

Enforcement of EEC-laws and police innovation in Europe

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Published in:
Proceedings European police Summer-course

Publication date:
1991

[Link to publication](#)

Citation for published version (APA):
Fijnaut, C. J. C. F. (1991). Enforcement of EEC-laws and police innovation in Europe. In *Proceedings European police Summer-course* (Vol. 2, pp. 80-86). Nederlandse Politie Academie.

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6.2 REPORT OF SEMINAR 2:

ENFORCEMENT OF EEC-LAWS AND POLICE INNOVATION IN EUROPE

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I. Introduction

In the foregoing years the EEC has become more and more involved in the problems of law enforcement and crime fighting. This in a very direct way : that of the European Council, the European Parliament, and in a more indirect way : the European Political Cooperation.

The role of the European Political Cooperation became really important in 1975. In this year TREVI was established in its bosom to contain terrorism, violent radicalism and large-scale-disorder; meanwhile this mandate has been enlarged to organised crime in general. And within the foreseeable future the importance of the European Political Cooperation will increase as a result of the Schengen - Convention II that this year has been concluded by Germany, France and the Benelux-countries: the Netherlands, Belgium and Luxemburg. For notably the provisions of this convention with regard to cooperation among the police forces concerned are seen as a model for the organisation of police cooperation between all the member-states of the EEC. Herewith one should think of the exchange of liaison officers, the management of cross-border surveillance, the adjustment of hot-pursuit-clauses and so on.

The increasing involvement of the European Parliament, the European Council and the European Commission can also be illustrated in different ways. Last years the European Parliament has expressed its interest by charging commissions to study problems like drugs use and drugs trade within the EEC-countries (the report of J. Stewart-Clark) and, recently, the problem of EEC-fraud (the report of H. Dankert). And the conclusion of these commissions with regard to policing in Europe or, if you like it more, European policing are not trifling, a.o. the establishment of an European information system and the foundation of international "flying brigades". The participation of the European Council in this field has become very clear all over the time in public statements and the like. As a most important utterance of its interest, however, the final declaration of the Single Act should be taken into

consideration. For, implicitly, this declaration gives the message that not only the member-states of the EEC but also the ECC themselves have to play an important role in the fight against international crime. And, lastly, at the moment the European Commission itself is very busy with mobilising on the one hand its own bureaucracy and on the other hand the police and judiciary within the member-states against EEG-fraud.

It is evident that this seminar can't be devoted to all these developments and initiatives at the same time. We have to make a choice among the different topics. Because the subject is increasingly important but not well-known in regular police circles I prefer to devote this seminar to the problem of the enforcement of EEC-law. This means that attention will be paid to three issues : the foundations of its enforcement within the EEC-treaties, the policy concerning its enforcement and the innovation of the (regular) police as a result of its enforcement.

II. The foundations of the enforcement of EEC-law.

The EEC-Treaty 1957 aims at the establishment of an economic community. And so Community law can be divided into two parts : institutional law, concerning the institutions of the Community, and substantive law, concerning the economic, financial and fiscal relations within the Community. And it is important to stress immediately that the European Council, the European Commission and, to a lesser degree, the European Parliament, are legislators. They have the power to make general regulations and directives on the one hand and to take decisions in individual cases on the other hand that are directly binding upon all the member-states respectively all the parties concerned (art. 189).

A most remarkable thing now is that the named institutions, and notably the European Commission, are not empowered, generally speaking, to enforce the laws they make. To say it more strongly even : the enforcement, and in any case the penal enforcement, of EEC-law isn't regulated at all within the EEC-Treaty. The reason why is quite simple : the responsibility for this has been given to the member-states. Article 5 provides that they should take all the general or special measures that are apt to assure the observance of all the obligations that result from the Treaty. This not only means that the enforcement of EEC-law essentially is the task, the responsibility of the member-states, but also that

these states dispose of very much freedom, discretion, with regard to the means they are willing to bring into action for this goals; it is up to them, to a certain extent, to put on administrative law and/or criminal law and/or civil law. The last years the limits of their freedom have been made more clear by the Court of Justice. In general terms the Court has stipulated time and again that those means must be adapted to the ends of the Treaty and may not snub them. In particular the Court has ruled for example that also (penal) sanctions should be adequate, proportionate to the ends of the Treaty, and that, from this viewpoint, some severe imprisonments or heavy fines are in conflict with them, because they impede the free movement of persons or goods. To prevent any misunderstanding in this respect it should be added that the European Council has indeed the power to compel the member-states to come into action against some malpractices by making use of criminal law. However, the Council is very economical with this power. Nevertheless, in its recent proposal for a regulation with regard to money laundering (drugs money !) the Council introduces the criminalisation of this behaviour.

The only great exception to this general rule that the enforcement of EEC-law is the affair of the member states relates to the fight against unfair competition (art. 85, 86, 87). The last-mentioned article clearly provides that the competition rules may be enforced by way of fines and penalties, and that to this end an effective control has to be organised. In other words, at this point EEC-law can be considered as punitive law and the European Commission as a regulatory agency, not to say as a special police authority. However, one should note immediately that in Regulation 17 from 1962 in which the punitive power of the European Commission has been elaborated, explicitly is laid down that the named sanctions are no penal sanctions. But this again doesn't alter the fact that this regulation contains a procedure in case of suspicion with respect to unfair competition. In this case the European Commission disposes of powers to ask information, to search firms and to seize documents.

In the light of these facts it isn't surprising that EEC-law sometimes is seen as quasi-criminal law. And this notion has become of more and more importance through the jurisprudence of the Court of Justice and the doctrine concerned. For these bear a lot of resemblance to the general criminal law within the member-states. In the field of substantive law for example not only the principle of legality (and its implications, the prohibition of retrospective effect) but also the principle of guilt are without much ado accepted. And in the field of procedure no

one questions the right of "suspects" to adequate defence and their right to protection of professional or industrial secrets. Besides there is a question of some resemblance to general penitentiary law too : sanctions have to be motivated and they should be proportional to the nature and seriousness of the offences.

Evidently, all this evokes a lot of questions. I only want to touch upon two of them.

The first problem refers to the relation between the EEC-Treaties and the European Convention of Human Rights. The EEC is no party to this Convention and, formally spoken, the Court of Justice isn't committed to it. However, against the background of the European tradition the Court of Justice really takes into account the rights and powers embodied in that Convention. And this is a very important with respect to the enforcement of EEC-law. Notably because in the last ten years or so the Court of Human Rights applies the Convention more and more to the pre-trial proceedings or, more specific, the role of the police in criminal and administrative procedures too. This evolution can be demonstrated by the jurisprudence in cases like Melone (telephone - tapping), Can (legal assistance) and Kostowski (anonymous witnesses).

The second question I want to mention relates to the discussion concerning the "integration" of criminal law into the EEC-Treaties. Time and again a revision of the Treaties in this sense has been advocated. But this plea never obtained enough hearing. Repeatedly even the conclusion of a treaty among the member-states with relation to the specific criminalisation of EEG-fraud has been championed in vain too, although at this moment a new proposal for such treaty is in the course of preparation. And it goes without saying that, if this point already appears to be such a tricky affair, the much broader discussion about the harmonisation of criminal law within the member-states, with a view to a more uniform and equal enforcement of EEC-law in the wake of article 5, is the more arduous.

III. The policy concerning the enforcement of EEC-law.

The normal, traditional form of enforcing EEC-law is a purely administrative one. By way of regulations and/or directives the member-states are under the obligation to organise a less or more severe control system in the areas concerned and to inform the European Commission about its results. In general this way of working hasn't been very suc-

cessful. Not only the institutional capabilities of the several member-states differ considerably from each other and the financial means to build up a tough control system too. But within the member states themselves the pursuit of the named control again and again turns out to be a political hot issue and in this way becomes a shaky business.

In the light of this situation it isn't surprising that the European Commission has taken various initiatives to get the enforcement process more into its power. These initiatives can be placed into two categories : "inside" and "outside" the Commission.

With respect to the "inside-initiatives" first of all the regular, periodical deliberations with the several regulatory agencies or inspections from the different countries may be mentioned that are organised by different directorates of the Commission to discuss the enforcement of the regulations and directives that are under their jurisdiction. In the second place attention must be paid to the foundation of the UCLAF (Unité de Coordination de la Lutte Anti-Fraude) in July 1988. As the explanation already suggests this office is in charge of the anti-EEG-fraud coordination, not only between the several directorates within the Commission that have to deal with the problem of this peculiar form of fraud, but also between these directorates and the regulatory agencies concerned within the member-states; every state has a representative in this office. Thirdly, within the Commission, actually, is made an attempt to establish associations, composed of academics, members of the judiciary, policemen, within the member-states to enlarge the interest in the question of the enforcement of EEC-law.

In relation to the "outside-initiatives" first of all attention should be paid to the point that the Commission pays for the equipment and so on of regulatory agencies within some member states, for example the fishery inspections in Spain and Portugal, to enhance their possibilities to enforce the regulations and directives concerning this special part of its policy. And secondly, a very interesting fact is that the Commission not only has subsidized existing regulatory agencies but also has established in any case a new one : age-control in Italy to enforce EEC-law in the field of agriculture; at the moment the establishment of such an agency in Greece is considered too.

Besides there are some initiatives that are difficult to qualify in terms of "inside" or "outside". Notable mention should be made of the appointment of real European controllers in the matter of fishery. These people mainly do their job in close cooperation with members of the national

agencies. But it should be clear, however, that, working this way, they exert some control on these agencies. To some degree they could also be seen as the starting-point of a European "police of the police".

Taking all the foregoing together the conclusion can be drawn that a threefold strategy is being developed with a view to the enforcement of EEC-law :

- mobilisation of the national (regular and special) police forces, agencies, from below;
- foundation of community "police agencies" from above;
- and interweaving of national and Community "police forces/agencies".

Evidently this expanding strategy poses a lot of problems I just want to name a few of them.

How the relation between the regular police forces and the regulatory agencies should be organised in the near future on a European level. Should for example the strong distinction between TREVI and the UCLAF be maintained ? Or should these consultation mechanisms be amalgamated into one police institution within the framework of the European Commission ? Such a course of events should not only have a lot of practical advantages but also political ones, notably more influence from the European Parliament on policing in Europe. Another question in the longer run will be in that case : what to do with Interpol . Should it be reduced to the letter-box for the European police forces within their relation to police forces in other continents ? Or should it preserve its actual position in Europe ?

IV. The innovation of the regular police : some final remarks.

The most general question that is at stake here, relates to the innovation of the whole police system in Western Europe. It is moving up, if not in federal direction, than in any case in Community direction. And this evolution will in the long run have a tremendous impact on policing in Europe and everything that has to do with it : police law, the judiciary, criminal procedure and so on.

Looking notably at the regulatory agencies one clearly notices this impact by way of the founding and/or the subsidizing of (new) agencies by the European Commission in some countries, and by way of gro-

wing Community control on their functioning in all the member states. Besides under the influence of the Commission their position, their role is changing : from *inspectories* toward bureaux of investigation. So the evolution has a qualitative character too !

The innovation of the regular police forces will be the same to some extent : the European Commission will get more influence on them too ! However, for the rest, I suppose, that their role will encompass more and more not only the investigation of "EEC-crimes" but also the general control of the compliance with EEC-law in general. And this means that the regular police within the member-states have to introduce general Community law into their training programmes, has to establish special groups, task forces etc. to contain massive problems of contravention of EEC-law, have to build, on a national level, bridges towards foreign (national) police forces and the European Commission. So "Europe 1992" really is a challenge for the regular police in Europe !