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Enforcement of EU law and national criminal law – Legal problems in composite procedures

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ENFORCEMENT OF EU LAW AND NATIONAL CRIMINAL LAW – LEGAL PROBLEMS IN COMPOSITE PROCEDURES

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The growing inter-relatedness between EC and EU law with national criminal law can be well illustrated with the example of enforcement of EU law. Criminal law is one of the latest examples of increasing European integration within the perimeters of explicit competences of EU/EC law which additionally is driven ahead by what functionalist theories of European integration might refer to as a spill-over of approaches. Necessities of cross-border crime and criminal enforcement make cooperation necessary. The latter takes place to a certain degree on the basis of positive law established on the basis of the Treaties. It also takes place in the context of evolutionary development of what one might refer to as ‘administrative networks.’ Enforcement is an important topic in European law for several reasons. First, it is necessary in order to ensure uniform compliance throughout the EU - an essential requirement for a legal system under the rule of law. This avoids Member States seeking advantages by non-enforcement of certain aspects of EU law. Second, enforcement has become important to protect public finances and money spent from the Community budget through Member State procedures.² Enforcement is a matter, in which Member States act to a large degree by applying national (procedural) law, but this application of national law takes place in the framework of Community law. It therefore is a good example to illustrate the complex interactions between law from the different sources in the integrated European legal system.

Enforcement is a word which is widely used in Community law terms but is rarely defined. Enforcement could in a wider sense be understood to encompass any means to achieve compliance with obligations under European law, but in this chapter enforcement is used in a more narrow sense. It focuses on measures of enforcement in the sense of activities that are necessary to bring into actual effect or operation a final measure of EU administrative law.³ It will analyse this area of law combining administrative and criminal law aspects by first looking at enforcement by Member States of EU decisions (indirect administration in cooperation with EU institutions and in the framework of EU law), second, enforcement of EU decisions by EU institutions (direct enforcement in cooperation with Member States’ institutions) and finally third, by looking at specifically created enforcement networks. The chapter will show that the distinction between direct and indirect administration and with it the traditional limits of application of national versus EU law can not be drawn along a quasi-federal two-level model. The area of enforcement is an example for the fact that the EU can not be described by the

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² Fraud and mismanagement in this respect were for example important deficits which for example cumulated over decades and finally contributed to the downfall of the *Santler* Commission. See especially the Committee of Independent Experts, Second Report on Reform of the Commission Analysis of current practice and proposals for tackling mismanagement, irregularities and fraud of 10 September 1999, DOC_EN\DV\381\381230EN.doc

³ Although that would include public as well as private activity to enforce the complex system of incentives and penalties for infringements of European law, this chapter concentrates on public enforcement.

simplistic two-level constitutional system in which certain powers are allocated to the European level and many powers, including implementation and enforcement remain on the Member States levels.⁴ The chapter ends by indicating some of the central themes for further research to ensure limiting the dangers of a highly integrated legal system with shared powers on all levels.

A Enforcement of EU/EC Acts by Member States

Generally, in the absence of a delegation of enforcement powers to EU institutions or bodies through EU/EC law, Member States are in charge of enforcement.⁵ Equally, in the absence of harmonisation through European law, Member States are obliged to apply their substantive and procedural provisions to ensure enforcement. Thereby they apply their law within the framework of the general principles of EU/EC law, most importantly the principles of effectiveness and equivalence.

Member States use their administrative and where necessary criminal law system for the enforcement of EU/EC obligations. Since such enforcement activity is Member State action within the sphere of European Union law, Member States are obliged to follow the general principles of law, and acting within the fundamental rights protected by European law.

The legal framework for such enforcement activity by Member States arises essentially from Article 10 EC, Member States are obliged to provide for effective and dissuasive sanctions for violation of Community law obligations.⁶ In the leading case *Greek Maize* the ECJ held 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 and which, in any event, make the penalty effective, proportionate and dissuasive . Moreover, the national authorities must proceed, with respect to infringements of Community law, with the same diligence as that which they bring to bear in implementing corresponding national laws.’⁷

Next to this principle of equivalence, Member States are also bound by the principle of effectiveness obliging them to provide for procedures which make effective enforcement neither ‘virtually impossible’ nor ‘excessively difficult.’⁸ As *Jans, de Lange, Prechal* and *Widdershoven* correctly observe, ‘where there is a conflict in between the requirements of effectiveness and the requirement of equivalence, the former takes precedence. Consequently Member States cannot claim in their defence against a complaint that Community law has not been effectively

⁴ To the contrary, Member States’ authorities are instead involved in creating EU legislation and implementing acts and the EU is involved in administration and enforcement of jointly created law alongside the Member States authorities. See the contributions in Herwig C.H. Hofmann, Alexander Türk *EU Administrative Governance* Elgar Publishing (Cheltenham 2006).

⁵ Thereby the approach to the distribution of responsibilities to enforcement follows that of general EU administrative law.

⁶ Case 14/83 *Von Colson and Kamann* [1984] ECR I-1891, para 28.

⁷ Case 68/88 *Commission v. Greece (Greek Maize)* [1989] ECR I-2965, paras 24, 25. See with this respect also: Case C-326/88 *Hansen* [1990] ECR I-2911, para. 17; Case C-7/90 *Vandevenne and others* [1991] ECR I-4371, para. 11; Case C-29/95 *Pastors and Trans-Cap* [1997] ECR I-285, para 24; Case C-177/95 *Ebony Maritime* [1997] ECR I-1111, paras 35-37; Joined Cases C-387/02, C-391/02 and C-403/02 *Berlusconi* [2005] ECR I-3565, para. 65.

enforced, that similar national rules are not effectively either.⁹ Effectiveness requires that Member States may not subject the enforcement of Community law to conditions which ‘render virtually impossible or excessively difficult the exercise of rights conferred by Community law’ even if the same treatment is extended to similar claims arising from an infringement of national law.¹⁰ Further, the Member State provisions have to provide a ‘real deterrent effect’ against violation of Community law provisions.¹¹

These obligations exist also when Member States opt for non-enforcement. The Court of Justice held that the ‘apprehension of internal difficulties cannot justify a failure by a Member State to apply Community law correctly.’¹² Instead,

‘it is for the Member State concerned, unless it can show that action on its part would have consequences for public order with which it could not cope by using the means at its disposal, to adopt all appropriate measures to guarantee the full scope and effect of Community law (...).’¹³

Such enforcement action however needs to take place within the framework of Fundamental Rights protected under Community law.

The ECJ requires enforcement action to be proportionate in view of fundamental rights such as human dignity,¹⁴ the freedom of expression and the freedom of assembly (also guaranteed by Articles 10 and 11 of the ECHR),¹⁵ the protection of the home and other premises (also guaranteed by Article 8 of the ECHR),¹⁶ non-retroactivity of criminal sanctions (also guaranteed by Article 7 of the ECHR),¹⁷ as well as rights protected under the principle of good administration (also referred to as the right to good administration under Article 41 of the European Charter of Fundamental Rights).¹⁸

In the framework of applying their procedural and substantive law for the enforcement of EU/EC measures Member States are obliged to also apply their sanctions regimes. This encompasses both the administrative as well as the criminal sanctions. The Member States’ sanctions regimes are influenced by European law not only through general principles of law but increasingly from highly detailed Community regulations and directives harmonising both substantive and procedural law of the Member States. Harmonisation of substantive criteria includes provisions on the sanctions applicable for enforcement of EU/EC law. Procedural harmonisation orders integration of sanctions regimes and the investigations of infringements leading to the application of sanctions within the European administrative networks. Member States thereby increasingly encounter a

⁸ See e.g. Case C-261/95 *Palmisani* [1997] ECR I-4025, para. 27; Case C-326/96 *Levez* [1998] ECR I-7835, para 18; Case C-453/99 *Courage v. Crehan* [2001] ECR I-6297, para. 29.

⁹ Jan .H. Jans, R. de Lange, Sasha Prechal and Rob J.G.M. Widdershoven, *Europeanisation of Public Law*, Europa Law Publishing (Groningen 2007), p. 212.

¹⁰ Case C-255/00 *Grundig Italiana* [2002] ECR I-8003, para. 33; Case 199/82 *San Giorgio* [1983] ECR 3595, paras. 17, 18.

¹¹ Case C-180/95 *Draehmpael* [1997] ECR I-2195, paras. 24, 25; Case C-271/91 *Marshall II* [1993] ECR I-4367, paras. 24-26; Case 14/83 *Von Colson and Kamann* [1983] ECR 1891, para. 23.

¹² Case C-265/95 *Commission v. France (Spanish Strawberries)* [1997] ECR I-6959, para. 51; Case C-52/95 *Commission v France* [1995] ECR I-4443, para. 38.

¹³ Case C-265/95 *Commission v. France (Spanish Strawberries)* [1997] ECR I-6959, para. 52.

¹⁴ Case C-36/02 *Omega v. Bonn* [2004] ECR I-9609, paras. 34, 35.

¹⁵ Case C-112/02 *Schmidberger* [2003] ECR I-5659, para. 77.

¹⁶ Case C-94/00 *Roquette Frères* [2002] ECR I-9011, para. 29.

¹⁷ Case C-60/02 *Rolax* [2004] ECR I-651, para. 63.

¹⁸ T-54/99 *Max Mobil* [2002] ECR II-313, paras. 48, 57 and C-141/02 *Max Mobil* [2005] ECR I-1283, paras. 16, 72.

combination of Europeanized and truly national procedural and substantive law on administrative and criminal sanctions regimes.

The relation between Member States and harmonised sanctions provisions generally follows well-known patterns. Member States are only barred from using more stringent sanctions than those provided for in Community legal acts if the harmonisation is exhaustive. In cases where, for example, a Community directive provides for a civil sanction such as the recovery of the money which was improperly used, a Member State may therefore also apply its criminal law to sanction such infringement. In this respect the ECJ for example held in *Nunes* and *de Matos* that a Member State could punish fraud to the disadvantage of the European Social Fund by applying national criminal law, despite only civil sanctions for its violation being established in the relevant European legislation. The Court held that

[w]here 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 of the EC Treaty (now Article 10 EC) requires the Member States to take all measures necessary to guarantee the application and effectiveness of Community law (see, in particular, Case 68/88 *Commission v Greece* [1989] ECR 2965, paragraph 23). For that purpose, while the choice of penalties remains within their discretion, the 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 and which, in any event, make the penalty effective, proportionate and dissuasive.¹⁹

The ECJ in this case further held that Article 10 EC required,

‘Member States to take all effective measures to penalise conduct harmful to the financial interests of the Community. Such measures may include criminal penalties even where the Community legislation only provides for civil ones. The penalty provided for must be analogous to those applicable to infringements of national law of similar nature and importance, and must be effective, proportionate and dissuasive.’²⁰

Member States law on sanctions is in many policy areas harmonised to a certain degree. Provisions on administrative sanctions are regulated with seemingly ever greater detail in secondary Community law, for example in the areas of agriculture,²¹ fisheries,²² shipments of waste,²³ and the protection of Community financial interests.²⁴ Conditions, procedure and extent of administrative sanctions for enforcement are regulated

¹⁹ Case C-186/98 *Maria Amélia Nunes and Evangelina de Matos* [1999] ECR I-4883, paras 9-11.

²⁰ Case C-186/98 *Maria Amélia Nunes and Evangelina de Matos* [1999] ECR I-4883, para 14.

²¹ See for example Commission Regulation (EC) No 796/2004 of 21 April 2004 laying down detailed rules for the implementation of cross-compliance, modulation and the integrated administration and control system provided for in of Council Regulation (EC) No 1782/2003 establishing common rules for direct support schemes under the common agricultural policy and establishing certain support schemes for farmers, OJ 2004 L 141/18 (As amended e.g. by Regulation 972/2007, OJ 2007 L 216/3; Regulation 381/2007, OJ 2007 L 95/8; Regulation 2025/2006, OJ 2006 L 384/81; Regulation 659/2006, OJ 2006 L 116/20).

²² Council Regulation (EEC) No 2847/93 of 12 October 1993 establishing a control system applicable to the common fisheries policy, OJ 1993 L 261/1.

²³ Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste, OJ 2006 L 190/1.

²⁴ Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities financial interests, OJ 1995 L 312/1.

in line with the need for harmonised application and sanctions mechanisms for distribution of subsidies,²⁵ granting of authorisations or licences²⁶ and general granting of advantages under Community law.²⁷ Administrative sanctions outlined in such secondary legislation include, depending on the gravity of the offence: Administrative fines; Seizure of prohibited gear and economic benefits; Sequestration or temporary immobilization of gear; Suspension or withdrawal of a licence; Reduction of subsidies payments and exclusion from future payments (with details on the time of such exclusion); Total or partial remove from an advantage granted by Community rules; Termination of agreements; Obligations to pay or repay amounts of moneys paid or wrongly received; Forfeiture of deposit payments; Loss of security provided; Payment of interest on monies.

Community law provisions also order Member States to make distinctions as to the intentional or negligent infringements of Community rules,²⁸ as well as against whom (natural or legal persons) sanctions for enforcement of Community law have to be undertaken.²⁹ They often also define the relation between administrative and criminal sanctions.³⁰

However, as is well known from the debates in the various national legal systems, the difference between administrative and criminal sanctions is gradual. Both systems have recourse in a certain margin to fines and other coercive means. However, criminal sanctions generally are adopted after a procedure with more onerous investigatory procedures, and generally carry more severe penalties. Nevertheless, both systems of sanctions are designed to achieve compliance with the law by deterrence from infringements and sanctions aimed at reducing the risk of repetition of offences.

Whether the Community has the power to harmonise Member States provisions on criminal sanctions under the EU/EC Treaty is highly disputed. Several cases before the ECJ prove that. Originally, such measures were based on legal basis from the EU Treaty under the third pillar. With respect to environmental policy, an area where a cross-section clause requires all measures to ensure a high level of protection, the Community (annex-) competence has been affirmed by the ECJ. It held that in the area of environmental law that Community powers exist.

‘In this regard, while it is true that, as a general rule, neither criminal law nor the rules of criminal procedure fall within the Community’s competence, this does not, however, prevent the Community legislature, when

²⁵ See especially Articles 59, 60, 66 and 67 of Commission Regulation (EC) No 796/2004 of 21 April 2004 laying down detailed rules for the implementation of cross-compliance, modulation and the integrated administration and control system provided for in of Council Regulation (EC) No 1782/2003 establishing common rules for direct support schemes under the common agricultural policy and establishing certain support schemes for farmers, OJ 2004 L 141/18 (as amended). Therein the Commission lays down for the Member States from which level of infractions (e.g. how many animals were wrongly accounted for) which level of sanctions are applicable.

²⁶ E.g. Article 31 Council Regulation (EEC) No 2847/93 of 12 October 1993 establishing a control system applicable to the common fisheries policy, OJ 1993 L 261/1.

²⁷ Article 5 (1)(c) Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities financial interests, OJ 1995 L 312/1.

²⁸ See e.g. Articles 59 (4), 60 (6), 66, 67 of Commission Regulation (EC) No 796/2004 of 21 April 2004 laying down detailed rules for the implementation of cross-compliance, modulation and the integrated administration and control system provided for in of Council Regulation (EC) No 1782/2003 establishing common rules for direct support schemes under the common agricultural policy and establishing certain support schemes for farmers, OJ 2004 L 141/18 (as amended).

²⁹ See for example Article 32 (1) Council Regulation (EEC) No 2847/93 of 12 October 1993 establishing a control system applicable to the common fisheries policy, OJ 1993 L 261/1 detailing that ‘appropriate action’ shall be taken ‘against the master of the vessel involved or against any other person responsible for the infringement.’

³⁰ See e.g. Article 6 Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities financial interests, OJ 1995 L 312/1.

the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for combating serious environmental offences, from taking measures which relate to the criminal law of the Member States which it considers necessary in order to ensure that the rules which it lays down on environmental protection are fully effective.’³¹

The Commission broadly interpreted this judgement in a Communication explaining that

‘the judgment makes it clear that criminal law as such does not constitute a Community policy, since Community action in criminal matters may be based only on implicit powers associated with a specific legal basis. Hence, appropriate measures of criminal law can be adopted on a Community basis only at sectoral level and only on condition that there is a clear need to combat serious shortcomings in the implementation of the Community’s objectives and to provide for criminal law measures to ensure the full effectiveness of a Community policy or the proper functioning of a freedom.’³²

In a clarification of its case C-176/03, and against the opinion of its Advocate General,³³ the ECJ has now clarified that despite the fact that criminal sanctions are an annex competence to the regulation of environmental matters. However despite the fact that Community legislation may request Member States to provide for criminal sanctions,

‘the determination of the type and level of the criminal penalties to be applied does not fall within the Community’s sphere of competence.’³⁴

A policy area which seems to be in-line with this case law is the partial harmonisation of criminal sanctions for the enforcement of Community law objectives is immigration and asylum law.³⁵ Here Member States have maintained a large margin of discretion for establishing the type and the severity of criminal sanctions to be applied for violation of Community provisions. However certain aspects of general criminal law are harmonized such as the expansion of the application of sanctions to instigation, participation and attempts to commit an

³¹ See e.g. C-176/03 *Commission v Council* [2005] ECR I-7807, paras. 51-53. Further cases outside of the area of environmental law are pending e.g. Case C-91/05 *Commission v Council (small arms)*. For the literature see for example, Stefan Braum, *Europäische Strafgesetzgebung: Demokratische Strafgesetzlichkeit oder administrative Opportunität*, 25 *Zeitschrift für Wirtschafts- und Steuerstrafrecht* [2006], 121-125; John A.E. Vervaele, *The European Community and Harmonisation of the Criminal Law Enforcement of Community Policy*, [2006] *European Criminal Law Association’s Forum* 87-92.

³² No 7 of Communication from the Commission to the European Parliament and the Council on the Implications of the Court’s judgment of 13 September 2005 (Case C-176/03 *Commission v Council*) COM (2005) 583 final. The Commission goes on to explain that ‘The horizontal criminal law provisions aimed at encouraging police and judicial cooperation in the broad sense, including measures on the mutual recognition of judicial decisions, measures based on the principle of availability, and measures on the harmonisation of criminal law in connection with the creation of the area of freedom, security and justice not linked to the implementation of Community policies or fundamental freedoms, fall within Title VI of the TEU.’

³³ The Commission’s interpretation was broadly confirmed by AG Mázak in his opinion on case C-440/05 concerning a measure on ship-sourced maritime pollution. He found that case C-176/03 had affirmed that the Community had the competence to require Member States to adopt criminal sanctions where necessary to ensure the full effectiveness of Community law and where essential to combat serious offences in a particular area. Thereby, the Community could avail itself ‘of the full range of legal enforcement measures in order to uphold its legal order’. Opinion of Advocate General Mázak, delivered on 28 June 2007 in Case C-440/05 *Commission v Council* [2007] ECR I-nyr, paras. 112, 113 and 129-137.

³⁴ C-440/05 *Commission and Parliament v Council (ship-source pollution)* of 23 October 2007, [2007] ECR I-nyr, para. 70. As a consequence of this judgement, Commission proposals which harmonise Member State law on the level of criminal penalties for offences such as the Proposal for a Directive of the European Parliament and of the Council on the protection of the environment through criminal law, presented by the Commission, 9 February 2007, 2007/0022 (COD), COM (2007) 51 final, will have to be reviewed. This proposal provided for sentencing ranging from € 300 000 to € 1 500 000 in precisely described circumstances as well as a maximum imprisonment from one to ten years for certain offences conducted with negligence or intent. It also provides that these sanctions can be accompanied by further sanctions such as disqualification from authorisations and the obligation to reinstate the environment.

infringement.³⁶ The amount of areas which are also being covered by criminal law harmonization is rapidly increasing. Also in the area of the enforcement of intellectual property rights, such propositions for legislation have been made which provides for the exact frameworks of custodial sentences for natural persons and fines and confiscation of good for natural and legal persons. Additionally, it provides for sanctions such as *inter alia* the destruction of goods, closure of establishments, bans on commercial activity, placing under judicial supervision of enterprises and judicial winding-up of companies.³⁷ This directive also contains the proposal to regulate certain circumstances for the initiation of criminal proceedings.³⁸

B Enforcement by EU/EC Institutions and Bodies

Enforcement powers are in some policy areas also delegated to be undertaken by the EU/EC institutions and bodies. Direct enforcement of final measures under EU/EC law is the exception to enforcement by Member State administrations in implementation of EU/EC administrative law. Generally, final measures are measures on the European level such as decisions to impose on undertakings fines in cases of violation of competition law provisions,³⁹ are subject to enforcement action by the Member States in case of non-compliance by individuals.⁴⁰ However, direct enforcement of EU/EC decisions with the use of coercive measures vis-à-vis private parties is also possible. Provisions providing for such possibilities generally provide for that to take place in cooperation with the Member States authorities.⁴¹ The leading case in which such cooperation has been established is *Hoechst*.⁴² Therein it was established that Commission enforcement activity within the Member States can take

³⁵ Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence, OJ 2002 L 328/17.

³⁶ Article 2 of Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence, OJ 2002 L 328/17.

³⁷ Articles 4, 5 of Amended proposal for a Directive of the European Parliament and of the Council on criminal measures aimed at ensuring the enforcement of intellectual property rights, presented by the Commission, 26 April 2006, 2005/0127 (COD), COM (2006) 168 final.

³⁸ Article 8 of Amended proposal for a Directive of the European Parliament and of the Council on criminal measures aimed at ensuring the enforcement of intellectual property rights, presented by the Commission, 26 April 2006, 2005/0127 (COD), COM (2006) 168 final.

³⁹ E.g. Articles 23, 24 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ 2003 L 1/1.

⁴⁰ Only in the area of state aid control, is there a simplified enforcement procedure under Article 6 of Council Regulation (EEC) No. 2950/83 of 17 October 1983 on the implementation of Decision 83/516/EEC on the task of the European Social Fund, OJ 1983 L 289/1, due to the fact that the addressees of enforceable decisions in this policy area are the Member States themselves.

⁴¹ Informative with further references: Case C-94/00 *Roquette Frères* [2002] ECR I-9011, para 31: 'As is apparent from the case-law of the Court of Justice, an obligation to cooperate in good faith is incumbent both on the judicial authorities of the Member States acting within the scope of their jurisdiction (see, in particular, Case 14/83 *Von Colson and Kamann* [1984] ECR 1891, paragraph 26, and Case 80/86 *Kolpinghuis Nijmegen* [1987] ECR 3969, paragraph 12) and on the Community institutions, which have a reciprocal obligation to afford such cooperation to the Member States (see, in particular, Case 230/81 *Luxembourg v Parliament* [1983] ECR 255, paragraph 38, and the order of 13 July 1990 in Case C-2/88 *IMM Zwartveld and Others* [1990] ECR I-3365, paragraph 17).'

⁴² Joined cases 46/87 and 227/88 *Hoechst AG v Commission* [1989] ECR 2859, paras 13-36 summarised in points 3-5 as follows: '3. Both the purpose of Regulation No 17 and the list of powers conferred on the Commission's officials by Article 14 thereof show that the scope of investigations may be very wide. In that regard, the right to enter any premises, land and means of transport of undertakings is of particular importance inasmuch as it is intended to permit the Commission to obtain evidence of infringements of the competition rules in the places in which such evidence is normally to be found, that is to say, on the business premises of undertakings. That right of access would serve no useful purpose if the Commission's officials could do no more than ask for documents or files which they could identify precisely in advance. On the contrary, such a right implies the power to search for various items of information which are not already known or fully identified. Without such a power, it would be impossible for the Commission to obtain the information necessary to carry out the investigation if the undertakings concerned refused to cooperate or adopted an obstructive attitude. However, the exercise of the wide powers of investigation conferred on the Commission is subject to conditions serving to ensure respect for the rights of undertakings. In that regard, the Commission's obligation to specify the subject-matter and purpose of the investigation is a fundamental

place only with cooperation by the Member States' authorities unless Community legislation explicitly contains provisions to the contrary. These forms of cooperation between the Commission and the national authorities and courts, who in many cases are necessary to obtain the permission to search private premises, require also a minimum level of review of Commission activity by the national courts in order to assert for example, whether the Commission's request is in compliance with the privacy protection afforded under Article 8 ECHR or the parallel national constitutional law.⁴³

The approach established in the framework of competition law enforcement in *Hoechst* have become the norm for legislative acts providing for direct Community institutions' and bodies' enforcement powers. Investigations conducted for example by OLAF (the European anti fraud office) may conduct 'on-the-spot checks and investigations' on the territory of the Member States.⁴⁴ 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.'⁴⁵ Further, 'subject to the Community law applicable, they shall be required to comply with the rules of procedure laid down by the law of the Member States concerned.'⁴⁶

C Enforcement Networks

In almost all policy areas, cooperation between Member States and European institutions and bodies is a procedural requirement also for enforcement. Enforcement of EU/EC institutions' and bodies' measures by Member States is undertaken within the administrative networks. Cooperation takes place horizontally between Member States, in the vertical dimension between Member States and European institutions and bodies as well as

requirement not merely in order to show that the investigation to be carried out on the premises of the undertakings concerned is justified but also to enable those undertakings to assess the scope of their duty to cooperate while at the same time safeguarding the rights of the defence. 4. Where investigations are carried out with the cooperation of the undertakings concerned by virtue of an obligation arising under a decision ordering an investigation, the Commission's officials have, inter alia, the power to have shown to them the documents they request, to enter such premises as they choose, and to have shown to them the contents of any piece of furniture which they indicate. On the other hand, they may not obtain access to premises or furniture by force or oblige the staff of the undertaking to give them such access, or carry out searches without the permission of the management of the undertaking. On the other hand, if the undertakings concerned oppose the Commission's investigation, its officials may, on the basis of Article 14(6) of Regulation No 17 and without the cooperation of the undertakings, search for any information necessary for the investigation with the assistance of the national authorities, which are required to afford them the assistance necessary for the performance of their duties. Although such assistance is required only if the undertaking expresses its opposition, it may also be requested as a precautionary measure, in order to overcome any opposition on the part of the undertaking. 5. It follows from Article 14(6) of Regulation No 17 that it is for each Member State to determine the conditions under which the national authorities will afford assistance to the Commission's officials. In that regard, the Member States are required to ensure that the Commission's action is effective, while respecting the general principles of Community law. Within those limits, the appropriate procedural rules designed to ensure respect for undertakings' rights are those laid down by national law.'

⁴³ Case C-94/00 *Roquette Frères* [2002] ECR I-9011, para 81: 'It follows that, in order for the competent national court to be able to carry out the review of proportionality which it is required to undertake, the Commission must in principle inform that court of the essential features of the suspected infringement, so as to enable it to assess their seriousness, by indicating the market thought to be affected, the nature of the suspected restrictions of competition and the supposed degree of involvement of the undertaking concerned.'

⁴⁴ OLAF may also conduct inspections and enforce the inspection rights vis-à-vis EU/EC institutions and bodies. In those cases, no cooperation by Member States' authorities is required.

⁴⁵ Article 4 of Council Regulation No 2185/96 of 11 November 1996 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.

⁴⁶ Article 6 (2) of Council Regulation No 2185/96 of 11 November 1996 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.

in certain cases as cooperation with private parties.⁴⁷ Obligations for cooperation in enforcement networks can be found, for example, in the areas of competition, agriculture and fisheries as well as environmental law to name but a few. Within the enforcement networks, obligations to mutual assistance exist at to information gathering preparing enforcement activities⁴⁸ and the imposition of sanctions. This is most often cooperation with respect to trans-territorial collection and use of evidence for imposing sanctions.⁴⁹ Within the enforcement networks, the transfer of information and evidence can also lead to the allocation of enforcement responsibilities in cases where several Member State bodies might be in charge. The areas of competition enforcement and merger control have such allocation systems.⁵⁰ They also exist with respect to fisheries and environmental law.⁵¹ Often, a policy area will combine some or most of these factors (information collection and sharing between Member States and Community institutions and bodies as well as allocation of enforcement and sanction powers) with the legal basis for such cooperation in European secondary legislation.⁵²

This also leads to in the area of enforcement procedures the possibility of composite procedures. Joint enforcement activity can reach so far as to the obligation of one Member State to enforce another Member States

⁴⁷ For example, Article 50 (3) of example Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste, OJ 2006 L 190/1, which establishes that controls of shipments of waste may take place at the point of origin, carried out with the producer, holder or notifier or at the destination, carried out with the consignee or the facility. See also Article 7 (on 'joint investigation teams') in the Amended proposal for a Directive of the European Parliament and of the Council on criminal measures aimed at ensuring the enforcement of intellectual property rights, COM (2006) 168 final provides that: 'The Member States must ensure that the holders of intellectual property rights concerned, or their representatives, and experts, are allowed to assist the investigations carried out by joint investigation teams into the offences referred to in Article 3.'

⁴⁸ Under Article 33 (1) and (2) of Council Regulation (EEC) No 2847/93 of 12 October 1993 establishing a control system applicable to the common fisheries policy, OJ 1993 L 261/1, for example, 'The competent authorities of Member States shall without delay and in compliance with their procedures under national law notify the flag Member State or the Member State of registration, of any infringement of the Community rules referred to in Article 1, indicating the name and the identification marks of the vessel involved, the names of the master and the owner, the circumstances of the infringement, any criminal or administrative proceedings or other measures taken and any definitive ruling relating to such infringement. Upon request, Member States shall notify the Commission of this information in specific cases. Following a transfer of prosecution pursuant to Article 31 (4), the flag Member State or the Member State of registration shall take all appropriate measures as set out in Article 31.'

⁴⁹ Article 12 (3) Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ 2003 L 1/1 for example provides for Commission and the Member State authorities within the European Competition Network (ECN) to exchange information and request each others' services in gathering such information which is necessary to be 'used in evidence to impose sanctions on natural persons.' In the preamble to this regulation the approach is explained as follows: 'Notwithstanding any national provision to the contrary, the exchange of information and the use of such information in evidence should be allowed between the members of the network even where the information is confidential. This information may be used for the application of Articles 81 and 82 of the Treaty as well as for the parallel application of national competition law, provided that the latter application relates to the same case and does not lead to a different outcome. When the information exchanged is used by the receiving authority to impose sanctions on undertakings, there should be no other limit to the use of the information than the obligation to use it for the purpose for which it was collected given the fact that the sanctions imposed on undertakings are of the same type in all systems. The rights of defence enjoyed by undertakings in the various systems can be considered as sufficiently equivalent. However, as regards natural persons, they may be subject to substantially different types of sanctions across the various systems. Where that is the case, it is necessary to ensure that information can only be used if it has been collected in a way which respects the same level of protection of the rights of defence of natural persons as provided for under the national rules of the receiving authority.'

⁵⁰ E.g. Article 9 on the referral of merger control cases to the authorities of the Member States in Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), OJ 2004 L 24/1.

⁵¹ Under Article 33 (1) and (2) of Council Regulation (EEC) No 2847/93 of 12 October 1993 establishing a control system applicable to the common fisheries policy, OJ 1993 L 261/1, for example, 'The competent authorities of Member States shall without delay and in compliance with their procedures under national law notify the flag Member State or the Member State of registration, of any infringement of the Community rules referred to in Article 1, indicating the name and the identification marks of the vessel involved, the names of the master and the owner, the circumstances of the infringement, any criminal or administrative proceedings or other measures taken and any definitive ruling relating to such infringement. Upon request, Member States shall notify the Commission of this information in specific cases. Following a transfer of prosecution pursuant to Article 31 (4), the flag Member State or the Member State of registration shall take all appropriate measures as set out in Article 31.'

⁵² See for example Article 50 (5) and (7) of Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste, OJ 2006 L 190/1 which holds that '5. Member States shall cooperate, bilaterally or multilaterally, with one another in order to facilitate the prevention and detection of illegal shipments.' '7 At the request of another Member State, a Member State may take enforcement action against persons suspected of being engaged in the illegal shipment of waste who are present in that Member State.'

enforcement decisions and sanctions including the area of criminal law sanctions.⁵³ Obligations to cooperate with enforcement measures arise from secondary legislation establishing detailed provisions in several policy areas. In absence of specific provisions they arise from the obligation to cooperate in good faith, which

‘is incumbent both on the judicial authorities of the Member States acting within the scope of their jurisdiction and on the Community institutions, which have a reciprocal obligation to afford such cooperation to the Member States.’⁵⁴

There are many examples of provisions in positive law which provide for the obligation to horizontal and vertical cooperation in enforcement networks in all pillars of the EU.⁵⁵ Within the Community, far reaching structures have been established for example in the framework of the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (FRONTEX).⁵⁶ Under the provisions of the Regulation 562/2006 on the powers for border checks and border surveillance,⁵⁷ Member States controlling and supervising the external borders of the Schengen area may request FRONTEX for assistance to deploy ‘Rapid Border Intervention Teams’.⁵⁸ Such teams are composed by border guards from various Member States. The executive director of FRONTEX determines the exact composition of the teams decides on the deployment of the teams on the basis of national requests. This is done on the basis of the agency’s ‘operational plans’, which specify tasks and special instructions of the teams of border guards, the ‘permissible consultation of databases and permissible service weapons, ammunition and equipment’ the Member State of deployment as well as the names of the border guards who are in command of the teams during the period of deployment. Coordination takes place by the agency’s coordinating officer who is a Community official. During deployment, the border guards remain national officers from their home state but are within a chain of command both from the agency and the host Member State. Their exercise of executive powers, including the use of force with their service weapons, ‘shall be subject to the national law of the Member State’ on the territory of which the border guards are deployed. But the members of the teams remain subject to the disciplinary rules of their home Member State.⁵⁹ Therefore, the applicable law for enforcement measures

⁵³ See especially Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties, OJ 2005 L 76/16.

⁵⁴ Case C-94/00 *Roquette Frères* [2002] ECR I-9011, para. 31 with references for the former obligation to: Case 14/83 *Von Colson and Kamann* [1984] ECR 1891, para. 26, and Case 80/86 *Kolpinghuis Nijmegen* [1987] ECR 3969, para. 12. With reference to the latter Community obligation the ECJ refers to in particular, Case 230/81 *Luxembourg v Parliament* [1983] ECR 255, para. 38, and the order of 13 July 1990 in Case C-2/88 *IMM Zwartveld and Others* [1990] ECR I-3365, para. 17.

⁵⁵ See for example, Council Regulation No 2185/96 concerning on-the-spot check 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 and Council Regulation 515/97 of 13 March 1997 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 and agricultural matters, OJ 1997 L 82/1.

⁵⁶ Council Regulation (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ 2004 L 349/1 as last amended by Regulation (EC) No 863/2007 of the European Parliament and the Council of 11 July 2007 establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation (EC) No 2007/2004 as regards that mechanism and regulating the tasks and powers of guest officers, OJ 2007 L 199/30.

⁵⁷ Regulation (EC) No 562/2006 of the European Parliament and the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), OJ 2006 L 105/1.

⁵⁸ Articles 8 – 8h and 10 of Council Regulation 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ 2004 L 349/1 as last amended by Regulation 863/2007 establishing a mechanism for the creation of Rapid Border Intervention Teams, OJ 2007 L 199/30.

⁵⁹ Article 10 of Council Regulation 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ 2004 L 349/1 as last amended by Regulation 863/2007 establishing a

including the use of force with weapons is a mix of Community law (for the coordination officer), law of the host Member State and law of the home Member States of the border guards in the rapid border intervention teams.⁶⁰

Legal Certainty as to responsibility and systems of accountability, legal protection and the judicial review have become an extremely difficult in these network structures. The example of the rapid border intervention teams in the context of FRONTEX shows the extent to which network structures can be developed and how they touch issues as important for enforcement as the use of fire-arms against people. It points to the need for accountability and review procedures which are capable of matching the complexity of the underlying legal constructions. In the long term, a transfer of the system towards a common European border control seems inevitable to avoid the problems of the network administration.

Similar structures as the ones studied with respect to border control also exist in the framework of the EU's Common Foreign and Security Policy (CFSP, second pillar). Within the CFSP, implementation of Common Positions may be undertaken by means of Joint Actions. Such Joint Actions may include the use of military force in the framework of EU-led Crisis-Management Operations.⁶¹ The military and other security forces jointly active within the EU-led operations are provided by Member States and will be commanded by a single Framework nation. The terms of engagement are based in a mix of EU law establishing the legal basis, national law of the forces which are deployed within the EU-led crisis management teams, and agreements concluded under Article 24 EU between the EU and international organisations such as the UN or single states. These agreements are governed by public international law. Such agreements establish details of the status and the powers of EU-led forces and the rules of engagement including the use of force necessary to enforce the mandate.

D Outlook – Some of the Central Legal Problems of Composite Procedures

Questions of enforcement are a good example for the challenges which both criminal law and administrative law currently face. Few of these problems have been sufficiently addressed let alone resolved in the case-law and legal doctrine. The challenges arise from the necessary cooperation between various Member States' agencies with the European institutions and bodies. They also arise from the parallel application of EC and national law. In these contexts some of the main problems are effective legal protection against measures which arise from multiple-step procedures. Mutual recognition of acts acting as preparatory acts for final decisions by another Member State or by the European Union may impede effective judicial review by the national law in the jurisdiction in which a final acts has been taken.

mechanism for the creation of Rapid Border Intervention Teams, OJ 2007 L 199/30; Article 9 Regulation 863/2007 establishing a mechanism for the creation of Rapid Border Intervention Teams, OJ 2007 L 199/30.

⁶⁰ Article 6 Regulation 863/2007 establishing a mechanism for the creation of Rapid Border Intervention Teams, OJ 2007 L 199/30.

⁶¹ See for example the Council Joint Action 2003/423/CFSP of 5 June 2003 on the European Union military operation in the Democratic Republic of Congo, OJ 2003 L 143/50.

The background to the problem is often that not all acts of EU institutions or Member States' institutions implementing EU law, are 'intended to produce legal effects.'⁶² Often, acts are aimed at achieving a factual as opposed to a legal consequence. This is especially the case in enforcement networks. Different legal systems have created different expressions for these types of act. ⁶³ For lack of established terminology, I refer to these acts aimed at achieving factual consequences here with the term 'factual acts.' Criteria for legality are the same as for all acts of EU institutions. The institution needs to be competent to act within this policy area in this form and the general legal principles for the legality of Community acts apply such as the principle of proportionality and the protection of fundamental rights and others discussed below in the chapter on general principles of law. If Member State institutions act in the sphere of EU law, they are bound by respecting these rights under EU law.⁶⁴ Administrative action through factual acts is frequent and has in reality become increasingly important. Factual acts are often linked to processing and computing data in administrative networks.⁶⁵ The distribution of data is generally an act which can have far reaching and serious impact on the rights of individuals.⁶⁶ These may become problematic primarily in the framework of information networks in Europe's integrated administration. Once a piece of information is circling in the network, a private party can only affect the correction of that information – be it factually correct or not - unless a special legal provision allows for its review. Generally however, there is no remedy against use and computation of information once entered into administrative networks, as long as this information does not lead to a final decision either on the European or the Member State level. Given the expanding use of information networks in European administrative law, this appears to be a dangerous development for legal protection of citizens in EU law, especially in view of the inclusion of sensitive matters for fundamental rights such as criminal investigations and police-cooperation.

A good example for this latter situation comes from the *Tillack* case.⁶⁷ Hans-Martin Tillack a journalist accused by OLAF of having paid a Commission official for internal Commission documents, attempted to bar the Commission and OLAF from 'obtaining, inspecting, examining or hearing the contents of any documents and information' which had been seized at his premises.⁶⁸ It appears from the case that the seized information could be obtained by OLAF prior to a final review of the legality of the seizure under national law. The only potential remedy which could stop the use of such information obtained by the agency would be to bring a claim for interim measures under Article 243 EC. Such however will only be granted if *prima facie* the application in the main procedure would be well founded. Due to a lack of formal decision, the main procedure – a case under Article 230 EC – would not be deemed admissible.⁶⁹

⁶² Article 230 (1) EC.

⁶³ Such activities are referred to in the legal systems of the member states as *acte juridique* and *fait materiel* or *Realakt* and *schlichtes/informales Verwaltungshandeln*.

⁶⁴ Joined Cases C-20/00 and C-64/00 *Booker Aquaculture and Hydro Seafood* [2003] ECR I-7411, para 88; Case 5/88 *Wachauf* [1989] ECR 2609, para 19.

⁶⁵ The decision to distribute information on the other hand can be subject to a procedure under Article 230 EC, see: Joined Cases C-317/04 and C-318/04 *European Parliament v Council and Commission* [2006] ECR I-4721.

⁶⁶ An example is the listing of an individual in the Schengen Information System by a Member State administration, which may lead to him or her being refused to travel into or within the Schengen area. For this with references in German and French case law see: Jens Hofmann, *Rechtsschutz und Haftung im Europäischen Verwaltungsverbund*, Duncker & Humblot, Berlin 2004, pp. 283, 284.

⁶⁷ Case T-193/04 *Tillack v Commission* [2006] ECR II-3995.

⁶⁸ Case C-521/04 P(R) *Tillack v Commission* Order of the President of 19 April 2005, [2005] ECR I-3103, para 9.

⁶⁹ Case T-193/04 *Tillack v Commission* [2006] ECR II-3995; Case C-521/04 P(R) *Tillack v Commission* Order of the President of 19 April 2005, [2005] ECR I-3103. Judicial review has now been granted against such action by the ECtHR in Strasbourg. The ECtHR condemned

The question thus arises how to avoid a legal situation in which EC institutions can factually breach the rights of individuals without the possibility of effective judicial review.⁷⁰ One approach to this type of factual acts – the feeding of information into an information network – could be to allow for the review of the factual correctness of the information in the discretionary review of a final decision. However, the very fact of uncontrolled data streams containing wrong and potentially damaging information, can in itself contain a violation of the fundamental rights of the person to whom such data refers. Given the lack of direct judicial remedy against a factual act within the current system of legal remedies on the European level, this might easily amount to violations of the principles of effective legal protection – i.e. the existence of rights which are not legally enforceable. There are basically three ways out of this dilemma of the potential breach of the principle of effective judicial review.⁷¹ One would be to follow an approach used in French jurisprudence, and consider that a refusal to remedy a violation of an individual's right by a factual act, to be regarded as a decision and thus be viewed as an act which could be annulled as result of an annulment procedure under Article 230 EC or the equivalent in a national jurisdiction. This approach has been tentatively adopted in a first case before the CFI accepting that a certain type of 'physical act, necessarily entails a tacit decision'.⁷² The solution goes in the direction to widen the notion of a decision by allowing for implicit decisions in cases where acts may damage the rights of parties. Tendencies to such jurisprudence also exist in the area of the implicit effects of a decision of the Commission to award a contract to one party and thereby not awarding the contract to another.⁷³ Additional damages suffered due to the violation of the rights of an individual would then be remedied under Article 288 EC. The most far reaching solution, finally, would be to adapt the approach to judicial protection to the realities of integrated administration and the growing role of information networks therein. This would imply the ECJ's jurisprudence to redefine the meaning of the legal effect of a decision and take rights-based approach. If there is right which is violated by a factual act or a decision, there needs to be a judicial remedy available to protect the right. This would imply a turn towards a more 'subjective right' based approach by the ECJ and by national legal systems.

Next to questions of access to judicial review, there are as this contribution has briefly highlighted with certain examples, further procedural rights which need to be protected specially in composite multiple-step procedures. These are especially defence rights, rights to fair hearing and effective access to documents in cases of multiple-step decisions. The challenges are therefore to combine the increasingly integrated nature of EU and national law

Belgium for violation of Article 10 of the European Convention on Human Rights on freedom of expression (ECtHR 20477/05 *Tillack v Belgique* of 27 November 2007). Unfortunately, the case has so far had not effect on the EU institutions who deny any relation to the ECtHR decision, despite the European Ombudsman having submitted a special report to the European Parliament in which he concluded that the suspicion of bribery which OLAF had communicated to the Belgian authorities to incite the search and confiscation of Tillack's documents in order for OLAF to find the source of Tillack's journalistic information had been based on mere rumours. The Ombudsman concluded in his recommendation that OLAF should acknowledge that it had made incorrect statements when requesting the Belgian authorities to act. (Special Report from the European Ombudsman to the European Parliament following the draft recommendation to the European Anti-Fraud Office in complaint 2485/2004/GG of 12 May 2005) The EP has to date failed to take a resolution on the basis of the Ombudsman's report.

⁷⁰ This principle on the basis of Article 220 EC was famously formulated in Case 294/83 *Les Verts* [1986] ECR 1339, paras 23-27.

⁷¹ The principle is based on Article 220 EC and was expansively interpreted by the ECJ since its case law in Case 294/83 *Les Verts* [1986] ECR 1339, paras 23-27, albeit only for review against decisions in the sense of Article 230 EC.

⁷² Case T-125/03 and T-253/03 *Akzo Nobel and Akros v Commission* [2007] ECR II-nyr, para 49.

⁷³ See for decisions leading to the Community entering into a contractual relationship to support a research proposal and thus implicitly not to support a competing proposal. See: Joined cases T-369/84 and T-85/95 *DIR International Film and others* [1998] ECR II-357, para 55; C-48/96 P *Windpark Groothusen* [1998] ECR I-2873, para 16-21; Case 56/77 *Agence européenne* [1978] ECR 2215, para 12.

with the protection of rights and judicial review in network structures. EU criminal law and EU administrative law are two fairly new sub-disciplines both working on these issues.