

European Law

The Corpus Juris: a bold step

by Simone White

In the autumn of 1996, a draft for a unified body of rules to deal with criminal offences affecting the EU budget (M Delmas Marty (ed) (1997) *Corpus Juris: introducing penal provisions for the purpose of the financial interests of the European Union*, ECONOMICA, Paris) was produced by a team of criminal lawyers. The Union budget (and in particular its income) has proved vulnerable to fraud, as has been well documented in the media and various EU and other publications.

It is not possible here to give a full account of the Corpus Juris ('CJ'), but it may suffice to say that it is set under two titles: Title I deals with principles of criminal law (art. 1–17) while Title II proposes to unify criminal procedure within the EU. The introduction of this new institution would have far-reaching consequences. The most controversial of these proposals is perhaps the creation of a European Public Prosecutor (EPP) located in Brussels, with delegated EPPs based in the Member States, with a duty to prosecute frauds affecting the EU budget (Articles 18 and 19 of the CJ).

A group of EU academics, including the authors of the draft CJ and four rapporteurs, is now engaged in a vast exercise to assess the compatibility of the CJ with their national laws and to review existing provisions with regard to mutual assistance in criminal matters. The exercise promises to yield very valuable information on Member States' criminal justice systems and on the way the Member States cooperate in criminal cases involving EU funds. The 'suivi du CJ' (CJ follow-up) study will also flesh out ideas in the individual Member States on the way to improve the fight against fraud and corruption affecting the EU budget. It is a valuable exercise from which much can be learned.

Apart from the problem of compatibility with national laws, the CJ text raises the (comparatively neglected) problem of its compatibility with EU law. I would like to raise a few issues in this context. First, the CJ, if it is to be

adopted, needs a legal basis in EU law. Secondly, the provisions contained in Article 28 of the CJ (on appeals to the European Court of Justice (ECJ)) raise the question of whether it would be possible for the ECJ, as it is presently constituted, to fulfil the role envisaged. Thirdly, the introduction of an EPP needs to be considered from a constitutional point of view. Lastly the compatibility of the CJ with Articles 226–233 needs to be considered.

LEGAL BASIS FOR THE CJ

The CJ is a remarkable text. One assumes that it will be revised after July 1999, and continue its progress. One important consideration when revising it should be knowing where it will fit in the legal architecture of the EU, for this will define the way it is re-drafted. Will it be re-drafted as a convention, or a framework regulation, or as a (more precise) first pillar regulation, destined to have direct effect in the Member States? The determination of its future legal basis seems essential.

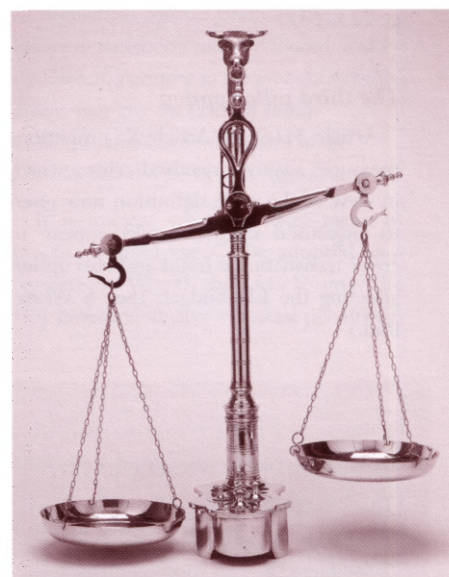
The first pillar option

Opinions differ as to whether the CJ could be integrated into the 'first pillar' (which regulates economic activity) after the Treaty of Amsterdam is ratified, under Article 280 (amended Article 209(a)), which reads:

- (1) *The Community and the Member States shall counter fraud and any other illegal activities affecting the financial interests of the Community through measures to be taken in accordance with this Article, which shall act a deterrent and be such as to afford effective protection in the Member States.*
- (2) *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.*
- (3) *Without prejudice to 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.

- (4) *The Council, acting in accordance with the procedure referred to in Article 251, after consulting with the Court of Auditors, shall adopt the necessary measures in the fields of the prevention of and fight against fraud affecting the financial interests of the Community with a view to affording effective and equivalent protection in the Member States. These measures shall not concern the application of national criminal law or the national administration of justice.*
- (5) *The Commission, in cooperation with Member States, shall each year submit to the European Parliament and to the Council a report on the measures taken for the implementation of this Article.'*



The difficulty for the CJ seems to reside with paragraph 4 of the article, which excludes measures concerning the application of national criminal law or the national administration of justice (a stipulation also to be found in the newly inserted Article 135 on Customs Cooperation). Some academics have argued that the CJ could be adopted

under Article 280, since its effects would be complementary to national criminal law and would not therefore interfere with its application (see, e.g., K Tiedemann (1997) 'Pour un espace juridique commun après Amsterdam', *AGON*, No. 17, p. 12–13). Even if this were the case, however, some Member States might balk at the qualified majority requirement contained in Article 280 and might prefer a less ambiguous legal basis, as well as one requiring unanimity (see S White (1998) 'Protection of the financial interests of the European Communities: the fight against fraud and corruption', *Kluwer European Monographs*, No. 15, p. 185–197).

Other first pillar legal bases have been mooted, such as Articles 308 (ex Article 235), which has often been called a 'catch all', or Article 100(a), which has previously been used in an attempt to impose minimum standards and to 'regulate out' financial crime. Directives in particular have been used to harmonise criminal laws, so the possibility of either of these legal bases being adopted to unify criminal laws and procedures cannot be ruled out completely, should the political will be present. (S White (1997) 'EC Criminal law: prospects for the Corpus Juris', *Journal of Financial Crime*, Vol. 5, No. 3, p. 223–231)

The third pillar option

Article 31(e) (ex Article K3) mentions measures against organised crime, which in view of the wide definition now given to organised crime, would appear to cover transnational fraud and corruption affecting the EU budget. (See S White, *ibid.*)

FAR REACHING CONSEQUENCES

The introduction of this new institution would have far-reaching consequences. The most controversial of these proposals is perhaps the creation of a European Public Prosecutor (EPP) located in Brussels, with delegated EPPs based in the Member States, with a duty to prosecute frauds affecting the EU budget.

It must be remembered that the CJ was introduced partly because 'third pillar' (justice and home affairs) instruments (not unlike traditional international instruments) were perceived to be deficient in tackling fraud and corruption affecting the EU budget. The main criticisms were that ratification was slow, and that implementation was not subject to scrutiny. Looking at the third pillar after Amsterdam, it is clear that Treaty changes have aimed to speed up procedures (see Article 34(2)(d)), and that framework decisions might prove a useful tool, since they are binding on the Member States.

The CJ (or parts of the CJ) could, therefore, in theory become a third pillar instrument, although we understand that this is not the option favoured by the Commission.

Closer cooperation

Title VII of the Treaty of Amsterdam makes provision for enhanced cooperation for Member States who wish to 'forge ahead' in matters of cooperation. It is possible therefore, to envisage a scenario where a group of member states would adopt the CJ. This would of course add complexity to the present arrangements and may, in the short term at least, defeat the object of a 'unified' system within the EU. It could however provide a 'pilot phase' for the CJ, in the spirit of variable geometry.

Implications of legal basis uncertainty

The CJ looks to the unification of criminal laws and procedures in the member states, an aim not explicit in the original treaties, and not hitherto fully discussed at inter-governmental conferences with an instrument such as the CJ in mind. One would therefore not expect to find a tailor-made legal basis for the CJ. Yet given political will, the CJ (or parts of the CJ) may find a home in the existing structure.

PROPOSED ROLE OF THE ECJ IN THE CORPUS JURIS

Article 28 of the CJ reads:

'(1) The Court of Justice has jurisdiction to rule on offences as defined above (Articles 1 to 8) in three cases:

(a) preliminary questions on the

interpretation of the Corpus and any application measures;

- (b) *on the request of a Member State or the Commission on any dispute concerning the application of the Corpus;*
 - (c) *on the request of the EPP or a national legal authority on conflicts of jurisdiction regarding application of the rules on the principle of European territoriality, concerning both the public prosecution services (Articles 18 and 24) and the exercise of judicial control by national courts (Articles 25 to 27).*
- (2) *When a question of interpretation is raised or a conflict of jurisdiction brought before a court of one of the Member States, this court may, if it considers that a decision on this point is necessary in order to give its judgment, call on the Court of Justice to rule on the issue.*
- (3) *When an issue or conflict such as this is raised in a case pending before a national court whose decisions are not subject to appeal in national law, this court is bound to seise the Court of Justice.'*

At first sight, this article is an amalgam of Article 234 (ex Article 177 EC) and the clauses found in third pillar conventions granting the European Court of Justice (ECJ) jurisdiction to rule on disputes. However it goes beyond powers hitherto granted to the ECJ.

Under (a) the ECJ would be called to give preliminary rulings on the interpretation of the CJ – that is to say on the implementation in the national criminal law of a Member State of the CJ provisions. These implementation measures could relate either to substantive law (application of Articles 1–17 of the CJ) or to criminal procedure (Articles 18–35 of the CJ). Such preliminary rulings would then be binding on all Member States, thus reinforcing the uniformity of procedure and approach to the CJ.

Preliminary rulings could originate from a Member State in order to determine the validity of criminal law or procedure of another Member State. The ECJ has already ruled over questions by a court of a Member State in order to determine the validity of a law of another Member State. However it has refused jurisdiction in politically-sensitive cases because it considered the proceedings to

have been manufactured for the purposes of testing a foreign law (see, for example, *Foglia v Novello* (Case 104/79) [1980] ECR 745 and (Case 244/80) [1981] ECR 3045)). The ECJ would therefore be moving into uncharted territories, and politicisation might be difficult to avoid.

Historically, the preliminary ruling procedure has worked well and has promoted uniformity of interpretation in the Member States. However the procedure can be lengthy (18 months or more). There would be a need to ensure that the preliminary ruling procedure is not used purely as a delaying tactic. Such tactics could be counter-productive in the fight against fraud and corruption affecting the EU budget.

FURTHER READING

A fuller account of the Corpus Juris proposals can be found in S White (1998) 'EC Criminal Law: Prospects for the Corpus Juris', *Journal of Financial Crime*, Vol. 5, No. 3, p. 223-231.

For background, see also S White (1998) 'Protection of the financial interests of the European Communities: the fight against fraud and corruption', *Kluwer European Monographs*, No.15, p.179ff.

The willingness of national courts to refer under Article 177 EC has varied greatly across the European Union. In view of this, it might be useful to monitor and issue a yearly report on preliminary rulings dealt with by the ECJ in the context of the CJ.

The question of the lack of specialisation of the ECJ cannot be avoided. This has already been highlighted in relation to third pillar matters. One solution proposed in 1996, and which may be worth resurrecting, was that a specialised court be established (see 'The role and future of the European Court of Justice', 1996; a report by members of the EC section of the British Institute's Advisory Board, chaired by the Rt Hon Lord Slynn of Hadley, British Institute of International and Comparative Law, p. 98ff). Specialised Community courts already exist (the Community Patent Appeals Court, Board of Appeal on Community Trade Marks),

so the proposal is not as outlandish as it first appears. If a specialised court were to be adopted, delays could of course be reduced to a minimum. However, the creation of a specialised court would require a treaty amendment.

Another proposal was that the ECJ could become more like the US Federal Court and act as the court of last instance as far as certain Community matters are concerned (op. cit., 1996 Report). If the ECJ were to have this role in relation with the CJ, this would have the effect of removing the need for preliminary rulings.

Articles 28(1)(b) and (c) of the CJ give the Commission and the EPP the right to refer a case to the ECJ on any dispute concerning the application of the CJ. This differs from Article 234 (ex Article 177) which only enables properly constituted courts and tribunals of the member states to make references to the ECJ. The ECJ has ruled in *Pretore di Salù (Pretore di Salù v X)* (Case 14/86) [1987] ECR 2545; [1989] 1 CMLR 71) that the acceptance of a reference from a body acting in an investigative capacity could be justified in the following circumstances:

'The Court has jurisdiction to reply to a request for a preliminary ruling if that request emanates from a court or tribunal which has acted in the general framework of its task of judging, independently and in accordance with the law, cases coming within the jurisdiction conferred on it by law, even though certain functions of that court or tribunal in the proceedings which gave rise to the reference for a preliminary ruling are not, strictly speaking, of a judicial nature.'

Current constitutional arrangements appear to rule out the possibility of the Commission or the EPP making references to the ECJ. Articles 28(1)(b) and (c) would require Treaty amendments.

INTRODUCTION OF AN EPP

The introduction of a European Public Prosecutor, a sixth Community institution (or institution of the EU depending on the legal basis chosen for the CJ) means that the Treaty would have to be amended.

APPLICATION OF EC LAW

Should the CJ become a first pillar instrument, the 'acquis communautaire' (that is to say, the sum of established EC

law and juris prudence) would apply. This means that, inter alia, Treaty Articles 226-233 (previously Articles 169-176) would apply to the CJ.

Treaty Article 226 (ex Article 169)

Member States who failed to comply with an opinion of the Commission with regard to the CJ within the time laid down by the Commission might be brought to the ECJ.

Treaty Article 227 (ex Article 170)

A Member State may bring another member state to court for failing to fulfil an obligation under the Treaty. This is covered in article 28 of the CJ itself.

Treaty Article 228 (ex Article 171)

A Member State can be fined for failing to take the necessary measures to comply with an ECJ judgment within the time limits laid down by the Commission. This could mean, for example, that failing to implement a judgment from the ECJ requiring changes in criminal procedure could lead to a fine.

Treaty Article 229 (ex Article 172)

Article 229 reads:

'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.'

It is unclear what this may mean in practice should the CJ be adopted as a regulation. Would this article give the ECJ jurisdiction over criminal penalties?

Treaty Article 230 (ex Article 173)

At present the ECJ has the power to review the legality of acts adopted jointly by the European Parliament and the Council, acts of the Council, the Commission and of the European Central Bank (ECB). It is not known whether these review powers would extend to the actions of the EPP, nor is it clear to whom the EPP would be accountable.

Treaty Article 231 (ex Article 174)

The ECJ has the power to declare an act void. This raises the same question as above.

Treaty Article 232 (ex Article 175)

Article 232 gives the ECJ jurisdiction to establish infringements committed by the European Parliament, the Council, the Commission or the ECB. It is unclear whether the EPP would be added to this list.


Treaty Article 233 (ex Article 176)

The institutions named in Article 232, except the ECB, are required to take the necessary measures to comply with the judgment of the ECJ when an act has been declared void and when their failure to act has been declared contrary to the

Treaty. Would similar obligations also fall on the EPP?

CONCLUSION

The above text only highlights some of the issues of compatibility of the CJ with EU law. It seems important that the CJ be tested, line by line, for compatibility not only with national criminal law and procedure, but also with EU law, in relation to the first and the third pillar. This would add value to the work now being carried out in each of the Member States and would point out where changes may be required. It is with

trepidation that we await the House of Lords report on the CJ, due to be published in July 1999. 

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