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THE CIVIL FALSE CLAIMS ACT

USING LINCOLN'S LAW TO PROTECT THE EUROPEAN COMMUNITY BUDGET

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1. Lincoln's Law and the European Community Budget

This paper argues that the US Civil False Claims Act of 1986 (hereafter CFCA) could provide the European Community with a means to effectively protect the largely decentralised revenue collection and expenditure of the Community budget. It also offers a solution to the difficulty of creating an effective means of investigation and penalisation of cross-border fraud without having to create a Community criminal law or a European Public Prosecutor.

The CFCA was originally enacted at the height of the American Civil War. The US government was faced with a series of intolerable scandals concerning defence contractors. The newspapers of the Northern states were full of stories of the Union army being provided with diseased mules, cardboard boots and exploding muskets. Abraham Lincoln memorably railed against such corrupt defence contractors:

Worse than traitors in arms are the men who pretend loyalty to the flag, feast and fatten on the misfortunes of the Nation while patriotic blood is crimsoning the plains of the South and their countrymen are mouldering in the dust.¹

To protect the US budget Lincoln asked Congress to enact a Civil False Claims Act. The original CFCA of 1863 envisaged that private plaintiffs, known as *qui tam* plaintiffs² or

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¹ 89 Cong. Rec. 10,847 (1943). For a discussion of the contractor abuses of the civil war era, see Helmer, *False Claims Act: Whistleblower Litigation* (LexisNexis, 2002) 3rd Edition para 2.4.

² *Qui tam* is contraction of *qui tam pro domino rege quam pro se ipso in hac parte sequitur*, which is translated as one, 'who pursues this action on our Lord the King's behalf as well as his own'. Although the Civil False Claims Act is US legislation the idea of encouraging private parties to enforce public civil and criminal law has European origins. The origins of the CFCA can be traced back to *qui tam* actions in 14th century Europe. In an age with no real system of law enforcement, private citizens, often the victims or the victim's relatives, could bring actions in the name of the Crown to enforce the law. Incentives were built into the *qui tam* system, such as forfeiture of the wrongdoer's assets to the private party enforcing public or criminal law. However, a number of factors, such as the growth of urbanisation, making it more difficult for private parties to know and track down the perpetrators; the rise of seemingly victimless inchoate crimes; the Crown's interest in exercising its prosecutorial rights in order to exercise the right of forfeiture and win public support by tackling crime and as the centuries wore on pressure for respect of defence rights, led to the development of a prosecution system controlled and run directly by the Crown. In colonial America, and for a number of decades after the Revolutionary War, *qui tam* legislation was popular for similar reasons to medieval and early modern Europe, the systems of law enforcement were weak or non-existent and private parties had to be motivated in order to draw them into law enforcement. Helmer, *ibid.*, para 2-2. According to Helmer the greatest early exponent of *qui*

relators would bring actions for recovery against firms or individuals who had defrauded the US government. The penalties for violation of the Act were set at double damages and a civil penalty of \$2,000 per violation. If a relator were successful the relator would collect half of the monies recovered from the suit, the US authorities receiving the other half. The relator prosecuted the action alone and the government had no direct right of intervention. The only way the action could be withdrawn or discontinued was by written consent of both the US District Attorney and the court.³ The relator need not be affected by the defendant's conduct in any way. He or she was deemed to have standing on the basis that the US government, by operation of the Act, could assign its right to sue to the private plaintiff.⁴ The potential of the 1863 Act was eventually emasculated by a series of amending provisions between 1874 and 1943.⁵ However, in 1986 Congress effectively resurrected the Lincoln legislation, following the contractor abuses stemming from the largest peacetime military build-up in US history.⁶ Penalties are now set at triple damages for the US government, with an additional fine of between \$5,500 to \$11,000 per invoice; the Department of Justice has a right to prosecute the case, otherwise the right of qui tam relators to bring actions are retained and the relator-whistleblower can be rewarded with up to 30% of the recovery. Since 1986 the modern CFCA has resulted in recoveries of billions of dollars from firms and individuals who have defrauded the US government and deterred tens of billions of dollars of fraud that would otherwise have occurred.

A European CFCA created by Community regulation, and managed by the European Commission could provide the Community with a powerful means to protect the budget from fraud. Frauds would be more easily detectable and the existence of such a European CFCA would also act as a major deterrent to many potential fraudsters who might otherwise try to defraud the Community budget. In particular, with the accession of 10 new member states, with largely weak public administrations and court systems,⁷ a European CFCA would

tam legislation was Edward III of England. See also Bucy, *Information as a Commodity in the Regulatory World* (2002) Houston LR 905, 910.

³ Helmer, op. cit.

⁴ Bucy, *Private Justice and the Constitution* Tenn LR, (2000) 939, 945-946.

⁵ Act of March 2, 1863, ch. 67, 12 Stat. 696-98 (1863) (first codified by Rev. Stat. 3490-94, 5438 (1874), amended by Ch. 377, 57 Stat. 608 (1943), codified at 31 U.S.C. § 232-35 (1976), recodified at 31 USC, 3729-3731 (1982). The main damage to the Act occurred in 1943. There had been a number of parasitical qui tam suits brought on the back of government criminal prosecutions for contractor fraud in the defence sector. The parasitical suits enraged the then US Attorney General who rather than amending the Act to deter such suits, insisted on the right of the US government to prosecute fraudulent contractors. Despite opposition from a number of Senators who took the view that the government may not always have the will or resources to act, the qui tam elements of the CFCA were significantly curtailed. The 1943 amendments provided that if the government had any knowledge of the fraud when the relator's action was filed, that action must be dismissed. If the Department of Justice (DoJ) took the case the relator became a mere observer. If the DoJ did not bring the case, the relator could proceed. However, in all cases the maximum bounty was 10%. For a discussion the events leading to the 1943 amendments and the impact of those amendments, see Helmer, op. cit., para 2.5. Helmer points out that it was the 'government knowledge' requirement that inflicted real damage on the operation of the Act. A government official somewhere could often be found to have had some knowledge of the fraud. Furthermore the Act was interpreted so that even if a relator provided information concerning a fraud to the government before filing his/her suit, such relator acquired knowledge operated as a bar to the continuance of the suit.

⁶ Helmer, op. cit., para 2.6.

⁷ European Commission, *General Report on EU Enlargement II Progress by the Candidate Countries in Meeting Membership Criteria 2001* (Commission, 2002) 1 Problem of corruption and low salaries in the public sector. In specific country reports concern regarding the independence and effectiveness of the judicial systems in Romania, *2001 Regular Report on Romania's Progress toward Accession 2001* (Commission, 2002) 20; delays

provide significant additional protection for the Community budget in those states. In addition, it would create a Community system of investigation and administrative penalty, which would avoid the technical legal and political difficulties of creating Community criminal offences and a European Public Prosecutor.

2. Dealing with Fraud in the Community Budget

Although representing only 1 to 2% of the total GDP of the member states, the Community budget has a great practical importance in that it is the only source of funds that have generally Community, as opposed to national, objectives,⁸ and it gives political expression to policies that underpin European integration.

The Community budget for 2002 is €98.2 billion. It is derived from what are known as 'own resources'. These include customs and agricultural import duties, €14.80 billion and €1.8 billion respectively; 1% of the VAT take of each of the member states, €38.30 billion; and a payment made by each of the member states based on the size of GDP, €43 billion.⁹ On the expenditure side just under half goes on agricultural support at €45.2 billion, followed by €34.5 billion on the structural funds, such as the European Regional Development Fund, European Social Fund and Cohesion Fund. Relatively smaller amounts are then spent on training, youth and employment at €8.4 billion; energy and the environment, €5.2 billion and €4.1 billion on research and development.¹⁰

Under Article 274 of the EC Treaty, the European Commission is required to implement the budget on its own responsibility and within the limits of its appropriations in accordance with the principles of sound financial management. The member states are required to cooperate with the Commission to ensure those objectives are met. Article 274 is underpinned by Article 280, which directs the Community and the member states to counter fraud and other illegal activities affecting the financial interests of the Community. In reality, while the Commission has legal and political responsibility for the budget, the member states collect and pay 100% of the budget to the Community, and spend over 80%, mostly the agricultural and structural funds, on the Community's behalf. They are also responsible for supervising the effective application of the budget and applying administrative and criminal penalties should fraud affect the budget.

The Commission's role in combating budget fraud and irregularities is limited. It does have its own anti-fraud organisation OLAF (known by its French acronym for Office Européen

in the Polish judicial system, with a backlog of 1.8 million cases and concerns about corruption in a small number of cases, *2001 Regular Report on Poland's Progress toward Accession*, op. cit., 20; Lithuania's report raises concerns regarding both judicial vacancies and the backlog of cases, *2001 Regular Report on Lithuania's Progress toward Accession*, (Commission, 2002) 18-19; similar concerns regarding judicial vacancies, as well as low salaries and backlogs are raised regarding Latvia, *2001 Regular Report on Latvia's Progress toward Accession* (Commission, 2002) 17-18 and concerns are also raised in Hungary regarding the overloaded Supreme Court, *2001 Regular Report on Hungary's Progress toward Accession*, op. cit., 18. See also UNICE, *Ensuring Enlargement is a Success*, UNICE Position Paper, May 2002 (UNICE, 2002).

⁸ Aside from the funding obtainable from the European Investment Bank, and for the accession states, the European Bank for Reconstruction and Development.

⁹ With the continual multilateral cuts in customs duties through WTO measures, customs duties are a declining source of Community revenue, the two largest sources of revenue are now VAT payments and the GDP based resource.

¹⁰ European Anti-Fraud Office, (OLAF, 2003) page 8. Available at: http://europa.eu.int/comm/anti_fraud/publications/brochure/index_en.html

Lutte Anti-Fraude).¹¹ OLAF's principal role is to undertake internal investigations in respect of fraud and irregularity in use of Community funds within the European institutions. However, should criminal investigations become necessary, then OLAF requires the assistance of the member state in which the Community office is located where the fraud or irregularity occurred to undertake criminal investigations and, if necessary prosecutions. In relation to external investigations, OLAF can with the assistance of the member states carry out checks and inspections provided by Community regulations.¹² Again, whatever part OLAF plays in the investigation, criminal and administrative proceedings are in the hands of the member states. OLAF's role in the external investigation field is further limited by its staff resources. It has just 350 staff.¹³ It is also restricted in the investigations it can undertake by its reliance on the member states and the general public to report cases of fraud and irregularity. This may explain why OLAF has carried out very few inspections under its own external investigation regulation.¹⁴

While OLAF can act as a significant intelligence and cooperation unit for the member state agencies in the fight against fraud, its role as a fraud-buster is strictly limited by its resources, the limits of its investigative powers and its lack of administrative or criminal penalties. The initial response to this question of lack of resources, investigative powers and penalties is that investigation and punishment is a matter for the member states. The states punish all other forms of fraud; there is no reason why they should not also investigate and punish fraud against the Community budget as well. Furthermore, the Community has adopted two significant measures to assist the member states in prosecuting fraud. First, a Convention on the Protection of the Community's Financial Interest,¹⁵ and second a regulation providing for the Protection of the Community's Financial Interest.¹⁶ The Convention provides for a common definition of fraud,¹⁷ and the Council Regulation provides for a common definition of financial irregularity,¹⁸ together with appropriate common standards for penalties, time

¹¹ OLAF may also be assisted by two nascent European organisations EUROJUST, a judicial network and EUROPOL, the European Police Co-operation unit. For a discussion of the role of both organisations see *Comprehensive EU Policy against Corruption* (European Commission, 2003) COM (2003) 317 Final 28th May 2003, 10.

¹² For a discussion of the detailed powers of OLAF in respect of its powers of investigation, see Gless and Zeitler, *Fair Trial Rights and the European Community's Fight Against Fraud* (2001) ELJ 219.

¹³ For example, there are only currently 28 OLAF investigators to deal with all internal, direct expenditure, external aid and structural fund cases. *Report of the European Anti-Fraud Office, Third Activity Report for the Year Ending June 2002*. (European Commission, 2003) 15.

¹⁴ Although OLAF has powers under Regulation 2185/96 to undertake external investigations with the support of the member states, these powers have been scarcely used. See *OLAF Supervisory Committee Report*, June 2003 (European Commission, 2003) 10.

¹⁵ Convention Drawn Up on the Basis of Article K3 of the Treaty on European Union, on the Protection of the European Communities Financial Interest OJ 1995 C316/49.

¹⁶ Council Regulation 2988/95 on the Protection of the European Communities Financial Interests OJ 1995 L312/1.

¹⁷ Fraud is defined for the purposes of the Convention, as any intentional act or omission in respect of revenue or expenditure relating to the use or presentation of false, incorrect or incomplete statements or documents, which has as its effect the misappropriation or wrongful retention of funds from the general budget of the European Communities or budgets managed by, or on behalf of the European Communities; or non-disclosure of information in violation of a specific obligation, with the same effect or the misapplication of funds or misapplication of a legally obtained benefit with the same effect. Article 1.

¹⁸ Irregularity is defined as any infringement of a provision of Community law resulting from an act or omission which has or would have the effect of prejudicing the general budget of the Communities or budgets managed by

limitations in bringing cases and provision for the member states to carry out checks and inspections.¹⁹

Fraud in the Community budget is not a new phenomenon. There are indications that the agriculture budget was subject to fraud as early as the 1950s.²⁰ A study in the 1960s suggested that one-third of Community steel subsidies were fictitious.²¹ However, fraud in the foundational period of the Community running from its creation in the 1950s to the late 1970s and early 1980s was largely ignored by the media, the public and politicians. This benign neglect of fraud in Community budgets was first shaken in the late 1970s with the Como butter scandal and subsequent fraud scandals, together with the allegations that 10-15% of the budget was subject to fraud.²² In the recessionary climate of the early 1980s the media, the public and politicians began to focus on the fraud issue. Political pressure led to the first significant anti-fraud measures being adopted and culminated in the establishment of OLAF's predecessor, UCLAF in 1988. From then on a series of legislative measures such as International Conventions, Community regulations, action plans and cooperative measures have been launched to tackle budget fraud. The political priority of 'budget fraud' was heightened by the fall of the Santer Commission in March 1999 and led directly to the replacement of UCLAF with OLAF, with increased powers of investigation within the Community institutions.²³

Currently reported fraud amounts to less than 1% of the total Community budget.²⁴ However, the true 'dark number' of unreported cases is likely to be much larger.²⁵ There are several reasons for significant under-reporting. In the first place, the member states do not want to report too much fraud and irregularity to the Commission. Large fraud figures make a state's

them, either by reducing or losing revenue accruing from own resources collected directly on behalf of the Communities, or by an unjustified item of expenditure. Article 1(2).

¹⁹ The Convention provides that penalties for fraud must be effective, proportionate and dissuasive, including in the case of serious fraud, deprivation of liberty. The minimum amount of fine must not exceed €50,000. Article 2. Establishes the principle of criminal liability of heads of businesses (Article 3); provides for jurisdiction (Article 4); extradition and prosecution (Article 5); co-operation (Article 6) and rules on double jeopardy (Article 7). The Regulation provides for the adoption of checking and inspection measures (Articles 2 and 8); imposes a limitation period of 4 years (Article 3); provides for Administrative Penalties (Articles 4 to 8).

²⁰ White, *Protection of the Financial Interests of the European Communities: The Fight against Fraud and Corruption* (Kluwer, 1998) 7.

²¹ Checks carried out in the steel industry in the 1960s revealed that one third of the subsidised categories were fictitious. House of Lords Select Committee on the European Communities, *Fraud against the Community* (HMSO, 1989) 88.

²² For a discussion of the origins of the fight against Community fraud, see the European Parliament's website on the subject (http://www.europarl.eu.int/comparl/libe/elsj/zoom_in/38_en.htm#1).

²³ Prior to the fall of the Santer Commission and the creation of OLAF, its predecessor UCLAF was only able to undertake investigations into the operations of the Commission and not into the other European institutions. OLAF was given powers in Regulations 1073/1999 and 1074/1999 to be able to undertake investigations into other European institutions. Recent case law has made it clear that this power of internal investigation extends to a wide range of European agencies. See Case C-11/00 *Commission v. ECB* and C-15/00 *Commission v. EIB* both of 10 July 2003, not yet reported.

²⁴ In the last three years, the total annual figures in euros for the value of reported fraud cases were as follows: for 2002, €324 million; 2001 €238 million and 2000 €517 million. See *Protection of the Financial Interests of the Communities and Fight Against Fraud, Annual Report 2003*, COM (2003) 0445 Final 23rd July 2003 (European Commission, 2003) 67.

²⁵ A term coined in an article in 1994. See Ruimschotel, *The EC Budget: Ten Per Cent Fraud? A Policy Analysis Approach* (1994) JCMS 317.

enforcement and supervisory agencies look weak and can cause political problems at home.²⁶ In addition, reporting of fraud and irregularity is likely to result in the freezing of allocations to the programmes in question, and potentially the cutting of a states overall funding allocations.²⁷ A further difficulty is that most of the fraud against the Community budget involves a fact pattern that is cross-border. Evidence tendered before the House of Lords Select Committee on the European Union indicated that 80% of the value of fraud relating to the Community budget was cross-border.²⁸ Consequently it can be very difficult, if not impossible, for Member State agencies to know if a fraud or irregularity has been committed. For example, whether VAT was in fact paid in another Member State or goods to a destination outside the Community and granted export subsidy, actually were exported or were diverted back into free circulation within the Community. Thirdly, there is often a lack of incentive to protect Community resources. The least incentive is likely to exist in particular in respect of collection of customs duties, where the tax is 100% a Community resource but 100% dependent on collection by the member states, and compounded by the significant potential for cross-border fraud, which requires co-operation between the member states to tackle, and given that the fraud does not concern a Member State tax resource and involves the expenditure of state resources, such co-operation is not necessarily forthcoming.²⁹ Fourthly, there is the particular problems of the Accession States of Central and Eastern Europe who may not, even less than some of the western member states, have the administrative resources and procedures to effectively protect the Community's financial interests.³⁰

A fundamental question in respect of the protection of the Community's financial interests is whether the member states, largely on their own, can either be relied on to or otherwise effectively protect those finances. The lack of willingness to report fraud cases and late³¹ or poor³² reporting; an unwillingness to recover unwarranted payments;³³ the lack of incentive to protect Community resources such as customs duties; the evident lack of commitment to

²⁶ Ruimschotel, *ibid.*, 321, 325.

²⁷ Ruimschotel, *op. cit.*, 330.

²⁸ *Prosecuting Fraud on the Communities' Finances-The Corpus Juris*, Ninth Report, (HMSO, 1999) para 2.

²⁹ White, *op. cit.*, 65. White also points out the low morale of customs officials whose numbers have been cut as a result of the removal of internal borders; the burden work of running the transit system and their own lack of resources. The Commission has more recently expressed concern regarding the funding of customs operations in Western Europe and amongst the Central and Eastern European states, post-accession. It is particularly concerned that those states that have funded their customs operations will be undermined by the lack of investment by other member state customs agencies. See *Strategy for the Customs Union* (European Commission, 2001) Com (2001) 51 Final 12.

³⁰ For a discussion of the state of play of the accession states' readiness to protect the finances of the Community, see *Protection of the Financial Interests of the Community, Annual Report 2002, op. cit.*, 7-13.

³¹ Even where the member states report cases, they can take so long before they report that the reporting is valueless. See *Protection of the Financial Interests of the Community, Annual Report 2002, op. cit.*, 47, which suggests that reporting to the Commission post-detection can take considerable lengths of time. As the supervisory committee in its most recent report points out, late reporting makes it very difficult to identify the responsible individual. See *Supervisory Committee Report, op. cit.*, 13.

³² The largest number of reported irregularities (1548 cases in 2002) had the code 99, which stands for unknown. This means that the member states were not able to identify the products concerned in the irregularities. As the Commission says "this information has no added value". See *Protection of the Financial Interests of the Community, Annual Report 2002, op. cit.*, 55-56.

³³ *Protection of the Financial Interests of the Community, Annual Report 2002, op. cit.*, 16.

prioritising the issue, either in terms of resources³⁴ or legislation,³⁵ suggest that it would be unwise to rely on the member states to put in place the resources, legislation and cooperative measures necessary to protect the Community's financial interest. Furthermore, there are strong grounds for arguing that the member states are unable to effectively respond to much of the cross-border fraud and irregularity. The difficulty is that while the Community constitutes a single commercial territory with open borders, there are 17 legal borders. A criminal jurisdiction limited to national territory compounded by 17 different types of criminal procedures and rules of evidence makes it extremely difficult if not impossible to detect and then prosecute cross-border fraud cases. A whole series of barriers face national prosecutors seeking to try a cross-border case in a national court.³⁶ The principal danger however is that the national trial court will refuse to accept evidence that has been obtained in another Member State, on the grounds that it was not obtained by the same sort of procedure in the national court or according to the trial court's rules of evidence.

Frustration with the problem of obtaining convictions in cross-border fraud cases in the national courts have encouraged the Commission to suggest the establishment of a European Public Prosecutor's (EPP) office.³⁷ The EPP would investigate cases of fraud against the Community budget, and allocate cases to national Deputy EPPs. Evidence obtained by the EPP's office would be required to be recognised by the national trial court. While this proposal would certainly make it easier to undertake criminal prosecutions in the national court and gain convictions, despite being included in the draft EU Constitution,³⁸ it is likely to face significant political hostility among the member states. Many states refuse to accept that the Community should have any criminal jurisdiction.³⁹ Furthermore, as the House of Lords Select Committee on the European Union pointed out, there are questions as to the feasibility of such a proposal.⁴⁰ Another option suggested by the House of Lords Committee, however, in the form of greater cooperation, is open to question,⁴¹ for as explained above, the member

³⁴ The Commission circumspetively puts it: "The very limited share of manpower assigned at national levels to such anti-fraud controls (investigation services of the ministries, police and judicial authorities) may indicate that insufficient account has been taken of the criminal law dimension of serious acts prejudicial to Community public finance". See *Protection of the Financial Interests of the Community, Annual Report 2002, op. cit.*, 15.

³⁵ The member states took from 1995 to October 2002 to ratify the first Convention on the Protection of the Financial Interests of the Community. An additional 1997 Protocol on money laundering has yet to be ratified. By contrast, the member states managed to agree and ratify the politically controversial Treaties of Amsterdam and Nice in that same time frame!

³⁶ A list provided by the Select Committee of the House of Lords includes the inability to obtain foreign communication intercepts; lack of provisions to compel foreign-based witnesses to give evidence; gaps in member states' ability to assist one another in tracing, seizing and confiscating criminal assets; as well as the ubiquitous problem of ensuring the recognition of foreign-obtained evidence in the courts, especially written evidence. See House of Lords Select Committee on the European Union, *Prosecuting Fraud on the Communities Finances-The Corpus Jurist*, Ninth Report, (HMSO,1999) para 35.

³⁷ See the details of the EPP proposal in the *Green Paper on Criminal Law Protection of the Financial Interests of the Community and the Establishment of a European Prosecutor*, (European Commission, 2001) COM (2001) 715 Final, 11th December 2001.

³⁸ Article III 175 of the draft Constitutional Treaty establishing the European Union.

³⁹ As a consequence on a number of occasions the member states have refused to accept proposals creating any form of criminal law legislation within the first pillar. 'EU legislation' has only been adopted on an inter-governmental basis through the third pillar.

⁴⁰ The Select Committee pointed out the practical difficulties of prosecuting fraud under two legal regimes side by side. *Prosecuting Fraud on the Communities Finances, op. cit.*, para 119.

⁴¹ *Prosecuting Fraud on the Communities Finances, op. cit.*, para 131.

states appear very reluctant to really engage with the issue and assist the Community in effectively protecting its financial interests.

3. The Civil False Claims Act 1986

3.1 The CFCA 1986

The Act creates civil liability for any person who knowingly⁴² presents or causes to be presented a false or fraudulent claim for payment or approval.⁴³ The scope of a false claim is very broad. It includes conspiracy to defraud the government by getting a false or fraudulent claim to be allowed or paid;⁴⁴ a reverse false claim where a person uses or causes to be used a false record or statement to conceal, avoid or decrease an obligation to pay or transmit money or property to the government⁴⁵ or where a person making or delivering a document certifying receipt of property used or to be used by the government and, intending to defraud the government makes or delivers the receipt without completely knowing that the information on the receipt is true.⁴⁶ The burden of proof in CFCA cases is the civil preponderance of evidence standard.⁴⁷

The CFCA contains two major penalties. The first penalty is of at least \$5,500 and not more than \$11,000 for each violation.⁴⁸ The second penalty is three times the damage sustained by the government as a result of the defendant's conduct.⁴⁹ These penalties are applied cumulatively.⁵⁰ Hence in a case which inflicted only relatively minimal damage on the US government, but involved numerous violations, e.g. over-priced ball-bearings provided by a defence contractor, each invoice would attract at least the minimum \$5,500 fine, even if the application of the triple damages rule in the Act itself resulted in a relatively small penalty. Equally, one major order, which was significantly over-priced, would result in only one fixed penalty, where the maximum fine could only be \$11,000; however, the triple damages rule could impose a very significant penalty on the defendant.⁵¹

⁴² Knowingly and knowing are defined under the statute as meaning that a person with respect to information, has actual knowledge of the information; acts in deliberate ignorance of the truth or falsity of the information or acts in reckless disregard of the truth or falsity of the information and no proof of specific intent to defraud is required. 3729 (b) (1)-(3).

⁴³ 3729 (a) (1).

⁴⁴ 3729 (a) (3).

⁴⁵ 3729 (a) (7).

⁴⁶ 3729 (a) (5).

⁴⁷ 3731(c).

⁴⁸ The 1986 amendments originally provided for fine levels of \$5,000 and \$10,000. However, under the Federal Monetary Penalties Inflation Adjustment Act of 1990, the levels have been increased to respectively \$5,500 and \$11,000 in respect of violations of the CFCA occurring on or after 29 September 1999.

⁴⁹ The Court however may assess less than treble damages if it determines that the violator of the Act furnished responsible government officials with all information known to the violator within 30 days of learning of it and fully cooperated with the government investigation. In addition, there must have been no ongoing civil or criminal investigation of which the violator was aware. 3729(a).

⁵⁰ Damage does not have to be actual damage for the civil penalties to apply. It is sufficient that there is proof that a violation has occurred for the Act to apply and civil penalties to be levied. Causation however has to be demonstrated for compensatory damages to be obtained. For a discussion of the issues involved in assessing damage, see Helmer, *op. cit.*, para 3.14.

⁵¹ 3729(a).

Relators, sometimes called whistleblowers or qui tam plaintiffs (hereafter relators), are entitled under the Act to a share of the monies recovered. If the DoJ initiates a prosecution based on the evidence of the relator, the relator receives between 15 and 25% of the monies recovered, plus reasonable attorneys' fees, costs and expenses. If the DoJ leaves the relator to prosecute, then the percentage going to the relator is likely to be greater. The amount a relator can recover in such circumstances is 25 to 30%.⁵²

There are a number of grounds under which the recovery by a relator can be reduced. The courts may limit the recovery to 10% or less if the litigation process reveals that the evidence rests mainly on already available public information.⁵³ The amount a relator recovers is also reduced if the relator participated in the fraud. In particular, the relator gets nothing if the relator is convicted of criminal conduct that also violates the Act. Even where there is no criminal conviction, the court may reduce the percentage of the recovery going to the relator who planned and initiated CFCA violations.⁵⁴

Proceedings are initiated by a relator serving the DoJ with a copy of the complaint, and substantially all the material relating to the case in the relator's possession. The complaint is placed under seal with a US District Court for an initial 60 days, during which period the DoJ assesses the complaint. The complaint is not served on the defendant until the 60-day period has expired. The DoJ may seek extensions to the initial 60-day period. The DoJ has a number of options. It can prosecute the action itself, settle the action, and let the relator proceed independently, or seek to have the action dismissed.⁵⁵ If the relator is permitted to proceed independently the DoJ can intervene in the case, and later intervene to seek dismissal; intervene to support or takeover the case.⁵⁶ In most cases the DoJ will arrive at a settlement with the defendants, and the relator's percentage will be subsequently decided in a hearing before a Federal district judge. In parallel, the DoJ may have instituted criminal proceedings against individual employees or executives of the defendant's firm.

3.2 The Impact of the CFCA

Since its resurrection in 1986, the CFCA has proved to be a uniquely powerful system for recovering losses from fraudsters. Between 1986 and September 2002, the US government recovered \$6.39 billion. Relators have recovered over \$988 million as their percentage of the recoveries. From a handful of cases prior to 1986, 3,954 cases have been filed in the 16 years between 1986 and September 2002.⁵⁷

The CFCA has had an even more powerful effect on potential fraudsters. Research commissioned by the not-for-profit organisation Taxpayers against Fraud, suggests that the Medicare error rate, which measures improper payments, fraud and waste, fell from 14% in

⁵² 3730 (d)(1).

⁵³ Ibid.

⁵⁴ 3730 (h). It should also be noted that restrictions are placed on a number of classes of private suits, brought by members of the armed forces, against members of the Federal Institutions, if a proceeding has already been initiated or the evidence is based on publicly disclosed information, 3730(e).

⁵⁵ 3730(b)

⁵⁶ If the defendant wins and the court finds that the action was clearly frivolous vexatious or brought primarily for the purposes of harassment, the relator plaintiff may be required to pay all reasonable attorneys fees and expenses, 3730 (d).

⁵⁷ The statistics from the US Department of Justice are collated on the Taxpayers against Fraud website (see www.taf.org).

1996 to 7% in 2000. Complaints under the CFCA were a critical element in reducing the error rate.⁵⁸ If that research is correct the CFCA has resulted in savings of literally tens of billions of dollars to the US Treasury in the health sector alone.

There are a number of features of the CFCA that go some way to explaining its success. In particular, relators are potentially able to obtain very high financial payments as a result of blowing the whistle. There are very strong grounds for paying high financial rewards. The Act recognises the reality that inside information in relation to fraud against the US government is extremely valuable.⁵⁹ The complexity of most instances of fraud, and its covert and opaque nature make it difficult for 'outsider' regulatory agencies to effectively police payments to government contractors.⁶⁰ It is also clear that the damage that fraud can do to the interests of the US government and taxpayer can be very significant.

A second reason for providing such major financial incentives is that relators at the very least are likely to face the liquidation of the careers in which they have often invested their lives.⁶¹ They are likely to find that they are unable to work in their own industry ever again. There is also the likelihood, if not certainty of extremely stressful and damaging retaliation, often social and economic and sometimes physical.⁶² In fact the Act goes so far as to provide a special cause of action to protect relators.⁶³

The third reason to pay relators a significant percentage of the monies recovered is that they can then enter contingency fee arrangements with major law firms who can prepare their case. The contingency fee arrangement is necessary, as the work is complex, time-consuming and usually requires very high-quality legal advice to present a complaint⁶⁴ or if the DoJ does not bring the case, to institute one's own qui tam proceedings.⁶⁵ There is a threefold advantage from the perspective of the state to contingency fee arrangements in this context. Firstly, the lawyers do all the hard work of putting the case together, saving the state the cost of the detailed investigative effort otherwise necessary. Secondly, the lawyers act as a filter system for the state, weeding out weak, speculative or suspect complaints. Thirdly, by inducing

⁵⁸ Meyer and Anthony, *Reducing Health Care Fraud, An Assessment of the Impact of the False Claims Act*, (Taxpayers Against Fraud, 2001) 12-13.

⁵⁹ One striking example is the Yield Burn Case, in which a former Managing Partner of investment firm Smith Barney revealed to the US Treasury that most of the major Wall Street banks were illegally overpricing US Treasury securities. The Treasury was not aware of this practice or its extent. As a result of the CFCA whistleblower complaint, a multi-agency investigation was launched, hundreds of millions of dollars were recovered and the practice of yield burn terminated in the sector. Meyer and Anthony, *op. cit.*, 104-109.

⁶⁰ Bucy, *Private Justice*, (2002) S.Calif LR 1, 8.

⁶¹ See Helmer, *op. cit.*, para 1.2 for a graphic account of the tribulations of whistleblowers.

⁶² See Bucy, Houston LR, *op. cit.*, 950-951, for a further graphic account of the travails of whistleblowers.

⁶³ 3730(d)2. This includes restoring seniority, two times back pay, interest on back pay, special damages, litigation costs and reasonable attorneys fees.

⁶⁴ From the perspective of the relators, it is usually preferable to put together a very good complaint which induces the DoJ to initiate proceedings. This approach reduces the financial exposure of the relator and his or her attorneys, and means that the full investigative powers of the state can be deployed in the case. The relator may then be able to ride the DoJ case to the settlement where the court should award the relator his/her cut of the recovery.

⁶⁵ From the raw DoJ figures it appears that the qui tam plaintiffs have very little chance of success on their own account. To date of the \$6.39 billion recovered, \$6.11 billion were recovered in DoJ proceedings and only \$276 million in qui tam proceedings. However, Helmer, *op. cit.*, para 18.2(d) argues that the DoJ includes in the amounts it recovers cases in which it intended to intervene, but actually did not undertake intervention. The DoJ also intervenes in a case just prior to settlement and then counts such recoveries in its list of recoveries. Helmer argues that this practice significantly underestimates recoveries by qui tam plaintiffs.

lawyers to get involved via payment of contingency fees, the state significantly increases the enforcement resources devoted to the prosecution of fraud at no cost to itself.

There are also a number of potential downsides to the CFCA. There is a danger that the CFCA procedures could be ‘gamed’ by a relator who let the fraud continue in order to increase the damage and thereby his/her potential percentage of the recovery.⁶⁶ This can be countered by emphasising that there is a premium for the first relator to provide evidence to the DoJ. The courts could also stand guard over such behaviour, evidence of such behaviour being a basis for a reduction in the percentage the relator would receive. It is also important to put in place restrictions against relators bringing actions based on anything other than first hand or original source information rather than public information. The issue of what counts as original source information is one of the most litigated issues surrounding the CFCA.⁶⁷

Perhaps the most powerful challenge to the CFCA is the argument that the Act can become a prosecutorial engine against business. In the first place there is the danger that the DoJ will take the view that a relator may win and recover for the government; therefore it will use its power to seek dismissal of a relator case sparingly. Hence, undertakings are left with the expense and trouble of defending cases that often turn out to be fundamentally unmeritorious.⁶⁸ Secondly, particularly, in the health care sector, the frauds alleged by relators and then prosecuted by the DoJ sometimes appear to be more technical than real.⁶⁹

Clearly any European CFCA legislation would have to effectively tackle these concerns. In particular, steps would have to be taken to ensure that any whistleblowers could not use information already in the public domain, and that undertakings are protected against false allegations.

4. A European CFCA to protect the Community budget?

A European CFCA would significantly increase the level of protection provided to the Communities’ financial interests.⁷⁰ A Community regulation closely based on the CFCA 1986

⁶⁶ Kovacic, *Private Monitoring and Antitrust Enforcement: Paying Informants to Reveal Cartels*, (2001) GWLR 766, 795.

⁶⁷ The Act prohibits private suits that are based on public disclosure of allegations in a criminal, civil or administrative hearing or accounting office report; a hearing, audit or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information. 3730 (e)(4)(A).

⁶⁸ Although the DoJ has exercised its power to seek dismissal sparingly in the past, it has recently taken a more active stance. Bucy, S.Calif LR, *op. cit.*, 71.

⁶⁹ Bucy, S.Calif LR, *op. cit.*, 64. Bucy quotes the CFCA expert John T. Boese, who described the situation faced by health care providers because of the FCA: “[H]ealth care providers today are expected to operate in an almost Kafkaesque environment, where conventional conduct is made illegal and where the government is permitted broad prosecutorial discretion, the exercise of which is unpredictable and subject to being overruled by both private citizens and other branches of government”. For further criticism of the health care cases, see Trunk, *Sounding the Death Toll for Health Care Providers: How the Civil False Claims Act has a Punitive Effect and why the Act Warrants Reform of its Damages and Penalties Provision* (2003) GWLR 159. However, the DoJ has now taken some steps to overhaul prosecution by issuing guidelines for prosecutors in dealing with health care cases, see Helmer, *op. cit.*, para 18.2(f).

⁷⁰ One solution, at least on the revenue side to the problem of protecting the Communities’ financial interests, would be to abandon VAT and customs receipts as sources of Community revenue and instead provide more resources out of GDP per capita allocation. This would certainly fraud proof almost all the revenue provided to the Community. GDP per capita allocations are entirely fraud proof. See *Protecting the Communities’ Financial Interests – The Corpus Juris*, *op. cit.*, para 105. However, taking such a step would not solve the actual problem of customs and VAT receipts being susceptible to fraud, and particularly cross-border fraud. All the Community

would be likely to result in an increase in detection of fraud against the revenue and expenditure sides of the Community budget.⁷¹ Of even greater importance is the likely deterrent effect. Potential fraudsters may well be deterred from even attempting to defraud the Community when faced with the prospect that a member of staff of the fraudulent enterprise, contractor or other supplier who comes to have knowledge of the fraud can whistleblow profitably to the Commission. That deterrent factor is increased by the fear of the size of the fines that could be imposed on the enterprise. Given that a very high proportion of the value of fraud against the Community budget is cross-border fraud, and therefore difficult to detect, a European regulation that puts a financial premium on inside information and encourages whistleblowers to come forward is likely to prove a powerful new weapon in the fight against fraud.

A European CFCA does not only have significant advantages in terms of detection and deterrence. It also offers a solution to many of the legal and political difficulties encountered in proposals for Community criminal law directives and the proposed European Public Prosecutor (EPP). Most member states have opposed the creation of Community criminal law legislation and the office of EPP on the grounds that the Community has no criminal law jurisdiction, and in any event, such a step amounts to too great an interference in the legal systems of the member states. The European CFCA could provide a Community civil definition of fraud,⁷² a Community-wide investigation system and Community administrative prosecution before a Community court – but which is civil in nature,⁷³ and therefore does not face the same objections as criminal law legislation or an EPP.

There is also a precedent within the Community *acquis* for cross-border civil investigative and contentious procedures and penalties, run by the Commission, in respect of the EC competition rules. That investigative and enforcement system, currently enshrined in Regulation 17/1962 could be adapted for the European CFCA. Hence, following a complaint

would be doing is transferring the problem to the member states. Although in the case of customs duties, by returning that source of finance to the member states, such a step may give some states more incentive to tackle fraud in that sector. Furthermore, returning revenue sources to the member states will not deal with fraud on the expenditure side, particularly in respect of the large agricultural and structural fund budgets.

⁷¹ The legal base for a Community regulation establishing a European CFCA would be Article 280(4) of the EC Treaty, which permits the adoption of 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. However, if it were decided to use the European CFCA to protect national revenue and funds also defrauded in the same act, then another legal base would probably be required – possibly Article 308 of the EC Treaty.

⁷² There are a number of difficulties with the current definition of fraud and irregularities. In the first place it is often difficult to distinguish between a fraud and irregularity. In the second place the two definitions have different legal bases. Fraud is defined under an international convention, where it is easier for member states and their courts to impose their own concept of the proper scope of the definition. Irregularity is governed by Community law and subject to the general principles of Community law, and subject to common interpretation as part of the *acquis* and is more easily the subject of a reference to the European Court of Justice. A major advantage of a European CFCA is that a common approach could be taken to fraud and irregularity. It is submitted that the concept of ‘false claim’ under the CFCA may provide a better starting point for the development of a common definition than the current Community concepts of fraud and irregularity. In particular, because under the CFCA the definition includes not just intentional acts, but also where a fraudster acts in deliberate ignorance of the truth or falsity of the information or acts in reckless disregard of the truth or falsity of the information.

⁷³ It would also be possible to apply a lower civil standard of evidence in proceedings, thereby making it easier to impose fines and recover losses to the Community budget.

by a whistleblower,⁷⁴ the Commission would be able to issue decisions for the surrender of documents or undertake unannounced inspections to copy documents and ask questions. The Community competition system also involves the payment of very heavy fines. In recent cases fines have been as high as €462 million.⁷⁵

However, certain features of the European CFCA regulation would be likely to differ from Regulation 17. One feature in particular is the contentious procedure whereby the Commission not only investigates and prosecutes the case, but effectively acts as judge, albeit subject to review by the Court of First Instance. There are grounds for arguing that the decision as to whether or not a whistleblower should receive a share of the recovered proceeds should be made by an independent judicial authority, rather than the Commission. This argument is significantly reinforced if the whistleblower as relator is going to bring the case himself if the Commission refuses to take the case. Few potential relators would be willing to bring a case themselves if the proceedings were instituted before a Commission administrative proceeding, with the Commission drafting the final decision, when the Commission had already refused to bring the case itself.⁷⁶ It is also the case that national criminal prosecutors would be likely to find it much more difficult to bring a prosecution with evidence tendered in a CFCA case, where the CFCA decision had occurred before a tribunal where the investigation, prosecution and judge had been undertaken by one institution, the Commission.

As with the US CFCA the European CFCA would impose a high penalty of three times the loss to the Community budget and in addition would impose a high minimum false claim fine of several thousand euro and a maximum fine double that amount, per false claim. The European CFCA would also contain a provision providing for a significant maximum percentage of the fine to be paid to the whistleblower, the actual percentage to be decided by a court or other independent judicial authority, and not the Commission. The regulation would create statutory protections for the whistleblower to protect him or her from retaliation as well as criteria for assessing the percentage that a whistleblower should receive. Increases would be justified for instance by the speed with which the relator came to the Commission or the continued and complete assistance given to the Commission. Decreases would be justified, for example, by dilatoriness, complicity in the fraud or the availability to the Commission of alternative sources of information.

One difficult question is whether the *qui tam* procedure in which the whistleblower can step into the shoes of the authority and sue in its name if the public authority does not take the case can be utilised in the Community context. The principle difficulty with the *qui tam* procedure in a Community context is that *qui tam* relators can rely on the powerful US Federal Rules of Civil Discovery to obtain additional documents to further prove their case, including wide-

⁷⁴ In fact the current Community competition system relies heavily on corporate whistleblowing in order to prosecute the most egregious anti-competitive activities, such as price-fixing cartels. See Van Barlingen, *The European Commission's 2002 Leniency Notice after One Year of Operations* (2003), European Commission Newsletter, Summer 2003, 16-22.

⁷⁵ *Vitamins Cartel*, November 2001 (European Commission, 2001).

⁷⁶ Clearly the US concern that *qui tam* cases are being run on the basis of minor technical breaches of the law would be reinforced if the prosecutor were also effectively the judge at first instance. On the other hand, it is also the case that one of the other major concerns, the lack of DoJ control over relators, would be unlikely to be so apparent in the EC, particularly if the current DG Competition-controlled contentious procedure is maintained. Unlike the DoJ, the effect of permitting a relator to proceed would have the effect of committing Commission resources to run the contentious procedure and draft a decision. Hence the Commission would be likely to take a tougher line than the DoJ as to which relators can and cannot bring such an action.

ranging discovery and interrogatory procedures.⁷⁷ Such rules do not exist in the member states. Clearly, this is not so much a problem for the Commission under the European CFCA would have the evidence from the whistleblower, and it would be able to use its powers to obtain documents and carry out unannounced inspections to obtain further evidence. The position is different for relators, however. They are not the Commission and do not automatically have access to its powers of investigation. Even though relators would bring their proceedings before Community courts, it is difficult to see the member states agreeing to create a wide-ranging civil discovery procedure for them even to protect the Community budget. An alternative approach would be to apply the logic that the *qui tam* relator sues on behalf of the public authority and allow the relator to deploy the Commission's power to obtain documents and power to make unannounced inspections of the defendant's premises, subject to a court order. Again there may well be political difficulties with this solution as well.

An alternative approach, and one that may prove attractive to the member states, would be to apply the *qui tam* relator procedure solely to cases where the alleged fraud related to funds managed directly by a Union institution or agency or concerned an official of a Union institution or agency. There are good policy grounds for taking this approach. It is not unreasonable to suppose that the Commission would be willing to be vigorous in the protection of its own revenue and expenditure, and revenue and expenditure of other Union institutions or agencies. By contrast, it is not unreasonable to suppose that the Commission may not be so vigorous in taking action against alleged fraud affecting its operations or officials or those of other Union institutions or agencies.

Even if a *qui tam* relator procedure that exclusively applied to fraud occurring in Union institutions or agencies or amongst their officials were approved by the member states, there is still the question of how the *qui tam* relator would obtain evidence. Given the narrow scope of application of the *qui tam* procedure, the member states may be willing to introduce broad US-style pre-trial discovery rules against Union institutions and agencies.

If a *qui tam* procedure were to be introduced, it would be necessary to provide safeguard powers of intervention for the Commission. Hence the Commission would have to be able to intervene in the action; be able to seek amendment of the statement of objections; obtain or frustrate applications for interim measures; and seek dismissal of or take over the action.

The European CFCA should also include a provision permitting contingency fee payments for lawyers. This is a vital part of the success of the CFCA. It ensures that lawyers are induced to take cases: the lawyers filter out the weak or suspect cases and undertake the investigative effort, reducing the investigative burden on the Commission. The Commission is then presented with a road map to successful prosecution. Essentially contingency fee payments are a way of bringing in significant additional investigative resources without the Commission or the member states having to pay for those resources. Furthermore, if a *qui tam* relator procedure permits either broad or narrowly focused prosecution by relators, additional resources are created to prosecute fraud, for which again Commission and member states are not required to pay.

There are also questions as to whether government employees should be permitted to benefit as whistleblower relators. The US courts have ruled that there are no special limitations on a

⁷⁷ Helmer, *op. cit.*, para 8.2. The DoJ does have special powers to obtain information in respect of a CFCA case prior to the actual initiation of proceedings. Under 3733(a), the US Attorney General may issue civil investigative demands after initiation of a relator action, but prior to the intervention of the government.

government employee's right to maintain a *qui tam* action. However, some US District Courts have ruled that *qui tam* actions are barred against a government employee relator whose duties include the investigation and reporting of fraud.⁷⁸ Given the importance of obtaining information on fraud against the Community's financial interest, there is a strong policy argument for permitting government employees to be whistleblowers and *qui tam* relators. However, taking the approach of the US courts, employees such as officials of OLAF and officials of the member states' fraud investigation and prosecution agencies should be barred from bringing a claim under the European CFCA.

The collection of Community revenues and the spending of Community funds are not only decentralised to the member states, they are also often mixed up with member state revenue collection, for example in respect of value-added tax, and the expenditure of national funds, in the case of national matching funding in the utilisation of the Community structural funds. It would be difficult to apply the European CFCA purely against the element of the fraud that attached to the Community budget, but not to national budgets. One approach would be for the member states to obtain benefit of Community law, in that the European CFCA would apply Community penalties to the whole of the revenue lost or funds fraudulently expended and then return the national part of the recoveries to the member state treasuries. Another approach, if member states were willing to adopt national CFCAs would be for the member states and the Commission to allocate cases between them.⁷⁹ Hence in a cross-border case, the Commission would act on behalf of the Community and the member states, and in cases with solely a national dimension, the national agency would apply the CFCA on behalf of the state and the Community, with the national agencies and the Commission making proportionate financial transfers at the end of each case.

A major question remains unanswered in the above discussion of a European CFCA. That is the relationship between the evidence obtained under the CFCA and national criminal law. Even if fraudsters are heavily penalised financially under the CFCA, the public across Europe will be shocked if those who have plundered the Community's finances are not subject to a criminal process. Part of the solution is to ensure that the investigations and civil process undertaken by the Commission and potential national CFCA agencies comply with criminal defence rights. This is achievable in respect of evidence not obtained directly from the whistleblower, such as evidence obtained on unannounced inspections.⁸⁰ However, it is likely to be much more difficult to rely on evidence in most criminal courts from whistleblowers directly, who may well be treated by the judge and the jury as paid criminal informers. On the other hand, if the European CFCA does uncover large numbers of fraud cases, then public

⁷⁸ Helmer, *op. cit.*, para 3.5(c).

⁷⁹ A European CFCA system with the Commission running cross-border cases and the national agencies running national cases would in many ways parallel the system for the enforcement of the EC competition rules envisaged in Regulation 1/2003, which is due to come into force on May 1st, 2004. It would be possible to envisage two approaches. The first would be a series of national CFCA regimes together with a European CFCA, and coordination provisions between them. An alternative approach and drawing upon Regulation 1 would be for there to be one European CFCA law whose enforcement would then be shared between the member states and the Commission. One of the major advantages of this latter approach would be that it would provide for greater uniformity in the application of the law across the Community, rather than having up to 26 differing legal regimes, with different procedures, legal terms and definitions, which are likely to be a source of confusion and potentially result in lost cases, particularly if cases have to be transferred from one jurisdiction to another.

⁸⁰ The solution here would be for the Commission to obtain a full warrant from a court or independent judicial authority before undertaking an unannounced inspection.

opinion and the member states may well decide that a degree of legal criminal harmonisation to ensure that prosecutions succeed is in fact politically acceptable.

5. Conclusion and Future Prospects

The major European objection to an equivalent of the CFCA being enacted for the Community is the idea of paid informers. The concept of very high rewards to any person who came to know of the fraud, especially where the whistleblower is on the periphery of the fraud, is likely to prove difficult to accept. However, the US experience suggests there is a very strong public policy argument in favour of high rewards for informers. US public policy recognises that the inside information that such informers or whistleblowers have is extremely valuable to the public interest in terms of detection of fraud against the public purse and deterrence. Furthermore, there is recognition that whistleblowers have to be properly compensated. By providing information to the authorities, they are effectively liquidating their careers; imposing considerable stress on themselves and their families and potentially putting their physical security at risk.

It is also the case that the idea of paying for information is not as foreign as it first appears. The Commission does offer some financial rewards for information in respect of fraud or irregularities against the Community budget.⁸¹ Furthermore, in the competition field, the Commission now routinely grants immunity from fines to firms that were members of cartels, in return for information on cartel activity. Since the Commission introduced its US-style leniency notice in February 2002, over 20 cartels have been placed under Community investigation as a result of information from whistleblowers.⁸²

Competition law also provides a strong precedent for creating a Community system of investigation, prosecution and civil fines in respect of the protection of the Community's financial interests. If the Community can have a cross-border system of investigation, prosecution and penalties directed against anti-competitive activities that threaten the single market, it should be able to run a similar civil investigation, prosecution and penalty system against those who seek to distort the operation of the single market through VAT or customs fraud or undermine Community objectives by plundering the agricultural or structural funds budgets.

A European CFCA offers a route out of the dilemma faced by the member states of dealing with large numbers of cross-border cases, which national agencies and systems have great difficulty in coping with, but being unwilling to adopt Community criminal law or establish an EPP Office for fear of losing criminal jurisdiction to the Community. A European CFCA would introduce an effective civil system of detection, investigation, prosecution and penalty, but would not extend by one iota the Community's criminal jurisdiction. Such a regulatory system would provide an effective means of protecting the Community financial interests, given the understandable weaknesses in judicial and administrative procedures in Central and Eastern Europe, while such structures are being brought up to modern levels of effectiveness.

Adopting a European CFCA is not a remedy for all ills: it will not solve the problem of how effectively to deal with cross-border criminal cases; member state agencies need to increase their commitment to cooperate, and many new measures are needed. However, a European CFCA offers the Community an effective and immediate solution to the problem of protecting

⁸¹ White, *op. cit.* 17.

⁸² Van Barlingen, *op. cit.*

the Community finances. Many more fraudsters will be detected, revenue and funds lost will be recovered and many more potential fraudsters will be deterred. Furthermore, the peoples of Europe will begin to believe that all the actors on the European stage in the institutions and the member states are serious about tackling Community fraud.

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