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Das Corpus Juris als Grundlage eines Europäischen Strafrechts

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The Provisions of the Corpus Juris on Community Fraud:
A Belgian and Dutch Perspective

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I. Introduction

The starting point for the increasing attention of criminal lawyers for the harmonisation perspective of European law has undoubtedly been the cry from the European institutions themselves demanding an effective protection of the financial interests of the community via the administrative penal and criminal law. First actions in this respect were the well-known Council Regulation No 2988/95 of 18 December 1995 concerning administrative penalties and the Council Act of 26 July 1995 drawing up the Convention on the Protection of the European Communities' financial interests. These documents already caused a lot of reaction in the traditional world of criminal lawyers, protected by their national legal system. Although the Regulation and the Convention merely concern the protection of the financial interests of the European Union, it became increasingly clear that these legal documents could have an important impact on the traditional criminal law as well.

A further interesting step has been taken in the ambitious Corpus Juris project proposing common principles at least for the fight against community fraud. This is, as the drafters rightly mention in the preamble, a drastic change compared to the way in which the union traditionally interfered (or more precisely: did not

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1 I am grateful to Dr. G. Stiensens of Antwerp University for providing me with some useful insight in preparing this paper and to Prof. Dr. Günter Heine, University of Giessen, for useful comments on an earlier draft of this paper.

2 Official Journal L 312/1 of 23 December 1995.

3 Official Journal C 316/48 of 27 November 1995 (usually abbreviated as the PFI Convention).

4 See e.g. John Vervaeke, Rechtshandelvings van het gemeenschapsrecht, Nederlands Juristenblad 1995, 1298-1305. See on the new competences with respect to the criminal law, introduced by the Treaty of Amsterdam, Gerardus Corstens, Siralechtspleging na het Verdrag van Amsterdam, Nederlands Juristenblad 1999, 803-808; see Jean Pradel/Gerardus Corstens, Le droit pénal européen.
interfere) with national criminal law. The Corpus Juris contains a number of highly interesting proposals, which have been formulated on the basis of a thorough comparative research. One of the proposals concerns the issue of fraud in the community budget (art. 1 and a corresponding art. 8 which makes it a crime to form a gang with the purpose, among others, to commit fraud in the community budget). The organizers of this conference have rightly mentioned in their invitation that the Corpus Juris is of such a high quality that the question should be addressed whether the various proposals could take us a step further than merely protecting the interests of the Community through the criminal law. The question indeed arises whether the proposals do provide such a high degree of "common core" that they could indeed be seen as a ius commune criminalibus. One of the questions that will undoubtedly arise in that respect is whether the proposed articles, e.g. concerning fraud more or less comply with the structure of similar articles in the penal codes of European countries today.

In my comment I shall therefore attempt to touch upon this question briefly by comparing the proposed art. 1 in the Corpus Juris concerning fraud in the community budget with the provisions punishing fraud in criminal codes in a few countries, notably the legal systems with which I am most familiar, Belgium and the Netherlands, although I shall touch upon France and Germany as well. I am of course aware of the fact that in some legal systems specific provisions exist as well, aiming at the punishment of subsidy fraud. These provisions will, however, not be discussed within the scope of this paper. It seems more interesting to examine the Corpus Juris proposal concerning fraud with the classic provisions in some penal codes, aiming generally at the punishment of fraud.

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5 See Mireille Delmas-Marty (ed.), Corpus Juris portant dispositions pénales pour la protection des intérêts financiers de l'Union européenne, Paris 1997. The Dutch translation has been drafted by Bart De Smedt and Guy Stessel, Corpus Juris houdende strafbepalingen ter bescherming van de financiële belangen van de Europese Unie (this version contains the French version as well).

6 See Corpus Juris (note 5), "Exposé des motifs".

7 The various approaches to achieve a European criminal law have been extensively discussed by Ulrich Sieber, A propos du code pénal type européen, Revue de Droit Pénal et de Criminologie 1999, 3-34.
II. Structure of the Fraud Provisions in some Criminal Codes

A. Introduction: the German approach

Before addressing the proposed art. 1 CJ, it is probably useful to sketch briefly how fraud is generally punished in the criminal codes in a few legal systems. Obviously it will not be possible to provide a detailed overview in this brief comment. One should be aware that in many countries specific provisions exist to punish specific types of fraud which do not fall within the terms of the general provisions punishing fraud. This brings us immediately to an important difference between on the one hand, what one could call the German system and on the other hand the approach in the legal systems that I would like to look at, namely, France, Belgium and the Netherlands. Every lawyer who wishes to find out whether a certain behaviour constitutes fraud under German law will immediately be confronted with the seemingly straightforward structure of § 263 of the German Criminal Code which generally punishes a person who by deception gets an illegal monetary advantage for himself or for a third person, whereas the provisions in the other countries enumerate various conditions which have to be met e.g. concerning the means which have been used to deceive another.

B. France

Looking at France one can point at art. 313-1 of the nouveau Code pénal which specifies that to be punishable as escroquerie someone must have used either a false name or quality or should have abused a certain quality or should have used deceptive means. These means should lead to a certain consequence, being that the victim or a third person provides an object of value, a service or a legal right. French case law clearly holds that the mere fact of lying is not sufficient to incur criminal liability; there should be deceptive acts as well. Precisely this requirement of manœuvres frauduleuses in the Code pénal has been criticized in the literature. It means indeed that the French legislator has been forced to create new provisions to punish all those types of fraud where there were no manœuvres frauduleuses.9

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8 See Bernard Bouloc, Les infractions contre les biens dans le nouveau code pénal, Rev. Se.crim., 1993, 481-492.
9 See with respect to the old art. 405 Code pénal Roger Merle/André Vieu, Traité de droit criminel, Droit pénal spécial, pp. 1930-1931.
C. The Netherlands

The Dutch Criminal Code punishes in art. 326, very similar to the French approach, the person who, with the object of obtaining an unlawful gain for himself or another, induces another person, by assuming a false name or a false capacity, or by artful tricks, or by a tissue of lies, to surrender any property, make available data having monetary value in commerce, incur a debt or renounce a claim. Deception under Dutch law requires therefore, just as in France, that there should have been certain acts, artful tricks, or tissues of lies. These tricks should have induced another person to provide the wrongdoer with a monetary gain. Although case law has obviously provided far more details on the conditions for criminal liability for deception, the principles are in fact the same as in France.

D. Belgium

The same applies to Belgium, where escroquerie is criminalized in art. 496 of the Belgian Penal Code. The Belgian legislator too has enumerated in detail the tricky instruments which the actor should have used to deceive the victim. This obviously leads to a rather detailed description of the conditions for criminal liability. The structure is similar as in France and the Netherlands: firstly it is required that certain deceptive means have been used, e.g. a false name or quality. Secondly, it is required that these means are the causa for the loss of funds by the victim. So, notwithstanding the complicated formulation, the provision in fact only requires certain acts, a damage and a causal relationship between the two. Moreover, Belgium introduced specific provisions aiming at the punishment of Community fraud. This concerns more particularly an Act of 7 June 1994, which modified the old Royal Decree of 3 May 1993, which aimed at subsidy fraud.

10 See Jan Remmelink, in: Tarquinius Noyon/Gerard Langemijer/Jan Remmelink (eds.), Wetboek van Strafrecht, comment on art. 326.
11 For an overview of the Dutch case law, see Pieter Van den Hout, Oplichting: knooppunt van valsheid en bedrog, pp. 48-56 and 63-110.
12 See Alain De Nauw, Inleiding tot het bijzonder strafrecht, pp. 223-231.
E. A brief comparison

Comparing once more the German system on the one hand with the other just mentioned systems, the most important difference is probably\textsuperscript{14} that the German § 263 StGB generally punishes the one who obtains an illegal monetary advantage through deception, but does not require that specific means or acts must have been used for this deception, which the other mentioned legal systems do. Another important difference is that France, the Netherlands and Belgium, of course with certain differences, generally only require that the fraudulent acts have caused a monetary disadvantage to the victim.\textsuperscript{15} It is, however, not formally required that the deception should have led to a reduction of the wealth in the sense of Vermögen of the victim. This requirement of Vermögensschädigung has lead to an intense doctrinal debate in Germany,\textsuperscript{16} for example in respect of Ausschreibungs- betrug.\textsuperscript{17}

As was mentioned in the French legal doctrine, a disadvantage of the French/Belgian/Dutch solution is obviously that the requirement of the manœuvres frauduleuses or similar tricks excludes many inventive schemes of fraud. Thus Belgian case law held that fraudulent acts leading to e.g. illegal withdrawals from a money machine do not constitute criminal liability since one could not deceive a machine.\textsuperscript{18} It is, however, striking that German criminal law incurred similar problems, while Germany held that notwithstanding the broad formulation of § 263 StGB fraud with credit and other plastic cards could not be caught under all circumstances under § 263. That was the reason for introducing several specific provisions, among which the lex specialis of § 266b of the German Criminal Code which relates to the abuse of cheque and credit cards. In this respect we can also

\textsuperscript{14} I do realize that there are differences between Belgium, the Netherlands and France as far as the conditions for criminal liability are concerned. But the differences between these legal systems seem less important, compared to the structure of § 263 StGB.

\textsuperscript{15} This generalization of the three legal systems should of course be somewhat balanced. For instance, in France it was debated whether under art. 405 of the old Code pénal it was required that the victim would be disadvantaged as a result of the fraud (Pierre Bouclet, Infractions contre les biens, Rev. sc. cr. 1993, 783 claimed this to be the case, but this was denied by Vitu (note 9), p. 1883-1885). Art. 313-1 of the new Code pénal requires not only that the victim should remettre a specific object or service, but also that this should be done à son préjudice ou au préjudice d'un tiers.

\textsuperscript{16} See in this respect Schönke/Schöder-Cramer, Strafgesetzbuch, § 263, Rn. 78.

\textsuperscript{17} See BOHST 38, 186; Trübner/Fischer, Strafgesetzbuch und Nebengesetze, § 263 Rn. 32c, with further references.

refer to § 264 StGB which specifically aims at punishing subsidy fraud and to § 298 which was incorporated in 1998. This shows that also the wide German provision is not capable of catching all imaginary types of fraud.

The fact that Belgium and the Netherlands have a similar system as France is based on largely historic reasons since those countries were strongly inspired through the Code pénal of 1810. Since the German provision looks, at least at first glance, wider than the other ones discussed, one could argue that from a normative perspective the German system provides a better protection of the interests to be protected by the criminal law, which would be a strong argument at the normative level to follow the German model. That should, however, not necessarily be the case. First of all, one could hold that from a rule of law perspective and more particularly from the legality principle the requirement of specific tricky acts (manoeuvres frauduleuses) has advantages compared to the German open norm, aiming at the punishment of deception. Second, we already mentioned that one would expect that the German solution would better be suitable to cover all kind of new types of fraud through its broad formulation. But also the German legislator found it necessary to create specific norms e.g. aiming at fraud committed by using certain machines, subsidies or credit cards which could apparently not be covered under the general clause of § 263 StGB. This shows that also under the perspective of effectiveness the German solution is not necessarily the better one.


Let us now turn to the more interesting question how the provision of the Corpus Juris punishing Community fraud in art. 1 compares with the traditional provisions punishing fraud which we just discussed. Can this constitute a ius commune criminalibus?

19 These articles concern cartel agreements in case of procurement (wettbewerbsbeschränkende Absprachen bei Ausschreibungen).

20 For a comparative overview see Michael Faure, Der strafrechtliche Schutz des Vermögens gegen Täuschung in Belgien, Frankreich und den Niederlanden, ZStW 107 (1996), 527-547.

21 For a comparative discussion of the traditional provisions of the criminal codes aiming at the punishment of fraud see also the paper by Enrique Bacigalupo, Der Besondere Teil des Corpus Juris, published in this volume, p. 129.
A. Substantive requirements for criminal liability: abstract endangerment

Article 1(1)(a) and (b) of the Corpus Juris model define what should constitute fraud affecting the budget of the European communities, by referring to specific fraudulent acts, more precisely providing incomplete or false information or omitting to provide information when one is due to provide this. Differing from the German system and resembling the French model, art. 1(a) and (b) thus enumerate specific acts which are deemed to be deceptive. If one wishes one could read a certain resemblance with the French manœuvres frauduleuses. On the other hand, the damage and causal relationship between certain acts and the damage are not required. The traditional provisions on fraud indeed require some type of harm on the side of the victim. In that sense a certain effect, a consequence, must have taken place. This is apparently not necessary for the provision in the Corpus Juris, since art. 1(a) only requires the misrepresentation "in such a way as to risk harm to the community budget". The mere risk, the endangerment suffices for criminal liability. For the drafters of the Corpus Juris the mere abstract endangerment of the EU financial interests suffices for criminal liability. The commentary makes clear that the authors indeed wanted to criminalize the risk created, regardless of the result obtained. Apparently they held the opinion that the protected interests in this case, the financial interests of the European Union are that important that it warrants an intervention of the criminal law also if merely a certain risk is created, even if the harm has not materialized yet. This proposal obviously differs from the traditional provisions in the criminal codes, since the Corpus Juris requires certain tricks, but not necessarily an effect. The third type of fraud in art. 1 CJ relates to the diverting of Community funds (subsidies or grants), whereby no specific manœuvres are required at all. This art. 1(1)(c) hence differs substantially in its structure from the traditional provisions: diverting community funds constitutes a criminal offence, no matter what the means are to effectuate this diversion.

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22 By this we mean "harm" in the broad sense: that the victim is induced to give an object or service to the offender. Formally not all legal systems require that this leads to a reduction of the victim's wealth.

23 In that respect the proposal in art. 1 CJ differs from the definition of the Convention on the Protection of the Financial Interests (note 3).

24 See Delmas-Marty (note 5), Comments on art. 1. This was apparently one of the recommendations of the Comparative Study.

25 The punishment of "abstract endangerment" is also criticized by Harro Otto in his paper "Anmerkungen zu den Tatbeständen des Besonderen Teils des Corpus Juris", in this volume p. 141.
B. Mens rea

As far as the issue of mens rea is concerned the requirements of the Corpus Juris also appear to be less severe than the traditional provisions in the criminal codes. There is a criminal offence according to art. 1(1) as soon as the mentioned acts have been carried out "either intentionally or by recklessness or by gross negligence". The commentary makes clear that it is indeed the intention of the authors to assimilate recklessness and gross negligence to intentional fault.26 Here the draft also differs from the requirements in the criminal codes, at least as far as the requirements on paper are concerned. France already required intent in the former art. 405 of the Code pénal. It was defined as "the will to" achieve the transfer of specific objets as a result of the manœuvres frauduleuses.27 Mere negligence would thus not suffice for criminal liability. Article 326 of the Dutch Criminal Code requires the intention of obtaining an illegal gain28 and the Belgian Criminal Code requires intent as well. All systems therefore seem to agree that traditionally fraud requires more than mere negligence.29 Hence, one could conclude again that the traditional provisions have, at least on paper, more severe requirements than art. 1 of the Corpus Juris. By the way: generally art. 10 CJ requires intent or an intentional fault for the crimes defined in the Corpus Juris, but it makes an explicit exception for the articles discussed here, art. 1 dealing with Community fraud. Article 10 repeats that in that case recklessness or gross negligence suffice to constitute criminal liability.30 This, again, constitutes a deviation from the definition of fraud in the national criminal codes. The notion that one can commit a fraud negligently (even if it is "gross negligence") is probably "systemfremd" for most legal systems. If, from a criminal policy perspective one would consider it desirable to punish also "gross negligence", at least the draft should require that the offender has acted with gross negligence with respect to the violation of certain well specified statutory duties: in that case the fact that the criminal law already intervenes in case of (gross) negligence should also have consequences for the penalty (a prison sanction seems hardly justified for such an offence).

26 In that respect the proposal in the Corpus Juris differs from the PFI Cosvention which requires intent (note 3).
28 For details see Jan Remmelink (note 10), art. 326, Rn. 12.
29 See to the German system Schöneweiss/Schröder-Cramer (note 16), § 263, Rn. 164 and following.
30 This is also criticized in the paper by Ulfrid Neumann, Das Corpus Juris im Streit um ein europäisches Strafrecht, in this volume p. 67 and following.
C. "Change of heart"

Article 1(2) provides for an interesting protection for the offender who has a "change of heart". If the person corrects or completes a false declaration or withdraws an application made on the basis of those or informs the authorities before the act has been discovered, there will be no criminal liability.\(^{31}\) Although German law generally has various provisions dealing with *taige Reue* in the context of endangerment offences, giving incentives to the offender to change his mind,\(^{32}\) French, Belgian and Dutch law do not, at first view, have similar provisions. French law even holds explicitly that the crime has been fulfilled once the financial means have been transferred to the offender on the basis of fraudulent acts, even if the victim would afterwards give permission for such a transfer.\(^{33}\) In the Netherlands art. 46(b) of the Penal Code provides that there is no attempt of a crime when the person voluntarily decides not to pursue the crime. But in that case the conditions for criminal liability were never fulfilled, since the crime has not been committed.

Obviously there can exist good reasons for such a provision, but again, it differs from the regulations of fraud in the legal systems discussed above. One explanation for this "offender-kind" provision may be the fact that in art. 1 Crime criminal liability already is incurred when the misrepresentation causes a certain risk of harm to the Community budget. Precisely because the endangerment related to creation of the risk is criminalized (and not the effect), one could argue that it makes sense to abstain from criminal liability when the attempt has been given up and thus the risk has not been created. Indeed: since the crime of fraud in the *Corpus Juris* does not require a specific result to be achieved, the usual rules with respect to attempt are not available to the offender who has a change of mind. A consequence of the punishment of the abstract endangerment is that a specific provision is needed to deal with a situation when the offender changes his mind.

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31 It is less clear whether this provision applies to art. 1(e) (diverting Community funds) as well. One could think of a criminal who would nevertheless use the legally obtained Community funds for the right purpose.

32 See e.g. for environmental crimes § 330b StGB. But there is no such provision in the StGB with respect to fraud. The reason is that a damage is required for criminal liability, so the general attempt provision of § 24 StGB (Rücktritt) can avoid that the criminal law applies to the offender who changes his mind before the fraud has materialized.

33 As long as the transfer itself did not take place voluntarily the conditions for criminal liability are met (Crim. 18 November 1969, D. 1970, 437 with annotation by Bouloe).
D. Corpus Juris deviates from the Penal Codes

An obvious conclusion is that art. 1 CJ can apparently not be implemented into the discussed legal systems simply by referring to the applicability of the general provisions on fraud. In two respects at least these provisions have more severe requirements than art. 1, being that, at least in France, Belgium and the Netherlands, the mere creation of a risk of fraud does not suffice to constitute criminal liability under the classic provisions and that mere recklessness would not suffice as mens rea. Apparently, for reasons of effectiveness the Corpus Juris broadens criminal liability. A simple conclusion is therefore that if the authors of the Corpus Juris would wish to implement art. 1 protecting the financial interests of the European Union in France, Belgium or the Netherlands, they would need something else than the traditional provisions concerning fraud. A practical answer to that point may be that it is not needed either to use the classic provisions on fraud to implement the Corpus Juris since many legal systems have specific provisions concerning the punishment of fraud with (European) subsidies. In this respect we can, e.g., refer to § 264 German StGB and to the Belgian Act of 7 June 1994.\textsuperscript{34} I only want to stress that the proposed Corpus Juris provision on fraud deviates substantially from the traditional provisions on fraud in the sense that it broadens criminal liability in the legal systems I discussed.

This raises the question at the criminal policy level as to why the European financial interests deserve a much stronger protection from the criminal law than traditional (national) values and interests, which are protected by the penal codes. Maybe reasons could be advanced for such an extended protection of EU financial interests, but then still the question arises whether an "abstract endangerment crime" that includes even the "gross negligence" can give clear limits of criminal liability in a way which is in line with the lex certa requirement.

IV. Concluding observations

In this brief comment I tried to compare the incomparable, being on the one hand a specific provision aiming at the specific fraud in the Community budget with, on the other hand, general provisions in criminal codes aiming at the punishment of fraud. The result is obviously not surprising, being that these types of provisions are indeed very different. But given the different scope (and probably protected

\textsuperscript{34} For the Dutch approach in the punishment of EC fraud see Marcus Groenhuijzen/Martha Veldt (eds.), The Dutch Approach in Tackling EC Fraud; John Vervaele, Transnationale handhaving van de financi"ele belangen van de Europese Unie.
interest) this is perhaps the result one should have expected. The financial interests of the European Union are apparently valued that highly by the authors of the *Corpus Juris* that the intervention of the criminal law both, with respect to the *actus reus* and with respect to the *mens rea* takes place much faster than in the traditional provisions of the criminal codes.\(^{35}\) Whether that is justified is open to debate; I only conclude that there are indeed differences. The simple practical conclusion therefore is that if the *Corpus Juris* were to be implemented in national legislation this should obviously be done via other provisions than the traditional provisions punishing fraud since the requirements of the traditional provisions cannot guarantee an effective implementation of art. 1 CJ. That was, however, not the subject of this paper. Many legal systems do indeed have, as I indicated, specific provisions aiming at the punishment of *subsidy* fraud, which were not discussed here. The findings of the comparison between art. 1 CJ and the traditional provisions aiming at fraud, which showed that the *Corpus Juris* substantially enlarges criminal liability merit further research. At least at the normative level of criminal policy it should be asked why the European financial interests are apparently judged more worthy of protection through the criminal law than traditional, national (financial) interests. In addition, the question arises, whether the financial interests of the Community can only be protected at this price. Is it indeed necessary to introduce abstract risk crimes, which can be committed recklessly, in order to provide an effective protection of these interests? The proportionality requirement forces us at least to examine whether a similar protection could be reached without the serious broadening of criminal liability as proposed in art. 1 CJ. This merits at least a further justification from the authors.

As far as the question is concerned whether this *Corpus Juris* constitutes a *ius commune criminalium* concerning fraud the answer is, therefore, clearly no. Article 1 of the *Corpus Juris* seems, at least at first view, to have a different approach than the traditional approaches in France, Belgium and the Netherlands and, to my understanding, this is also the case for Germany. Moreover, a provision created with the aim of regulating one specific problem can obviously not be the standard for the general provisions punishing fraud. Nevertheless, the *Corpus Juris* provision concerning fraud is certainly useful in some other, probably less ambitious respects. If one accepts that this provision cannot be implemented through the traditional provisions punishing fraud and should probably not serve as a model to replace those traditional provisions it is nevertheless highly useful since

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\(^{35}\) Apparently the authors of the PFI Convention followed the approach of the traditional codes more closely, whereas the authors of the *Corpus Juris* aimed at providing the financial interests of the Union with a higher degree of protection through the criminal law.
it provides us with a common denominator for criminal provisions for this specific area of the fight against Community fraud. In that sense this is already a revolutionary attempt, as is rightly mentioned in the introduction, since the draft comes up with common provisions for this specific area. The harmonization approach taken in the Corpus Juris is moreover academically highly satisfactory since it is based on extensive comparative research. Looking in the crystal bowl of the uncertain future, I presume that, if the ambition of the Corpus Juris limits itself to its formulated aim, namely to protect the financial interests of the European Union, the chances of implementation (probably in some modified form) may be large. But limiting myself to art. 1 addressing the criminalization of fraud, at this stage I would presume that a more ambitious approach of putting the "risk related" provision of art. 1 into a general model penal code may itself perhaps be a little too risky and might be even a reckless exercise.

Moreover, the Corpus Juris could perhaps serve the goals of the ius commune criminalibus as far as the general part (with provisions on, e.g., justification and excuse) is concerned, but less so for the specific provisions.
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