

GUEST EDITORIAL: COMBATTING FRAUD – NECESSITY, LEGITIMACY AND FEASIBILITY OF THE *CORPUS JURIS* *

1. Background and current state of research

The proposal for a *Corpus Juris* to tackle frauds against the financial interests of the European Union dates back, in its initial version, to 1996. It was prepared by a group of eight academic lawyers, as part of the European Legal Area project launched by the Commission, and has the status of a research report. Since then, the Study Group¹ has carried out a “follow-up” study, which is essentially composed of three parts. First, highlighting the Community level, we have analysed the practical difficulties, the difficulties in the field which the agents of the UCLAF (now those of the OLAF) are confronted with when they carry out investigations into frauds against the Union’s financial interests. Thus, we have dealt with a number of concrete questions ranging from cooperation to the question of secrecy, questions of evidence or of the status of agents of the Commission when they intervene in national criminal proceedings, etc. This makes up the first part.

At the same time, it was necessary to complete the comparative study of national systems, which had been launched (in 1992–1993) even before the *Corpus Juris*, but which needed to be brought up to date, and above all to be juxtaposed with the proposals of the *Corpus*. We proceeded to study, in the fifteen Member States, the difficulties posed for each of the 35 articles of the *Corpus*; we have drawn up a table with on the one axis the 15 Member States, on the other the 35 Articles, and have listed all the difficulties, point by point.

The third part is related to external evaluation from outside the Study Group. First, there has been the considerable work of the Budgetary Control Committee of the European Parliament, and the Committee on Civil Liberties and Internal Affairs of the European Parliament. There have also been various initiatives in the Member States: the Avignon conference on the European Judicial Space organized by the French Minister for Justice in collaboration

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with the British minister Jack Straw, and the European Parliament.² In England, there has been a public hearing held at the House of Lords between February and June 1999, also published.³ In Germany, a seminar was held in Trier in March 1999 by the Academy of European Law, the Max Planck Institute for Foreign and International Criminal Law of Freiburg, the Association for European Criminal Law and the European Commission. In Finland, a meeting in September 1999 in Helsinki permitted a discussion with Scandinavian lawyers.⁴ In Spain, a seminar was organized in November 1999, at the Rey Juan Carlos University in Madrid, called "Towards a European criminal law". At the same time, a number of seminars have been organized by European criminal lawyers, sometimes even in the candidate States which are not yet Member States of the European Union.

The final report⁵ is divided into three chapters. The first chapter explains, on the basis of the practical difficulties encountered by investigators and sometimes judges, the reasons why we believe the *Corpus Juris* is *necessary*. The second chapter analyses the conditions for *legitimacy* which the project must meet, in order to be compatible with the requirements for the rule of law and democratic society, common to all our countries. Finally, the third chapter tests the compatibility of each article of the *Corpus Juris* with the diverse national systems, with a view to demonstrating the *feasibility* of the project. To the extent that the criticisms which we have received seem to us to be pertinent, we have also added to our analysis a number of proposals for amendments to the *Corpus Juris*.

2. Necessity of the *Corpus Juris*

For years, the European Parliament and the European Court of Auditors, as well as the legal literature, have been denouncing the absurdity of the present situation, which allows frontiers to be open wide to criminals, whilst being shut to those responsible for the suppression of crime. At present, the situation is even deteriorating. The situation is getting more serious as European integration advances and as the Union creates state-like institutions: a budget, a European civil service, a European currency, bodies and institutions which are largely autonomous, as well as a set of specific legal rules. As these

2. Published as "L'espace judiciaire européen, Actes du colloque d'Avignon", Ministère de la Justice, La Documentation française, Paris 1999.

3. Select committee on the European Communities, Session 1998–1999, 9th report "Prosecuting fraud on the Communities' finances – the Corpus Juris".

4. See Veijo Heiskanen and Kati Kulovesi (Eds.) *Function and future of European law*, (1999).

5. Forthcoming (Scientia, 2000).

European structures evolve, there emerges a corresponding need to protect specific European interests (the budget, but also the common currency, the euro, or the Community trade mark). Europe is now confronted by the type of criminality which develops not only *in* Europe, but is directed *against* Europe and which requires Community law rules. It is clear that the next enlargement of the Union must be accompanied by efforts to produce a real dissuasive effect. In order to reduce the criminality attacking the vital interests of the Union, it would be desirable to reinforce prevention and repression.

Prevention presupposes a certain internal reorganization; this (already suggested in the second report of the Committee of Independent Experts) is being put into place by the transformation of UCLAF into an independent office: the European Office for the fight against fraud, or OLAF.⁶ There have already been attempts to adapt national and international criminal law instruments through various means, notably the development of cooperation: an imposing number of conventions, either bilateral or multilateral, have been adopted in order to strengthen horizontal cooperation between States, and now, with UCLAF and subsequently OLAF, vertical cooperation is getting off the ground. However, the analysis carried out by the Study Group has identified a large number of obstacles which limit the effectiveness of existing provisions whenever the fraud has a transnational character (and it appears that about 80% of the amount of fraud against the financial interests of the European Union concern transnational cases). These obstacles have been grouped according to four categories in the final report.

First: *the existence of secrecy*: whether we consider banking secrecy or secrecy in criminal investigations, secrecy is in itself legitimate but it can form an obstacle to the detection of fraud, since it can constitute a ground for refusing to give information to European investigators. This is a first problem, the resolution of which is very heterogeneous in the various States.

Subsequently, *the extreme complexity of horizontal cooperation*, due to the multiplicity of multilateral and bilateral conventions in the various geographical spaces, with different rules. It has even been found that the list of competent authorities for requesting cooperation, designated by each State, differs according to the convention (differing, for example, between the 1959 Council of Europe Convention on Mutual Assistance in Criminal Matters and the Joint Action on the Creation of a European Network of 1998). The extreme diversity of competent authorities has also been noted: in some countries there is still a *juge d'instruction* in charge of the investigation; in others, this is in the hands of a prosecutor; in others again, it is the police. In addition there is the problem of appeals. The report reveals that in some countries, cooperation is often slowed down by frequent appeals against decisions granting assistance

6. Regulation 1073/99 of 25 May 1999, O.J. 1999, L 136/1.

(letters of request). For Luxembourg, a prosecutor cited a case in which there had been 60 separate, and consecutive, appeals. Obviously, one waits each time for the previous appeal to be rejected before bringing the next one. This system has the effect of slowing down proceedings, and when the letter of request is finally executed, in reply to the authority which made the request, it is much too late, and usually useless.

The third difficulty: *lacunae of vertical cooperation*, that is to say the cooperation by which agents of the Commission participate in the national investigations. The report shows that the status of Commission agents or officials in a national criminal procedure varies from one country to another, and from one situation to another, or from one instrument to another. If one considers the instruments of the First and of the Third Pillar, one notices in fact that the status of the Commission officials is not the same: sometimes they are experts, sometimes witnesses, sometimes technical consultants, sometimes civil parties, sometimes a joint party, able to prosecute alongside the national prosecutor. And sometimes these different statuses are incompatible with one another. Vertical cooperation is also endangered by the absence of a special register for eurofrauds. As a result of a decision of the Commission of 23 March 1997, there are “fraud files”, but these do not constitute a real register, and give little information on the state of fraud in each Member State.

Finally, the last difficulty is *the diversity of rules of evidence*. Once one has managed to overcome the other difficulties, and the case comes to court, very often problems of evidence can lead to failure at the judgment stage. The notions of evidence are different: continental law is based more on the concept of legality, and some countries, such as France or Belgium, have a system of official reports (“procès-verbaux”) whose probative force is predetermined by law; for the *Common Law* countries, it is the notion of “truthfulness of the evidence” which is decisive, with as a consequence the prohibition of evidence obtained from a third party, through hearsay (including evidence transmitted in writing to the court seised of the case, in a “dossier”). And there are also uncertainties as to the admissibility in one country of evidence collected in another, particularly when the operation was “regular” in one country and not in the other, as a result of the absence of national rules covering such a situation.

To sum up, cooperation is necessary, but is not sufficient. The unification of definition for criminal offences and of at least part of the rules of procedure has become indispensable, in order to overcome the obstacles mentioned above, and ensure the effectiveness of the system. Unification is also necessary in order to guarantee the rights of the defence, particularly in cases of internal frauds, where the absence of judicial control jeopardizes the protection of individual rights, as stressed by the Independent Committee of Experts in their report of 10 September 1999.

3. Legitimacy of the *Corpus Juris*

The attachment of the Member States to the rule of law and to democratic principles is enshrined in their constitutions and in the European Treaties, and is also recalled by the European Court of Justice and by the European Court of Human Rights. It is therefore not surprising that this question often emerges in the discussions concerning the *Corpus Juris*. Indeed, the fear has been expressed in national reports and throughout the discussions, that the main principles of the rule of law and democratic principles would be sacrificed for the sake of a more effective protection of European financial interests. In actual fact, effectiveness should not be seen in opposition to legitimacy, but the two should be brought together. For that reason, we make four proposals to strengthen the legitimacy of the project.

First, the six guiding principles which were enumerated but not precisely defined in the original version of the *Corpus Juris* are now to be defined. Four of these principles are classic ones: the need for a basis in law for offences and penalties, individual culpability, proportionality of penalties and judicial guarantee whenever individual liberties are concerned. We have added another principle of “European territoriality”, which is at the heart of the idea of a European Judicial Space (the “area of freedom, security and justice” announced in the Treaty of Amsterdam); and, secondly, the principle of the “*contradictoire*” (or adversarial) nature of proceedings, which should allow an escape from the age-old, (almost theological) argument between the accusatorial and inquisitorial traditions. In fact, what reunites all the States, and is moreover imposed by the ECHR, is the necessity for a “*debat contradictoire*” or adversarial debate, i.e. arguments from both sides: the judicial truth will be that much more solid, since the solution will be illuminated by a *contradictoire* debate from the beginning between the prosecution and the defence under the control of an impartial judge. The *contradictoire* nature of proceedings would thus seem to represent a synthesis of the accusatorial and inquisitorial traditions.

Second proposal: we have already suggested the creation of a European Public Prosecutor (EPP), which would be the keystone of the system of the *Corpus Juris*, but we had not explained the status of the EPP sufficiently clearly, particularly as far as the guarantees of impartiality and independence of such a EPP are concerned. We have therefore added to the initial proposals of the *Corpus Juris* a certain number of provisions concerning the conditions for nominating members of the EPP, and the question of their disciplinary regime, which had not been envisaged at all. We propose giving disciplinary jurisdiction to the European Court of Justice, and we even propose that in cases of abuse, citizens can bring a case before the ECJ. We have also given details concerning the duty of exclusivity of the EPP: a person may not at the

same time hold national and European functions, since members of the EPP are appointed from among the body of national members of the prosecution service, and for a temporary period, and during this period they only exercise their functions as European prosecutors. We have also explicitly adopted the principle of a hierarchy within the EPP – i.e. implying a duty of obedience on the part of the European Delegated Public Prosecutors (EDePPs) to the European Director of Public Prosecutions (EDPP) – and have provided for a duty of cooperation for the national prosecution services. We have also recalled the necessity to take full account of the principle of *ne bis in idem*: it is not permitted to prosecute at the national level persons who have already been judged at the European level on the same facts.

Moreover, there is a *third* proposal concerning legitimacy. Our debates have led us, following the model of the international criminal courts in the framework of the United Nations (*ad hoc* courts for ex-Yugoslavia and Rwanda), and above all following the statute of the international criminal court adopted by the Rome Convention of 1998, to provide for a European pre-trial chamber, made up of European judges, who would intervene at the end of the preparatory phase in order to guarantee the strict respect of procedures during investigations, and to bring the case to the trial judge.

Fourthly, and finally, the question of legitimacy relates to that of the legal basis of the *Corpus Juris*, and here various views are admissible, since none of the texts are entirely explicit. As is often the case in European matters, there are a number of compromise texts, for which different interpretations are possible. One solution would be to take the legal basis of the First Pillar (Article 280 EC) for the whole *Corpus Juris*, but this comes up against a problem in the final sentence of Article 280(4), which indicates that the measures taken on this basis “shall not concern the application of national criminal law or the national administration of justice”. Of course, the *Corpus Juris* does not directly affect the application of national criminal law, since it is European criminal law. Insofar as it does not create a completely autonomous system, and insofar in particular as the help and cooperation of national prosecutors may be required by the European prosecutor, or even insofar as national courts may render final judgment in cases, and therefore apply the rules of the *Corpus Juris*, one may wonder whether the rules of procedure do not have an indirect influence on the administration of justice in the Member States. The question has been raised, it has been discussed by experts, and we ourselves were divided.

This division led us to envisage another solution, which consists of making a distinction between the measures relating to substantive law, which could clearly be based on the First Pillar (Article 280), from those concerning procedure. For procedure, there are a number of possibilities: either one considers that all the procedure is based on the Third Pillar or institutional

reform, or – and possibly this is the most realistic solution – one considers that the procedure can be based on a combination of different solutions. Indeed, a European Public Prosecutor whose jurisdiction was limited to internal fraud could without doubt be created, as a first step, on a First Pillar basis, insofar as there is in that case no influence on the administration of justice in the member States. One could perhaps give procedural rules a basis in the First Pillar for internal fraud (Eurofraud); for external fraud, on the other hand, one would have to wait for the institutional reform announced in the framework of the coming IGC. In its Opinion of 26 January 2000 for the IGC, the Commission makes a proposal to the Conference “to supplement the current provisions relating to protecting the Community’s financial interests by a legal basis in view of setting up a system of rules relating to criminal proceedings in cross-border fraud, notably by the establishment of a European Public Prosecutor”.⁷

4. Feasibility of the *Corpus Juris*

The diversity of national systems of criminal law is a real challenge for any attempt at unification. The idea which we have taken as starting point is that it is not possible for such common rules to be inspired by just one system. Such a hegemonic view is undesirable. These days, Europe rejects such a view. That is, moreover, its specific characteristic as compared with the trend towards globalization of law which can be traced a little everywhere. In this sense, Europe has become a laboratory, perhaps the only one in the world, where there is an attempt to construct a pluralist common law. A hegemonic common law, of the old imperial type, has been tried several times and in several places throughout history, but all the experiments failed. We now know that a common law can only be accepted in Europe if it is a common law that is not just in conformity with the requirements of the rule of law, but is also a pluralist common law. That is why the European legal construction is an example for the current trend towards globalization, which tends rather to choose the hegemonic path. Our objective was thus to make proposals which respect the diversity, but try to distil a common ground. For there are already elements of approximation: we all have common roots, and even a common ancestor: *Jus commune*, taught throughout Europe from the middle ages to modern times (even if Roman law was never recognized in England or in Ireland, Roman law has been taught in these countries). And in present times, approximation is taking place under the influence of the European courts. Even if it is only taking place “blow by blow”, an enormous harmonizing

7. *Adapting the institutions to make a success of enlargement*. Commission Opinion for the IGC.

effort results from the case law of Strasbourg and Luxembourg. Finally, there is the “area of freedom, security and justice” announced by the Treaty of Amsterdam, which must be put in place.

Having said this, checking the feasibility of the *Corpus Juris* in relation to the fifteen Member States was a fairly complex undertaking. In the first stage, we drew up national reports ourselves, or requested assistance from our “contacts” in the countries not represented in the study group. For the fifteen countries, fifteen reports examine the *Corpus Juris* article by article, and for each article, the authors point out the problems of compatibility with each national system of law. The next stage was to engage on a comparative study: four rapporteurs were each entrusted with one quarter of the provisions of the *Corpus Juris*, and they prepared a comparative study of all fifteen countries for these articles, enumerating points of compatibility, incompatibility, even of blockage when the national rapporteur indicated that there was a constitutional problem. A comprehensive table, drawn up by Mr Manacorda, summarizes the comparison.

The preparatory work and the discussions led us to suggest a number of adjustments to the initial text. On the one hand, adjustments improving the internal coherence: for instance, we have regrouped all the offences committed by officials, thus separating these from offences which could be committed by anyone; and we have distinguished between “liability” and “sanction”, which were rather entwined in the first version.

However, most of our proposals are aimed at improving the “external” relevance of the *Corpus Juris* compared with national legal systems. There are three categories of proposal.

At all events, we judged it necessary to improve the initial text. In certain cases, this was because the provisions was not very explicit. For example, we had originally drafted one article on the concept of “judge of freedoms” (that is the national judge whose task is to ensure respect of individual liberties by the EPP throughout the investigative stage) and we have now developed this into four separate provisions: in order to define the preparatory stage and duration (Article 25), the status of the Judge of freedoms (Article 25b), his powers in relation to the conditions of the European arrest warrant (Article 25c), which he can issue and which would replace all extradition procedures, making it possible to apply the same rules for detaining an accused person in all fifteen Member States. Finally, by addressing the question, essential for individual liberty, of coercive measures (Article 25d). There are also a number of cases where, on rereading, we felt the *Corpus Juris* was incomplete: for example, criminal attempts were not defined, and we have now added Article 12b on this.

The *Corpus Juris* has also been “adapted”, where problems raised seemed to require simple adjustments and not additions: for example, we had originally

put the offence of fraud in the strict sense, i.e. an offence involving intent, on the same scale as the offence of imprudence or gross negligence. It was pointed out to us that these were two different categories, and therefore different sanctions should be provided, which we have now done. We had also originally given some rather confused definitions of offences committed by officials (misappropriation of funds and abuse of function) and we have therefore altered the titles and definitions.

Finally the third category of changes consisted, when confronted with real incompatibilities, of either reformulating the text to make it more flexible, or of removing certain provisions. For instance, we have toned down the rule which had been set with respect to judgment by national judges: we had originally said that it was necessary for cases of fraud to be judged by professional judges, which presented serious problems in countries which allowed judgment by jury in case of a plea of guilty. We have therefore relaxed this provision providing for judgment to be given “as far as possible by professional judges”, but without making this compulsory so as not to create incompatibilities with, in particular, the English system. In some cases we have even removed a provision: I will mention the example of the possibility of civil action by the Commission, which was included in Article 30. Commentators remarked that in many countries, the possibility of rights granted to the victim as *partie civile* does not exist; similarly, for the offences envisaged by the *Corpus Juris*, the victim is no ordinary one (an individual), but is the Commission, whose interests are already supposed to be defended by the EPP. Given the serious difficulties that this provision was likely to encounter, we considered it better to remove it.

To sum up, we consider that the project is feasible, on two conditions. First, the condition that uniformity is not imposed where it is not strictly necessary: thus, at the judgment stage, the risks of diversity are less serious than in the preparatory stage, and “eurofrauds” could be dealt with in national courts. The project is feasible further on condition that one keeps in mind the idea of a law which is common but also pluralist, which respects the different traditions in Europe and endeavours to keep the best features of each: the aim is not a compromise at the lowest level, but a progress along the highest level.

5. Conclusion

On the one hand, the necessity of the *Corpus Juris* seems to be apparent for reasons of efficiency and in order better to ensure respect of the rights of the defence; on the other hand, the *Corpus Juris* can be considered feasible on the conditions just mentioned, and taking account of the necessary adjustments; finally, the legitimacy of the project would be strengthened by our proposals

concerning six leading principles, the status of the European Public Prosecutor, possibly the creation of a European Pre-trial chamber; the choice of legal basis remains open, with the various possibilities we mentioned above.

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