shaping of regulations and their application?
(The other agents are: The Commission, the European Parliament, the Council of Ministers, the EC Court of Justice, the Court of Auditors, the other Member States, the media, experts and the representatives of special interests)
- Which is the most active in the creation of controls and sanctions regulations?
- Which country is the most active in the creation of controls and sanctions regulations?

- Which EU institution is the most active in the creation of controls and sanctions regulations?
- Which is the most active in implementing controls and sanctions regulations?
- Which country is the most active in implementing controls and sanctions regulations?
- Which EU institution is the most active in implementing controls and sanctions regulations?
- Which agent is the most active in implementing controls and sanctions regulations?

6. What is your view of the other agents' attitude to controls and sanctions regulations?
   (The other agents are: The Commission, the European Parliament, the Council of Ministers, the EC Court of Justice, the Court of Auditors, the other Member States, the media, experts and the representatives of special interests)
- Who is most in favour and who is most against?
- Which country is most positive and which is most negative?
- Which EU institution is most positive and which is most negative?

7. What is your view of how the other agents have put their views into practical action?

8. Any special circumstances.

The extent of irregularities

9. How extensive are irregularities against the EU's finances
(Irregularities covers fraud, misuse, failure to fulfil obligations/ irregularities)
- As a percentage of the EU's budget?

10. What are your reasons for estimating this extent of irregularities?

11. In your view, is the extent of irregularities acceptable, or is it a problem?

12. Why is the extent of irregularities acceptable/a problem?

13. Why are controls and sanctions apparently ineffective?

14. How should irregularities against the EU's finances be countered?

15. Any special circumstances

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Index