

Fair Trial Rights and the European Community's Fight Against Fraud

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Abstract: *The article surveys action taken by the European Community to combat fraud affecting its financial interests, focusing on the development of investigative authority granted to OLAF, the European 'Office Pour La Lutte AntiFraude' and its impact on the procedural rights of the alleged defrauder. It shows that the involvement of OLAF can be crucial for a national fraud investigation and subsequent criminal prosecution and that it meets the criteria set out by the Strasbourg organs for the applicability of Article 6 ECH. The article explores whether the legal sources governing the activities of OLAF or national—or rather, Community—law guarantee sufficient protection for the alleged defrauder and thus pay respect to principles arising from the rule of law in law enforcement. It is shown that general principles of Community law, which were mostly established in antitrust law, may provide a certain protection for the suspect, but may not protect him in all regards. It is thus argued that, in the long run, it will be necessary to provide special fair-trial rights which offer protection to alleged defrauders from those infringements arising out of the specific features of a Community investigation.*

I Introduction

Adopting the Treaty of Amsterdam, the Member States of the European Union agreed on a Community strategy to fight fraud affecting the EC budget. According to Article 280 EC—the treaty establishing the European Community—they shall organise, together with the Commission, close and regular cooperation between the competent authorities. In May 1999, the European *Office Pour la Lutte AntiFraude*, OLAF, was established. With these two events, a development has culminated which had started decades ago—the fight against fraud affecting the budget of the European Community is developing more and more into a Community issue. Despite this, the assumption that the authority for criminal law and procedure lies solely with the Member States¹ is still rarely openly disputed,² although the Commission has recently (re)opened the

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¹ For example, see *Milchwerke Köln/Wuppertal E.g. v Hauptzollamt Köln-Rheinau* [1994] ECR I-3407, para 23, *Nutral* [1995] I-4144, para 21; Albrecht and Braum, *Deficiencies in the Development of European Criminal Law*, 5 *ELJ* [1999], pp. 297f; Baker, 'Taking European Criminal Law Seriously', (1998) 62 *Criminal Law Review*, p. 361; Dannecker, 'Die Entwicklung des Strafrechts unter dem Einfluß des Gemeinschaftsrechts', (1998) 20 *Juristische Ausbildung*, p. 80; Delmas-Marty, 'The European Union and Penal Law', (1998) 4 *ELJ*, p. 87; Gröbblinghoff, *Die Verpflichtung des deutschen Strafgesetzgebers zum Schutz der finanziellen Interessen der Europäischen Gemeinschaften* (C.F. Müller, 1996), p. 141; Ligeti, 'European Community Criminal Law', (1998) 39 *Acta Juridica Hungarica*, p. 70.

² Pache, *Schutz der finanziellen Interessen der Europäischen Gemeinschaften* (Duncker & Humblot, 1994), p. 336; Böse, *Strafen und Sanktionen im Europäischen Gemeinschaftsrecht* (Heymann, 1996), p. 78. See

debate with its proposal for a new Article 280a as the legal base for a European Public Prosecutor.³ So far, the Community still mainly relies on national structures for the investigation of alleged fraud,⁴ with prosecution and enforcement of sanctions depending on the responsible authorities of the Member States. The EC Commission, however, is being vested with increasingly far-reaching investigatory powers. This authority is often regarded as a first opening for a European Penal law, exceeding the existing 'administrative' European laws⁵ against irregularities concerning its budget.⁶

Such a development raises various general questions and even touches constitutional issues. These questions include for example the division of powers between the Member States and the Community, the (correct) differentiation between 'administrative' and 'criminal' measures, and the necessary procedural rights or, rather, the impact of the rule of law in these operational activities. In the following, only one aspect of the latter will be analysed: the procedural rights of the alleged defrauder in European law enforcement actions. The classical conflict between effective prosecution of wrongful acts and individual rights of the accused raises more complex questions regarding prevailing procedural—national or European—law than material criminal law does.⁷

In general, the rule of law is considered a 'central element' of a new European constitutional order.⁸ In Article 2 TEU, the Treaty of the European Union itself sets the object of maintaining and developing the Union as an 'area of freedom, security and justice' for the Union. For the European Court of Justice, the rule of law has been the express base for several of its leading decisions, such as on the right to have every act of a Community organ reviewed by the court.⁹ Side by side with the rule of law go the basic rights, including procedural rights, which are a fundamental element of the common heritage of the Member States¹⁰ and therefore have to be respected by the European Union as general principles of Community law according to Article 6 (2) TEU. The new draft Charter of Fundamental Rights of the European Union

also: Bridge, 'The European Communities and the Criminal Law', (1976) 22 *Criminal Law Review*, p. 88, Johannes, 'Le droit pénal et son harmonisation dans les Communautés Européennes', (1971) 7 *Revue Trimestrielle de Droit Européen*, p. 326 and the European Parliament in its resolution of 28/10/1996, OJ 1996, C 320/211.

³ See European Commission, Communication DOC/00/27 of 2/10/2000 'Additional Commission contribution to the Intergovernmental Conference on institutional reforms—The criminal protection of the Community's financial interests: a European Prosecutor'.

⁴ See Wolfgang and Ulrich, 'Schutz der finanziellen Interessen der Europäischen Gemeinschaften', (1998) 33 *Europarecht*, p. 636.

⁵ For further information on the constant discussion on the (correct) distinction between 'administrative' and 'criminal' action, see e.g. Ligeti, 'European Community Criminal Law', (1998) 39 *Acta Juridica Hungarica*, pp. 60–66.

⁶ For further information on the current discussion, see e.g.: Kuhl and Spitzer, 'Die Verordnung (Euratom, EG) Nr. 2185/96 des Rates über die Kontrollbefugnisse der Kommission im Bereich der Betrugsbekämpfung', (1998) 9 *Europäische Zeitschrift für Wirtschaftsrecht*, p. 40; Nelles, 'Europäisierung des Strafverfahrens—Strafprozeßrecht für Europa', (1997) 109 *Zeitschrift für die gesamte Strafrechtswissenschaft*, p. 745.

⁷ See Delmas-Marty, 'Combatting Fraud—Necessity, Legitimacy and Feasibility of the Corpus Juris', (2000) 37 *Common Market Law Review*, p. 251.

⁸ Rodríguez Iglesias, 'Gedanken zum Entstehen einer Europäischen Rechtsordnung', (1999) 52 *Neue Juristische Wochenschrift*, p. 2.

⁹ *Les Verts* [1986] ECR 1339.

¹⁰ Rodríguez Iglesias, 'Gedanken zum Entstehen einer Europäischen Rechtsordnung', (1999) 52 *Neue Juristische Wochenschrift*, p. 5.

emphasises the importance of both elements by declaring in its preamble that ‘the Union is based on the principles of democracy and the rule of law’, on the one hand, while itself comprising basic fair trial rights such as the rights to an effective remedy and to a fair trial (Article 47), and the presumption of innocence and right of defence (Article 48) on the other hand.

Despite the central position of the rule of law and procedural rights in the legal order of the European Union, little interest has been shown in the rights of natural or legal persons suspected of defrauding Community’s budget until now.¹¹ Only rarely does one find a reference to well-established case law on the protection of fair trial rights in the proceedings of European competition law, another field in which the Commission pursues wrongful acts to secure the conditions for equal competition in the Common Market.¹²

The following article discusses the need and possible sources for fair trial rights protecting the accused against Commission actions. It begins by depicting the development of the Community’s fight against fraud, then explores the character of such action and subsequently argues why fair trial rights should protect the individual at this stage of proceedings. Third, it will determine which forms of ‘fair trial rights’ are needed: that is, whether those privileges already established as part of the proceedings in competition law are sufficient or whether there is a need for more or, rather, other defendants’ rights.

II The Community’s Fight Against Fraud

Under the terms of Article 209(a) of the Maastricht Treaty, Member States were already obliged to take the same measures to counter fraud affecting the Community budget as they do to protect their own financial interests.¹³ According to the new Article 280(3) of the Amsterdam Treaty, ‘the Member States shall organise, together with the Commission, close and regular cooperation between the competent authorities.’¹⁴ Article 280(4) EC Amsterdam stipulates that ‘the Council . . . 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’. Hence, it is to be expected that alleged defrauders in the Member States will face more and more Community-related action in future. Whether such action will be labelled ‘administrative’ or ‘criminal’

¹¹ See Baert and Misson, ‘Les droits de la defense’, in Huybrechts, Marchandise and Tulkens (eds), *La lutte contre la fraude communautaire dans la pratique* (MAKLU Uitg., 1994), 210–211; Vervaele, *Fraud against the Community*, (Kluwer Law and Taxation Publications, 1992), 192–195.

¹² See, for example: Baert and Misson, ‘Les droits de la defense’, in Huybrechts, Marchandise and Tulkens (eds), *La lutte contre la fraude communautaire dans la pratique* (MAKLU Uitg., 1994), 210–211; Dannecker, ‘Beweiserhebung, Verfahrensrechte und Verteidigungsrechte im europäischen Kartellordnungswidrigkeitenverfahren als Vorbild für ein europäisches Sanktionsverfahren’, (1991) 111 *Zeitschrift für die gesamte Strafrechtswissenschaft*, 291; Kuhl and Spitzer, ‘Die Verordnung (Euratom, EG) Nr. 2185/96 des Rates über die Kontrollbefugnisse der Kommission im Bereich der Betrugsbekämpfung’, (1998) 9 *Europäische Zeitschrift für Wettbewerbsrecht*, p. 42; Vervaele, *Fraud against the Community* (Kluwer Law and Taxation Publications, 1992), 192–195.

¹³ For further information, see: Anderson, den Boer, Cullen, Gilmore, Raab and Walker, *Policing the European Union*, (Clarendon Press, 1995), 183–184; Delmas-Marty, ‘The European Union and Penal Law’, (1998) 4 *ELJ*, 89.

¹⁴ Emphasis added.

proceedings is not in the centre of interest for the questions explored in this article.¹⁵ For the individual concerned, the retributive effect often is the same, thus EC law and the national systems grant generally equivalent procedural rights for defence in administrative and criminal proceedings.¹⁶ Accordingly, the European Court for Human Rights interprets the notion 'criminal' as in Article 6 ECHR in an autonomous way and does not rely on the notion used by national authorities for a certain sanction. If certain criteria are thus fulfilled,¹⁷ administrative proceedings can also be considered as criminal ones in the meaning of Article 6 and therefore open the scope of rights guaranteed herein.¹⁸

For the area of EC law, this is proved by the fact that basically all due process principles were developed by the European Court of Justice in the area of administrative Competition law.¹⁹

A History of the Commission's Fight Against Fraud

The Commission gradually started to give supervisory and coordinating authority to fight fraud affecting the financial interests of the European Communities in the 1960s.²⁰ This was after the detection of a series of large-scale fraud cases against the Community's budget (especially in the areas of customs and agriculture),²¹ which the Member States' authorities pursued only with hesitance in comparison with their national measures taken to fight fraud affecting their own financial interests.²² These first regulations providing for the Commission's authority to act against fraud allowed the EC agents mainly to assist national authorities in their investigative missions. The

¹⁵ Wolfgang and Ulrich, 'Schutz der finanziellen Interessen der Europäischen Gemeinschaften', (1998) 33 *Europarecht*, 644 argue that the new Article 280 creates a basis for supranational criminal law; for a different opinion see: Musil, 'Umfang und Grenzen europäischer Rechtssetzungsbefugnisse im Bereich des Strafrechts nach dem Vertrag von Amsterdam', (2000) 20 *Neue Zeitschrift für Strafrecht*, 68. For further information on the constant discussion on the (correct) distinction between 'administrative' and 'criminal' action, see e.g.: Ligeti, 'European Community Criminal Law', (1998) 39 *Acta Juridica Hungarica*, 57.

¹⁶ For France, see Delmas-Marty and Teitgen-Colly, 'France', in *The system of administrative and penal sanctions in the Member States of the European Communities*, Volume I (Office for Official Publications of the European Communities, 1994), 216; for Germany, see, Boujong (ed.), *Karlsruher Kommentar zum Gesetz über Ordnungswidrigkeiten* (C. H. Beck, 1989), at Introduction, no. 118; for Great Britain, see Leigh, 'United Kingdom', in *The system of administrative and penal sanctions in the Member States of the European Communities*, Volume I (Office for Official Publications of the European Communities 1994), p. 371; for The Netherlands, see de Doelder, in: *The system of administrative and penal sanctions in the Member States of the European Communities*, Volume I (Office for Official Publications of the European Communities 1994), p. 313; for the legal regulations of other Member States, see Schwarze, *Europäisches Verwaltungsrecht*, Vol. 2 (Nomos 1988), 1202.

¹⁷ For this criteria, see IV A.

¹⁸ ECHR *Öztürk v Federal Republic of Germany*, A 73 (1984); see also Harris, O'Boyle and Warbrick, *Law of the European Convention on Human Rights* (London, 1995), 169.

¹⁹ See IVA 2ii

²⁰ See Regulation 288/72, OJ 1972, L 36/11; Regulation 1466/81, OJ 1981, L 180/11; for further details, see: Vervaele, 'Community Investigative Procedures and enforcement of Sanctions', in Delmas-Marty (ed.), *What Kind of Criminal Policy for Europe* (Kluwer Law International, 1996), 213–230.

²¹ Most prominent is the 'Greek Maize case': *Commission v Greece* [1989] ECR I–2965.

²² For further information on the duty of the Member States to prosecute such fraud, see Delmas-Marty, 'The European Union and Penal Law', (1998) 4 *ELJ*, 89.

authority of the Community was based on various legal sources, scattered over different areas.²³

Although it is not contested that—as already indicated above—the primary duty of the fight against fraud is still the responsibility of the individual Member States (even if the Community's interests are affected),²⁴ the restricted role of the Commission in combating fraud finally changed in 1988 when the Antifraud Co-ordination Unit, better known by its French acronym 'UCLAF' (Unité de Coordination de la Lutte AntiFraude), was created within the Secretariat General and placed under the direct control of the President of the Commission. Invested with both a legislative function and an operational mission, the latter was primarily intended to support Member States in coordination with other Member States or services of the Community. After some time, however, UCLAF agents were furnished with further authority and assigned to a special Commissioner. With the adoption of Regulation 2185/96 concerning on-the-spot checks and inspections carried out by the Commission to protect the European Communities financial interests against fraud and other irregularities (hereinafter: Regulation 2185/96),²⁵ UCLAF agents were now permitted²⁶ to conduct on-the-spot checks (a) for the detection of serious or transnational irregularities or irregularities involving economic operators acting in several Member States; (b) for the detection of irregularities where the situation in a Member State requires on-the-spot checks and inspections to be strengthened in a particular case in order to improve the effectiveness of the protection of financial interests and so to ensure an equivalent level of protection within the Community; and (c) at the request of the Member State concerned. The Regulation further stipulates the conditions of access to information, documentation, and so on, as well as the duties of economic operators to facilitate checks by the Commission and the terms on which national authorities are to give assistance.²⁷ Finally, the Regulation provides that the reports submitted by UCLAF agents constitute admissible evidence in judicial proceedings (in the individual Member State).²⁸ After the detection of irregularities within the UCLAF, the new Office Pour la Lutte AntiFraude OLAF, whose competences for the internal fraud control are directed by the new regulation 1073/99,²⁹ was created in May 1999. The external control competences are still governed by Regulation 2185/96 according to Article 3(1) of Regulation 1073/99.

For the moment, the steady growth of the Community's investigative powers has been halted with the adoption of this Regulation. Taking recent discussions into

²³ For example, see Regulation 729/70, OJ 1970, L 94/13; Regulation 165/74, OJ 1974, L 20/1; Regulation 4253/88, OJ 1988, L 374/1.

²⁴ For example, see Regulation 2185/96, OJ 1996, L 292/2.

²⁵ OJ 1996, L 292/2.

²⁶ Subject to special sectoral rules, see Art 1 of Regulation 2185/96.

²⁷ Furthermore, UCLAF maintains a database of information regarding suspected fraud under inquiry by the Commission (the so-called 'pre-IRENE') as well as a database of investigations reported to the Commission by the Member States (IRENE)—to which the customs and agricultural services of the Member States also have access in order to fulfill their coordinating function.

²⁸ There is also informal cooperation: meetings between UCLAF investigators and representatives of the national authorities, at which decisions on anti-fraud operations and so on are made, take place nearly every week. An Advisory Committee on the Fight against Fraud (Cocolaf), a body of high officials from the relevant services of the Member States (mainly customs, finance, and agriculture), meets regularly to discuss further strategies concerning the fight against fraud, the work programme of the UCLAF, and other related matters.

²⁹ OJ 1991, L 136/1.

account, especially in regard to the performance of Commission organs in proceedings for alleged corruption in the Commission, it appears unlikely that the Member States are willing to cede more competences in the field of criminal actions to the Community.³⁰ The European Commission, however, has proposed a new Article 280(a) EC to prepare the ground for the appointment of a European Public Prosecutor who 'shall be responsible for detecting, prosecuting and bringing to judgment the perpetrators of offences prejudicial to the Community's financial interests and their accomplices and for exercising the functions of prosecutor in the national courts of the Member States in relation to such offences . . .'.³¹ Whether this proposal will find the unanimous support of the Member States, which is necessary for every revision of the Treaties according to Article 48 TEU, is possibly doubtful in regard to the discussions of the past.

B The Commission's Investigative Powers

The investigatory powers of OLAF mainly aim at access to information: according to Article 7(1) of Regulation 2185/96, to which Article 4(3) of Regulation 1073/99 refers, '[C]ommission inspectors shall have access, under the same conditions as national administrative inspectors and in compliance with national legislation, to all the information and documentation on the operations concerned which are required for the proper conduct of the on-the-spot checks and inspections. They may avail themselves of the same inspection facilities as national administrative inspectors and in particular copy relevant documents'. Article 5 of the same Regulation stipulates: 'In order to make it easier for the Commission to carry out such checks and inspections, economic operators shall be required to grant access to premises, land, means of transport or other areas, used for business purposes'. According to Article 4(2) of Regulation 1073/99 ' . . . the Office shall have the right of immediate and unannounced access to any information held by the institutions, bodies, offices and agencies, and to their premises'. Conducting external controls, OLAF agents still need a national warrant, however, if an alleged defrauder does not wish to cooperate in a search. Regulation 2185/96 thus does not establish classic criminal investigative powers for Commission inspectors independent of national structures:³² that is, the Commission's agents do not have the power to arrest and question suspects.

Article 8(3) of Regulation 2185/96 and Article 9(2) of Regulation 1073/99, however, as indicated above, stipulate that the reports prepared according to the defined rules 'shall constitute admissible evidence in administrative or judicial proceedings of the Member State in which their use proves necessary, in the same way and under the same conditions as administrative reports drawn up by national administrative inspectors'.³³

³⁰ For information on Art 280 EC, see e.g.: Monar, 'Justice and Home Affairs in the Treaty of Amsterdam: Reform at the Price of Fragmentation', (1998) 23 ELR, 324.

³¹ See Para 1 of the proposed Art 280(a) EC, European Commission, Communication DOC/00/27 of 2/10/2000 'Additional Commission Contribution to the Intergovernmental Conference on Institutional Reforms—The Criminal Protection of the Community's Financial Interests: A European Prosecutor'.

³² See Art 6(1) of Regulation 2185/96: '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 State concerned', and Art 7(1) of Regulation 2185/96: 'Commission inspectors shall have access, under the same conditions as national administrative inspectors and in compliance with national legislation, to all the information and documentation on the operations concerned which are required for the proper conduct of the on-the-spot-checks and inspections'.

³³ See especially Art 7(2) and Art 8(3) of Regulation 2185/96.

The background of these provisions appears to be a dispute between courts of the Member States and the Commission over the duty of its inspectors to appear for questioning in national courts.³⁴ One could, however, also view these provisions as an invitation for forum shopping³⁵—with OLAF acting in those countries whose requirements are lowest for a specific law enforcement action, such as seizures or searches. For traditional international cooperation in criminal matters, law enforcement agencies face the problem of whether or how evidence gathered in a foreign country may be presented in criminal proceedings.³⁶ These questions have now become obsolete for EC agents because of Article 8(3) of Regulation 2185/96 and Article 9(2) of Regulation 1073/99. In the long run, the impact of this provision could thus be more far-reaching into the national provisions on international cooperation in criminal matters, even though such an effect would be contrary to the Member States' original wish to leave the rules governing mutual assistance between Member States unaffected by this sort of cooperation.³⁷ A reform of (traditional) mutual assistance between EU countries was recently presented in the Council Act establishing the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union.³⁸ This Convention will ease mutual assistance between EU countries considerably,³⁹ while still preserving means to refuse assistance for reasons of state sovereignty.⁴⁰

III Fair Trial Rights in the Community's Fight Against Fraud

Despite their efforts to furnish OLAF agents with the means to prepare a case suitable for submission to criminal prosecution in the Member States, the Commission and the Member States maintain their view that the authority for criminal proceedings (still) lies solely with the Member States; hence, they classify the actions of OLAF not as a part of a formal criminal investigation.⁴¹ With this classification, the discussion of a

³⁴ See *Zwartveld* [1990] ECR 3365; *Weddel and Co. BV*, C 54/90 of 18. 2. 1992 unpublished; see Vervaele, 'Community Investigative Procedures and enforcement of Sanctions', in Delmas-Marty (ed.), *What Kind of Criminal Policy for Europe* (Kluwer Law International, 1996), 230–232.

³⁵ See Nelles, 'Europäisierung des Strafverfahrens—Strafprozeßrecht für Europa?', (1997) 109 *Zeitschrift für die gesamte Strafrechtswissenschaft*, 738.

³⁶ For an English view: McClean, *International Judicial Assistance* (Clarendon Press, 1992), 122; for a French view: Decocq, *Droit pénal international* (Fasc. 405–A., 1982) no. 5, 12, 59, 62; Huet and Koering-Joulin, *Droit pénal international* (Presse Universitaire de France, 1994), no 214; for a German view see: Nagel, *Beweisaufnahme im Ausland* (edition iuscrim, 1988), 289, 315; Schnigula, 'Probleme der internationalen Rechtshilfe', (1984) 62 *Deutsche Richterzeitung*, 181; Linke, 'Das neue Recht der Internationalen Rechtshilfe in Strafsachen', (1984) 96 *Zeitschrift für die gesamte Strafrechtswissenschaft*, p. 590; Tiedemann, 'Privatdienstliche Ermittlungen im Ausland—strafprozessuales Verwertungsverbot?', in A. O. Kaufmann (ed.), *Festschrift für Bockelmann* (Munich, 1979), 825.

³⁷ See Sec. 16 of the Preamble of Regulation 2185/96.

³⁸ OJ 2000, C 197/1.

³⁹ For details, see Articles 8–22, which regulate requests for certain specific forms of mutual assistance. According to Art 25, no reservations can be made by the signatory parties.

⁴⁰ According to Art 4(1) of the Convention, assistance may be refused if proceedings would violate 'the fundamental principles of law in the requested country'.

⁴¹ See Kuhl and Spitzer, 'Die Verordnung (Euratom, EG) Nr. 2185/96 des Rates über die Kontrollbefugnisse der Kommission im Bereich der Betrugsbekämpfung', (1998) 9 *Europäische Zeitschrift für Wirtschaftsrecht*, p. 40; Schoo in Schwarze (ed.), *EU-Kommentar* (Nomos, 2000), Art 280, no 8; for a different opinion, see Nelles, 'Europäisierung des Strafverfahrens—Strafprozeßrecht für Europa', (1997) 109 *Zeitschrift für die gesamte Strafrechtswissenschaft*, 745.

not-yet-existing authority of the EC for criminal law is at least partly avoided.⁴² Most authors, and the European Court of Justice, support the opinion that so far the Member States have not transferred the competence for criminal law matters to the EC. Since the Community may exercise only authority that can be derived from the Treaties, the Community is thus not empowered to issue rules binding upon the Member States without express legal bases in the constitutive treaties. The question as to the legal basis of Regulation 2185/96 thus arises. Considering the impact of differing national rules on the combat of fraudulent actions against the EC budget and therefore on the effectiveness of the internal market, it can be argued that the chosen legal basis for the Regulation, Article 308 (formerly Article 235 EC),⁴³ which is appropriate if action should prove necessary to attain one of the objectives of the Community in the course of the operation of the Common Market, also gives the Commission the right to prescribe rules on investigatory powers.

Because of the Member States' view that the actions of OLAF do not form a part of the formal criminal investigations, the legal sources governing the investigations of OLAF do not provide for fair trial rights protecting the alleged defrauder, such as those known from the national criminal procedure of the Member States. A few safeguards exist, however, which protect the interests of the individuals concerned.⁴⁴

IV The Need for (New) Fair Trial Rights in the Community's Fight Against Fraud?

Taking the official view⁴⁵ of the activities of OLAF into account, one could justify the lack of fair trial rights on the two following premises: a provision of fair trial rights would not be necessary at that early stage of the proceedings, if (1) the proceedings are purely 'preparatory' at that point—that is, the Commission's investigations in no way affect the alleged defrauder's position at a later criminal trial—or if (2) the alleged defrauder is sufficiently protected by existing rights.

A Nature of Community Investigations

In order to determine the need or, rather, the scope of fair trial rights, it might be helpful to analyse the nature of the Community's investigative procedure beyond its declaration as a purely administrative and preparatory proceeding.

The object of Community's investigation is to falsify or prove a suspicion of fraud and thus—if necessary—to prepare national criminal prosecution. The impact of Community investigation for (possible) national prosecution is reflected most obviously (a) in the provision on the admissibility of evidence in Article 8(3) of

⁴² See e.g. *Casati* [1981] ECR 2595; *Cowan v Trésor Public* [1989] ECR 195; Schutte, 'The European Market of 1993: Test for a Regional Model of Supranational Criminal Justice or of Interregional Cooperation in Criminal Law', (1991–1992) 3 *Criminal Law Forum*, 63; for another view after the introduction of Art 280(4) EC, see e.g. Wolfgang and Ulrich, 'Schutz der finanziellen Interessen der Europäischen Gemeinschaften', (1998) 33 *Europarecht*, 644, Schoo in Schwarze (ed.), *EU-Kommentar* (Nomos, 2000), Art 280, no 24.

⁴³ Within certain limits, Art 95 EC might also be a basis for regulations containing rules on investigatory powers. This article gives the EC the right to adopt the measures for the approximation of the provisions whose object is the establishment and functioning of the Internal Market.

⁴⁴ The principle of legality, for example, is explicitly mentioned in Art 2(2) and (3) of Regulation 2988/95, which aims at the protection of the financial interests of the Community, and Art 8 (1) of Regulation 2185/96, which provides for professional secrecy (OJ 1995, L 312/1). See also Art 8 (4) of Regulation 2185/96.

⁴⁵ See footnotes and *supra*.

Regulation 2185/96 and Article 9(2) of Regulation 1073/99, to which we already referred. These statutes stipulate that evidence gathered according to the rules set out in the Regulation 'shall constitute admissible evidence in administrative or judicial proceedings of the Member State in which their use proves necessary . . .'⁴⁶; (b) in the case law of the European Court of Justice, according to which the responsible national authorities are obliged to adopt all appropriate measures to guarantee the full scope and effect of Community law, including, of course, those for fraud prevention. Under certain circumstances, they may be even forced to implement criminal sanctions.⁴⁷ The Community's investigative procedures thus carry a certain weight for national prosecution. The responsible national authorities must not leave the findings of OLAF unconsidered even though they are not yet bound to prosecute or punish in strict terms. To understand the full impact of Community investigations, it must also be taken into account that the initial investigation proceedings—whether based on administrative investigative powers or on criminal investigative powers—are often pivotal for later, more formal criminal investigations.⁴⁸ National criminal procedure thus provides safeguards at an early stage of proceedings to guarantee a fair trial. Considering the impact of Community investigation, the same principles regulating the rule of law in criminal trials must apply to these proceedings. From a criminal lawyer's point of view, Community investigations must be regarded as 'pre-trial proceedings'—the Commission's activities to counter fraud prepare subsequent criminal prosecution in the respective Member State and thus form a special part of it.

This finding is further supported if one uses the criteria set forth by the European Court of Human Rights for the applicability of Article 6 ECHR, the guarantee of certain fair trial rights. This provision is referred to by Article 6(2) TEU, which requires respect for 'fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States' as a general principle of Community law.⁴⁹ Furthermore, all Member States are parties to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and are thus on the level of international treaty law bound by its guarantees even though the European Community itself is not a member of the ECHR.

According to Article 6 of the ECHR, anyone—both natural and legal persons—⁵⁰ charged with a criminal offence is guaranteed certain minimum rights, such as the right

⁴⁶ OJ 1999, L 136/1.

⁴⁷ *Commission v Greece* [1989] ECR 2965, para 24, 25; *Commission v France* [1997] ECR I-6959.

⁴⁸ Vervaele pointed this out for the Commission's investigative procedures, 'Community Investigative Procedures and Enforcement of Sanctions', in Delmas-Marty (ed.), *What Kind of Criminal Policy for Europe* (Kluwer Law International, 1996), 245.

⁴⁹ The adoption of this provision followed 'settled case-law' of the European Court of Justice, according to which 'fundamental rights form an integral part of the general principles of law whose observance the Community judiciary ensures'. For a recent judgement, see: *SCK and FNK v Commission*, [1997] ECR II-1739, para 53 with further references. According to Decision 2/94 of the European Court of Justice, however, the Communities themselves must not be part of the ECHR, [1996] *European Convention on Human Rights* ECR I-1759-1790. On the ECHR as 'a new normative starting point': Albrecht and Braum, *Deficiencies in the Development of European Criminal Law*, 5 ELJ [1999], 295.

⁵⁰ See Macdonald, Matscher and Petzold, *The European System for the Protection of Human Rights* (Martinus Nijhoff, 1993), 384; Frowein and Peukert, *Europäische Menschenrechtskonvention*, 2nd edn (Engel, 1996), 156; Wils, 'La compatibilité des procédures communautaires en matière de concurrence avec la Convention Européenne des Droits de l'Homme', (1996) 32 *Cahiers de Droit Européen*, 331.

to be informed promptly about the nature and cause of the accusation against him, the right to adequate time and facilities for the preparation of his defence, the right to legal assistance of his own choosing, including the free assistance of an interpreter, and the examination of witnesses for both prosecution and defence.

If OLAF's investigations are to be regarded as a criminal prosecution in the sense of Article 6 ECHR and the alleged defrauder as a suspect in these investigations, the necessary scope of these rights would be determined by Article 6 ECHR.

From the case law of the European Human Rights Commission and the European Court of Human Rights, it is clear that the legal classification of a proceeding given by authorities is not determinative for its classification under the Convention.⁵¹ The Strasbourg institutions rely on three criteria to determine whether Article 6 of the ECHR is applicable. These criteria were set forth for the first time in the *Engels*⁵² decision: (1) the European Court of Human Rights is not bound by the classification of a procedure given in national law, but explores the applicable substantive and procedural rules itself (and may even refer to the classification fixed by another state for the same type of offence); (2) a sanction is a criminal sanction when it punishes the violation of a general rule and pursues a goal simultaneously preventive and punitive; and (3) the nature and the severity of the penalty imposed are considered. National fraud prosecution thus clearly qualifies as a criminal proceeding.

If a proceeding is classified as criminal according to these criteria, the guarantees of the ECHR also apply during the preliminary inquiries⁵³ if those proceedings are directed towards the judgement of a court that the person concerned has committed a crime.⁵⁴ The scope of the applicable rights of Article 6 to these preliminary proceedings is then determined by the importance of their protection for the main proceedings and the significance of the preliminary proceedings for the main trial.

We have argued that OLAF's taking of action against an alleged defrauder affects his position. This effect on the alleged defrauder's position is substantial as the evidence gained by the Commission's actions will be considered by the national court during the main trial and as—under certain circumstances—the national courts might be obliged to impose sanctions for violations of Community law. Therefore, the investigation by the Commission's agents is directed towards a judgement according to the criterion of the ECHR and it can be argued that Article 6 of the European Convention on Human Rights is applicable.⁵⁵

⁵¹ For example, see ECHR *Öztürk v Federal Republic of Germany*, A 73 (1984); *Lutz v Federal Republic of Germany*, A 123 (1984); Schutte, 'The European Market of 1993: Test for a Regional Model of Supranational Criminal Justice or of Interregional Cooperation in Criminal Law', (1991–1992), 3 *Criminal Law Forum*, 61; Colly-Teitgen, 'Fair Trial Guarantees and Administrative Enforcement' in: Delmas-Marty (ed.), *What Kind of Criminal Policy for Europe* (Kluwer Law International, 1996), 282–287.

⁵² ECHR *Engel v Netherlands*, A 22 (1976).

⁵³ ECHR *Imbroscia v Switzerland*, A 275 (1993).

⁵⁴ ECHR, *Fayed*, A 61 (1994) and *Saunders*, A 67 (1996).

⁵⁵ See also: Baert and Misson, 'Les droits de la defense', in Huybrechts, Marchandise and Tulkens (eds), *La lutte contre la fraude communautaire dans la pratique* (MAKLU Uitg., 1994), 212–213; for a different view, see: Dannecker, 'Beweiserhebung, Verfahrensrechte und Verteidigungsrechte im europäischen Kartellordnungs-widrigkeitenverfahren als Vorbild für ein europäisches Sanktionsverfahren', (1999) 111 *Zeitschrift für die gesamte Strafrechtswissenschaft*, 292.

B Protection Through Existing Fair Trial Rights

Having explained that the alleged defrauder's position needs safeguards in regard to the activities of OLAF, we will now analyse whether (a) fair trial rights provided for by the national criminal procedure of the respective Member State or (b) general principles of Community law (sufficiently) protect the individual concerned.

i Protection Through Fair Trial Rights Provided For in National Law

At first glance, one might assume that fair trial rights provided for by the national criminal procedure of the respective Member State will protect the individual concerned sufficiently, based on the fact that the Commission's investigative powers are closely bound to the reigning national provisions on criminal procedure.⁵⁶ This is correct, however, only in regard to formal steps taken during an investigation which trigger certain defendant's rights in national law.⁵⁷ In regard to less formal steps or consequences arising from the special features of a Community investigation, national rights do not always protect the suspect. There is, for example, no safeguard against the possibility of presenting OLAF's findings in proceedings in other Member States.⁵⁸

ii Protection Through General Principles of Community Law

Fair trial rights as general principles of Community law were substantially developed in the case law of the European Court of Justice,⁵⁹ mainly in the area of the Community's competition law.

The European competition law arises directly from Articles 85ff EC. The basic rules of procedure are laid out in Regulation No. 17/62.⁶⁰ The primary agency for enforcement is the Commission. According to Article 3 of Regulation No. 17/62, the Commission has the power, either upon its own initiative or upon the request of a Member State or any other person claiming a legitimate interest, to issue a decision designed to terminate an infringement of the Community competition law. Regulation No. 17/62 therefore vests the Commission with extensive investigatory powers.⁶¹ Although the Commission's basic enforcement powers are shaped by Regulation No. 17/62,⁶² the details of procedure, the scope of sanctions, and, in particular, the rights of the (prosecuted) individual were extensively developed in the case law of the European Court of Justice and the Court of First Instance.⁶³

One might ask whether those fair trial rights should also govern the fight against fraud, since both areas are governed by Community law and, in both areas, procedure is handled by the Commission.⁶⁴ An argument against this line, however, could arise

⁵⁶ For example, see Art 6(1) of Regulation 2185/96: '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 State concerned'.

⁵⁷ If a formal search were to be conducted, for example, national law (with its safeguards) would take precedence, see Art 9 of Regulation 2185/96.

⁵⁸ See Art 8(3) of Regulation 2185/96.

⁵⁹ See e.g.: Craig and deBúrca, *EU Law: Text, Cases and Materials* (2nd edn) (Oxford University Press, 1998), chaps. 7 and 8; Baker, 'Taking European Criminal Law Seriously', (1998) 62 CLR, 362.

⁶⁰ OJ 1962, L 204.

⁶¹ For details, see Regulation 17/62; see also: Johnson, 'EU Competition Law', in Folsom, Lake and Nanda, *European Union Law after Maastricht* (Kluwer Law International, 1996), 348.

⁶² OJ 1962, L 204.

⁶³ For a short review on the development of constitutional rights, see: Lenz, 'Ein Grundrechtskatalog für die Europäische Gemeinschaft?', (1997) 53 *Neue Juristische Wochenschrift*, 3289.

⁶⁴ See e.g. Baert and Misson, 'Les droits de la defense', in Huybrechts, Marchandise and Tulkens (ed.), *La lutte contre la fraude communautaire dans la pratique* (MAKLU Uitg. 1994), 222.

from the fact that the rights explicitly mentioned in Regulation No. 17/62 and Reg. No. 99/63 are not directly transferable to the fight against fraud. Another argument against a transfer could be made from the assumption that ‘administrative proceedings’⁶⁵ in competition law are an *aliud* (not a minus) to proceedings which are supposed to lead to a criminal prosecution.

Still, nearly all of the rights recognised in the area of competition law are regarded by the European Court of Justice as ‘general principles of Community law’,⁶⁶ including the right to disclosure, the privilege of confidentiality (guaranteed in Article 287 EC n.v.), the right to be heard, the right to counsel, the legal privilege, and so on.

Even before the enactment of Article 6 TEU, the judges referred to fundamental rights which are an integral part of the general principles of law whose observance is ensured by the European Court of Justice in accordance with (a) constitutional traditions common to the Member States and (b) international treaties on which the Member states have collaborated or of which they are signatories, such as the ECHR.⁶⁷

The fair trial rights considered as general principles of Community law are valid in all areas of Community activities. As general principles of Community law, they must—in principle—be applied in all Community proceedings, including those implemented in the fight against fraud. Hence, it may be left undecided whether this finding is further supported by an argument *ad maiorem minus*, according to which fair trial rights valid in competition law that lead only to administrative decisions or sanctions must also be at least respected in the fight against fraud, in the course of which criminal prosecution in the Member States is prepared. An argument which might prove weak if one shares either the point of view that administrative proceedings are in fact an *aliud* to criminal proceedings or the opinion that the Commission’s investigations are a mere preparation for the real national investigation. The scope of recognized fair trial rights in the jurisprudence of the ECJ extends to the following rights, which also form part of the guarantees of the ECHR without exception.

1 Right to Disclosure

The right to disclosure forms part of Community law. In *Imperial Chemical Industries v Commission*,⁶⁸ the EC held that ‘[a]ccess to the file is thus one of the procedural safeguards intended to protect the rights of defence’.⁶⁹

⁶⁵ Schutte, ‘The European Market of 1993: Test for a Regional Model of Supranational Criminal Justice or of Interregional Cooperation in Criminal Law’, (1991–1992) 3 *Criminal Law Forum*, 61.

⁶⁶ See Rengeling, *Grundrechtsschutz in der Europäischen Gemeinschaft* (C. H. Beck, 1993), 150.

⁶⁷ For example, see *EC Lisrestal v Commission* [1994] ECR II-1194, para 42. Recognition that it is legally binding first came with the preamble of the Single European Act 1986 and is now finally settled through Article 6(2) TEU, which also binds Community law. The European Commission for Human Rights furthermore declared that ‘the transfer of powers to an international organization is not incompatible with the Convention, on the condition that in this organisation fundamental rights receive equivalent protection’ and held that this condition was fulfilled in the area of European competition law because the European Court of Justice reviews Community acts—and thus Community sanctions—and that it has subjected the law to an equitable process as a fundamental principle of Community law (*M & Co v Germany*, Reg 12358/87, (1991) 3 *Revue universelle des droits de l’homme* 134. For further details on the applicability of the ECHR on administrative proceedings, see: Teitgen-Colly, ‘Fair Trial Guarantees and Administrative Enforcement’, in Delmas-Marty (ed.), *What kind of Criminal Policy for Europe?* (Kluwer Law International, 1996), p. 283; Baker, ‘Taking European Criminal Law Seriously’, (1998) 62 *CLR*, 373.

⁶⁸ *EC Imperial Chemical Industries v Commission* [1995] ECR II-1922, para 49.

⁶⁹ See also: European Court of Justice *Fiskano v Commission* [1994] ECR I-2909, para 39 and 40; EC

In the ECHR, the right to disclosure is guaranteed by the 'right to a fair hearing' in Article 6 (1)⁷⁰ and also by the rights to have 'adequate facilities for the preparation of his defence' in Article 6 (3) (b).⁷¹

2 Right to Be Heard

The right to be heard also forms part of Community law. The EC found in *Imperial Chemical Industries v Commission*⁷² that 'the undertaking concerned must . . . be afforded the opportunity during the administrative procedure to make known its views on the truth and relevance of the facts, charges and circumstances relied on by the Commission'.⁷³ This view of the court is reflected in Regulation 99/63, as well, which has recently been replaced by Regulation 2842/98 and governs the compulsory hearing of the accused and other persons and companies concerned.

Under the ECHR, the right to be heard forms part both of the right to a 'fair and public hearing' as guaranteed in Article 6(1), assuring an 'equality of arms',⁷⁴ the right to 'defend himself in person or through legal assistance' as guaranteed in Article 6(3)(c), and most clearly by the right to cross-examine witnesses as guaranteed by Article 6(3)(d) of the Convention.⁷⁵

3 Right to Counsel

According to the case law of the European Courts, a right to counsel exists as part of Community law. In *Imperial Chemical Industries v Commission*,⁷⁶ the EC held that '[r]espect for the rights of the defence in all proceedings in which sanctions may be imposed is a fundamental principle of Community law, which must be respected in all circumstances, even if the proceedings in question are administrative proceedings'.⁷⁷

Cimenteries CBR v Commission [1992] ECR II-2682, para 38; *EC BPB Industries and British Gypsum v Commission* [1993] ECR II-389, para 30; Dannecker, 'Beweiserhebung, Verfahrensrechte und Verteidigungsrechte im europäischen Kartellordnungs-widrigkeitenverfahren als Vorbild für ein europäisches Sanktionsverfahren', (1999) 111 *Zeitschrift für die gesamte Strafrechtswissenschaft*, 272—276; Wils, 'La compatibilité des procédures communautaires en matière de concurrence avec la Convention Européenne des Droits de l'Homme', (1996) 32 *Cahiers de Droit Européen*, 341.

⁷⁰ A breach can however be remedied where the effect of the non-disclosure on the outcome of the case is properly considered by a court of appeal, see ECHR *Edwards v UK* A 247 (1992).

⁷¹ See: Harris, O'Boyle and Warbrick, *Law of the European Convention on Human Rights* (London, 1995), 255; it might though be sufficient that the accused's lawyer may inspect it: ECHR, *Kamasinski v Austria*, A 168 (1989).

⁷² *EC Imperial Chemical Industries v Commission* [1995] ECR II-1922, para 49.

⁷³ See also: *EC Lisrestal v Commission* [1994] ECR II-1194, para 42; *ECJ Hoffmann-La Roche v Commission* [1979] ECR I-511, para 44. For further information, see Dannecker, 'Beweiserhebung, Verfahrensrechte und Verteidigungsrechte im europäischen Kartellordnungs-widrigkeitenverfahren als Vorbild für ein europäisches Sanktionsverfahren', (1999) 111 *Zeitschrift für die gesamte Strafrechtswissenschaft*, 270; Kuhl and Spitzer, 'Die Verordnung (Euratom, EG) Nr. 2185/96 des Rates über die Kontrollbefugnisse der Kommission im Bereich der Betrugsbekämpfung', (1998) 9 *Europäische Zeitschrift für Wirtschaftsrecht*, 42.

⁷⁴ See ECHR, *Neumeister v Austria* A 8 (1968).

⁷⁵ See ECHR, *Barberà, Messegué and Jabardo v Spain*, A 146 (1988), para 78; *Feldbrugge v Netherlands*, A 99 (1986); *Sanchez-Reisse v Switzerland*, A 107 (1986), *H v Belgium*, A 127 (1987).

⁷⁶ *EC Imperial Chemical Industries v Commission* [1995] ECR II-1922, para 49; see also: *ECJ Michelin v Commission* [1983] ECR 3498, para 7; *Orkem v Commission* [1989] ECR 3350, para 29.

⁷⁷ See also: *ECJ Dow Benelux v Commission* [1989] ECR 3156, para 28; *ECJ Netherlands et al v Commission* [1992] ECR I-638, para 44; Dannecker, 'Beweiserhebung, Verfahrensrechte und Verteidigungsrechte im europäischen Kartellordnungs-widrigkeitenverfahren als Vorbild für ein europäisches Sanktionsverfahren', (1999) 111 *Zeitschrift für die gesamte Strafrechtswissenschaft*, 279.

In *Hoechst v Commission*,⁷⁸ the European Court of Justice held explicitly that the right to legal representation is one of the basic rights governing the administrative procedure, the violation of which may lead to the imposition of penalties.

Article 6(3)(c) of the ECHR stipulates that everyone charged with a criminal offence has the right to 'defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require', a right that applies also at the pre-trial stage.⁷⁹

4 Right to a Timely Decision

The European Court of Justice regards the right to a timely decision to be one of the fundamental rights forming an integral part of the general principles of law, whose observance the Community judicature ensures.⁸⁰ According to European Court of Justice case law, the question as to whether the duration of an administrative proceeding is reasonable must be determined in relation to the specific circumstances of each case and, in particular, its context, the various procedural stages, the conduct of the parties in the course of the procedure, the complexity of the case, and its importance for the various parties involved.⁸¹

Under the ECHR, Article 6(1) stipulates that 'everyone is entitled to a fair and public hearing within a reasonable time'.⁸²

5 Right to Judicial Review

In European Community Law, the right of the individual to have a decision reviewed is regarded as a basic principle.⁸³ It is based on the various possibilities for seeking judicial remedy. Most important in practice is Article 230 EC, according to which '[a]ny natural or legal person may . . . institute proceedings against a decision addressed to another person, of direct and individual concern for the former'.

The European Court for Human Rights has recognised the right of access to a court for the first time in the decision *Golder v UK*.⁸⁴

6 Right to Compensation

According to Article 288(2) EC, 'in the case of non-contractual liability, the Community shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties'. In the European Convention of Human Rights, Article 41 stipulates that 'if the Court finds that there has been a violation of the

⁷⁸ *Hoechst v Commission* [1989] ECR 2923, para 15 and 16.

⁷⁹ See ECHR, *Imbrioscia v Switzerland* A 275 (1993).

⁸⁰ *Lorenz v Germany Case* [1973] ECR 1471, para 4; *RSV v Commission* [1987] ECR 4617, para 12–17; *Guérin Automobiles v Commission* [1997] ECR I-1503, para 38; *SCK and FNK v Commission*, [1997] ECR II-1739, para 55.

⁸¹ *SCK and FNK v Commission*, [1997] ECR II-1739, para 57 with references to rulings of the European Court of Human Rights.

⁸² See e.g. ECHR, *H v France*, A 162 (1989), para 58, *Neumeister v Austria*, A 8 (1968), *Eckle v FRG*, A 51 (1982).

⁸³ See Delmas-Marty, 'Combating Fraud—Necessity, Legitimacy and Feasibility of the Corpus Juris', (2000) 37 CMLR, p. 251; Wils, 'La compatibilité des procédures communautaires en matière de concurrence avec la Convention Européenne des Droits de l'Homme', (1996) 32 *Cahiers de Droit Européen*, 340.

⁸⁴ ECHR, *Golder v UK*, A 18 (1975). See also *Airey v Ireland*, A 32 (1979) and *De Geouffre de la Pradelle v France*, A 253 (1992) for the scope of the right.

Convention or the protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party’.

7 *Presumption of Innocence*

Mr Vesterdorf, acting as Advocate General in *Rhone-Poulenc v Commission* (T 1/89, 1991 II-869(954)),⁸⁵ claimed that the principle *in dubio pro reo* applies in administrative (competition) proceedings. This opinion was neither discredited nor approved by the Courts.

It is undisputed, however, that the presumption of innocence forms part of Community Law through Article 6(2) TEU in connection with Article 6(2) ECHR regarding criminal prosecution.⁸⁶

8 *Privilege of Non-Disclosure*

The currently binding legal right of the accused not to commit self-incrimination arises again from Article 6(2) TEU in connection with Article 6 ECHR. Its scope, however, especially in competition law, is disputed.

In *Orkem v Commission*,⁸⁷ the European Court of Justice found that ‘[i]n general, the laws of the Member States grant the right not to give evidence against oneself’, but ‘only to a natural person charged with an offence in criminal proceedings’. It therefore concluded that a comparative analysis of national law does not indicate the existence of a principle ‘which may be relied on by legal persons in relation to infringements in the economic sphere, in particular infringements in the economic sphere, in particular infringements of competition law’.

Up to now, there has been no case law on the natural person’s privilege of non-disclosure. Such a right can only be concluded *ex contrario* from the Courts explanation in *Orkem v Commission* (see above).

The European Court for Human Rights has pointed out in a decision concerning a natural person that Article 6 of the Convention prohibits all—even indirect—forms of self-incrimination and therefore no one can be forced to provide any self-incriminatory documents.⁸⁸

In regard to legal entities, the Court furthermore held in *Orkem v Commission*⁸⁹ that, although the Commission has the right to compel a person or an undertaking to provide all necessary information and disclose documents, it ‘may not compel an undertaking to provide it with answers which might involve an admission on its part of the existence of an infringement which is incumbent upon the Commission to prove’.⁹⁰ In practice, this may lead to a privilege of non-disclosure for undertakings in the area of competition law.

⁸⁵ *Rhone-Poulenc v Commission* [1991] ECR II-954.

⁸⁶ See also: ECJ *Gutmann v Commission* [1966] ECR 178. Problematic in this aspect is Art 1 (4) of Regulation 2988/95 (for the protection of the financial interests of the Community), OJ 1995, L 312/1. For the presumption of innocence as guaranteed in Art 6(2) ECHR, see e.g. ECHR, *Barberà, Messegue and Jabardo v Spain*, A 146 (1989).

⁸⁷ *Orkem v Commission* [1989] ECR 3350, para 29; see also *Hoechst v Commission* [1989] ECR 2923, para 15.

⁸⁸ ECHR, *Funke v France*, A 256 (1993).

⁸⁹ *Orkem v Commission* [1989] ECR 3350, para 29

⁹⁰ *Orkem v Commission* [1989] ECR 3350, para 34 and 35; see also EC *Société Générale v Commission* [1995] ECR II-570, para 74; ECJ *Michelin v Commission* [1983] ECR 3498, para 7.

9 Principle of Legality/Retroactivity

The principle of legality (*nullum crimen, nulla poena sine lege*)—arising from Article 6(2) TEU in connection with Article 7 ECHR—is part of Community Law (see Article 5 TEU). According to the case law of the European Court of Justice, this principle does not only apply to criminal law, but also to provisions governing administrative prosecution.⁹¹ The prohibition of retroactivity is seen as part of the principle of legality.⁹²

10 Right to Confidentiality

On the level of the European Communities, the right to confidentiality is secured in various ways.⁹³ The scope of the privilege of professional secrecy and legal privilege in competition cases is currently being disputed.

With regard to the right of professional secrecy, it has been claimed that companies are not allowed to refuse to provide information claiming ‘professional secrecy’⁹⁴ because Article 20 of Regulation No. 17 and Article 287 EC oblige the Commission’s agents to maintain confidentiality in regard to all information acquired in the course of competition proceedings.⁹⁵

With regard to legal privilege, the European Court of Justice held in *AM & Commission*⁹⁶ that the Commission is—in the course of an investigation—empowered to ask for the disclosure of documents, ‘the disclosure of which it considers necessary, including written communications between lawyer and client’, but furthermore finds that this power is subject to the restriction imposed by the need to protect confidentiality. The EC—following the European Court of Justice—defined the scope of legal privilege in *Hilti v Commission*⁹⁷ as follows. Written communication between a lawyer and a client is protected by legal privilege if (a) it was made for the purpose and in the interests of the client’s right of defence and (b) it emanates from an independent lawyer: that is, a lawyer who is not bound to the client by a relationship of employment. In *Hoechst v Commission*,⁹⁸ the European Court of Justice even held that the ‘privileged nature of correspondence between lawyer and client’ is one of the basic rights of defence.

The European Court for Human Rights has recognised the legal privilege as part of the right to effective legal assistance guaranteed in Article 6(3)(c) of the ECHR.⁹⁹

V Do the Rights Guaranteed in Competition Law Provide for Sufficient Protection?

Having shown that it is necessary to provide for fair trial rights regarding the Commission’s investigations to detect fraud, and that fair trial rights acknowledged

⁹¹ Even before foresaid provision of the TEU existed, the European Court of Justice also decided this way in *Zollverwaltung v Gondrand Frères* [1981] ECR 1942, para 17; *Köneck v Balm* [1984] ECR 3302, para 11; *Maizena v BALM* [1987] ECR 4587, para 15.

⁹² For example, see ECJ *Bosch v van Rijn* [1962] ECR 113; *Racke v Hauptzollamt Mainz* [1979] ECR 86, para 20; *Regina v Kirk* [1984] 2718, para 22; *Hoechst v Commission* [1989] ECR 2924, para 19.

⁹³ See Delmas-Marty, ‘The European Union and Penal Law’, (1998) 4 ELJ, 82f.

⁹⁴ See Lavoie, ‘The investigative powers of the Commission with respect to business secrets under Community competition rules’, (1992) 17 ELR, 24.

⁹⁵ Decision of 31/1/1979, FIDES, OJ 1979, L 57/33.

⁹⁶ *AM & S Europe v Commission* [1982] ECR 1611, para 27.

⁹⁷ *Hilti v Commission* [1990] ECR II-169, para 13.

⁹⁸ *Hoechst v Commission* [1989] ECR 2923, para 15–16.

⁹⁹ *S v Switzerland*, A 220 (1991), para 48; see also *D v Austria*, No. 16410/90 (1990), unreported.

as general principles of Community law protect the alleged defrauder, we are left with the question as to whether this protection is sufficient.

The scope of fair trial rights provided for in competition law, however, may—on the surface—be considered equivalent to those privileges provided for in national criminal procedures. As already indicated above, however, a mere transfer of those rights could not protect the alleged defrauder from infringements that might arise from those special features of Community proceedings in the fight against fraud, such as the division of proceedings between the Community doing pre-trial checks and the responsible national authorities conducting the formal criminal investigation and prosecuting, giving ground for the danger of forum shopping and the possibility of transferring evidence without judicial safeguards. Antitrust privileges thus do not provide sufficient protection for the alleged defrauder.

Therefore, Article 6 of the European Convention of Human Rights, which is—as we have shown above—applicable to the Community investigations in the fight against fraud, could be necessary as an additional source of fair trial rights. Article 6 ECHR contains among others the right of the accused to be informed promptly about the nature and cause of the accusation against him, the right to adequate time and facilities for the preparation of his defence, the right to the free assistance of an interpreter, and the examination of witnesses on behalf of or against him. Particularly considering the dynamic character of the Community powers in the field of the fight against fraud, Article 6 ECHR can be helpful for ensuring a comprehensive scope of fair trial rights which can be referred to in individual cases where the rights traditionally recognised by the European Court of Justice prove to be insufficient.

V Concluding Remarks

When conducting an investigation on the grounds of Regulation 1073/99 and Regulation 2185/96, OLAF prepares the ground for national criminal investigation. Therefore, an OLAF investigation must thus be regarded as part of a pre-trial procedure. The application of the criteria established by the Strasbourg institutions to the decision as to whether Article 6 ECHR is applicable leads to the same finding. Hence, the alleged defrauder thus has a right to privileges securing his position as an 'accused' of a criminal charge.

At the time being, such privileges are insufficiently provided for both by the legal sources governing the actions of OLAF and by national or Community law. Although general principles of Community law provide a certain protection for the suspect, they do not safeguard against infringements arising from the specific features of a Community investigation, especially in regard to the possibility of evidence transfer. Thus, for the sake of a just and effective Community fight against fraud that meets the requirements set for criminal investigation in national law or, rather, the ECHR, it will be necessary to provide for special fair trial rights on a Community level, which empower an alleged defrauder to defend himself effectively in an EC pre-trial investigation possibly leading to a national criminal trial.

The EU Treaty proposes several (theoretical) possibilities to establish the necessary canon of Community-wide guarantees of fair trial rights: If one takes the point of view that the problems arising from the common fight against fraud belong mostly to the intergovernmental sector, a charter could be drawn in a separate convention worked out by the Member states according to Article 34(2) TEU. It would then form part of the so-called third pillar of the EU. If one, however, takes the point of view that the

fight against fraud is, or rather should in future totally be part of Community action, such rights should be developed as Community law, belonging to the 'first pillar'. The latter approach is apparently taken by the Commission, which launched the *Corpus Juris* project. In this project, a group of criminal law experts coming from the Member States have drafted a kernel of a common European penal code, presenting a research report on Criminal Law and a law proposal at the same time.¹⁰⁰ The authors introduce various penal provisions for the purpose of protecting the financial interests of the European Union that also contain rules on criminal procedure, especially ones that provide for a common European investigation phase regarding fraud affecting the Community's interests.¹⁰¹ In regard to the rights of the individual, the *Corpus Juris* stipulates in Article 29(1) *Corpus Juris* that, in any proceeding concerning fraud affecting the Community budget, 'the accused enjoys the rights of the defence guaranteed by Article 6 of the European Convention on Human Rights and Article 10 of the UN International Covenant on Civil and Political Rights'. With this reference, the proposal relies generally on the only common ground for principles securing the rule of law in criminal trials already established between European countries. Respect for these rules shall be guaranteed by 'judges of liberties',¹⁰² which—according to the *Corpus Juris* draft—shall determine the scope of such rights and may turn to the Luxembourg Court if necessary.¹⁰³ When deciding these matters, the 'judges of liberties' will *inter alia* decide on the admissibility of evidence according to the following rule: evidence is not admissible if its collection has violated relevant provisions.¹⁰⁴ The national law applicable to determine whether evidence has been obtained legally or illegally must be the law of the country where the evidence was obtained and not the law of the country where the evidence is to be presented in trial.¹⁰⁵ For the time being, the validity of the *Corpus Juris* approach in regard to the problem of evidence transfer cannot be evaluated: the various criminal procedures in the Member States permit fundamental differences. Hence, when admitting evidence, the judges of liberty will find themselves confronted with the task of mending pieces coming from disparate systems to a functioning unity.¹⁰⁶

A solution to this task, however, is a fundamental necessity for establishing a 'common European legal space'¹⁰⁷ which also protects the rights of the individuals accused of wrongdoing.¹⁰⁸ Searching for this solution, the authors of the *Corpus Juris*

¹⁰⁰ For further information, see Delmas-Marty, 'Combatting Fraud—Necessity, Legitimacy and Feasibility of the *Corpus Juris*', (2000) 37 CMLR, 247.

¹⁰¹ Delmas-Marty, *Corpus Juris introducing penal provisions for the purpose of the financial interests of the European Union* (Economica, 1997) (a revised version is forthcoming, which introduces *inter alia* a pre-trial chamber, see Delmas-Marty, 'Combatting Fraud—Necessity, Legitimacy and Feasibility of the *Corpus Juris*', (2000) 37 CMLR, 251).

¹⁰² Art 25(3) of the *Corpus Juris*.

¹⁰³ See Art 28 of the *Corpus Juris*.

¹⁰⁴ Either of the *Corpus Juris* itself or of the ECHR.

¹⁰⁵ Art 33(2) of the *Corpus Juris*. For a critical view on these provisions, see Nelles, 'Die verfahrensrechtlichen Vorgaben des *Corpus Juris*', in Huber (ed.), *Das Corpus Juris als Grundlage eines Europäischen Strafrechts* (edition iuscrim, 2000), 261.

¹⁰⁶ This problem arises in various contexts in regard to the establishment of a 'common legal space' (Presidency Conclusions, Tampere Council 15 and 16 October 1999).

¹⁰⁷ For further information on this vision, see Presidency Conclusions, Tampere Council 15 and 16 October 1999 and the declaration of the European Parliament, OJ C 54 of 25.2.2000, 93–97.

¹⁰⁸ Delmas-Marty, 'Combatting Fraud—Necessity, Legitimacy and Feasibility of the *Corpus Juris*', (2000) 37 CMLR, 250.

rightly referred to the ECHR: the appearance of common principles for individual rights, both in the case law of the ECHR and in the case law of the European Community, pose the chance to develop a canon of fundamental procedural rights that have to be respected in a common investigation procedure bridging a Community investigation and a (national) criminal trial.