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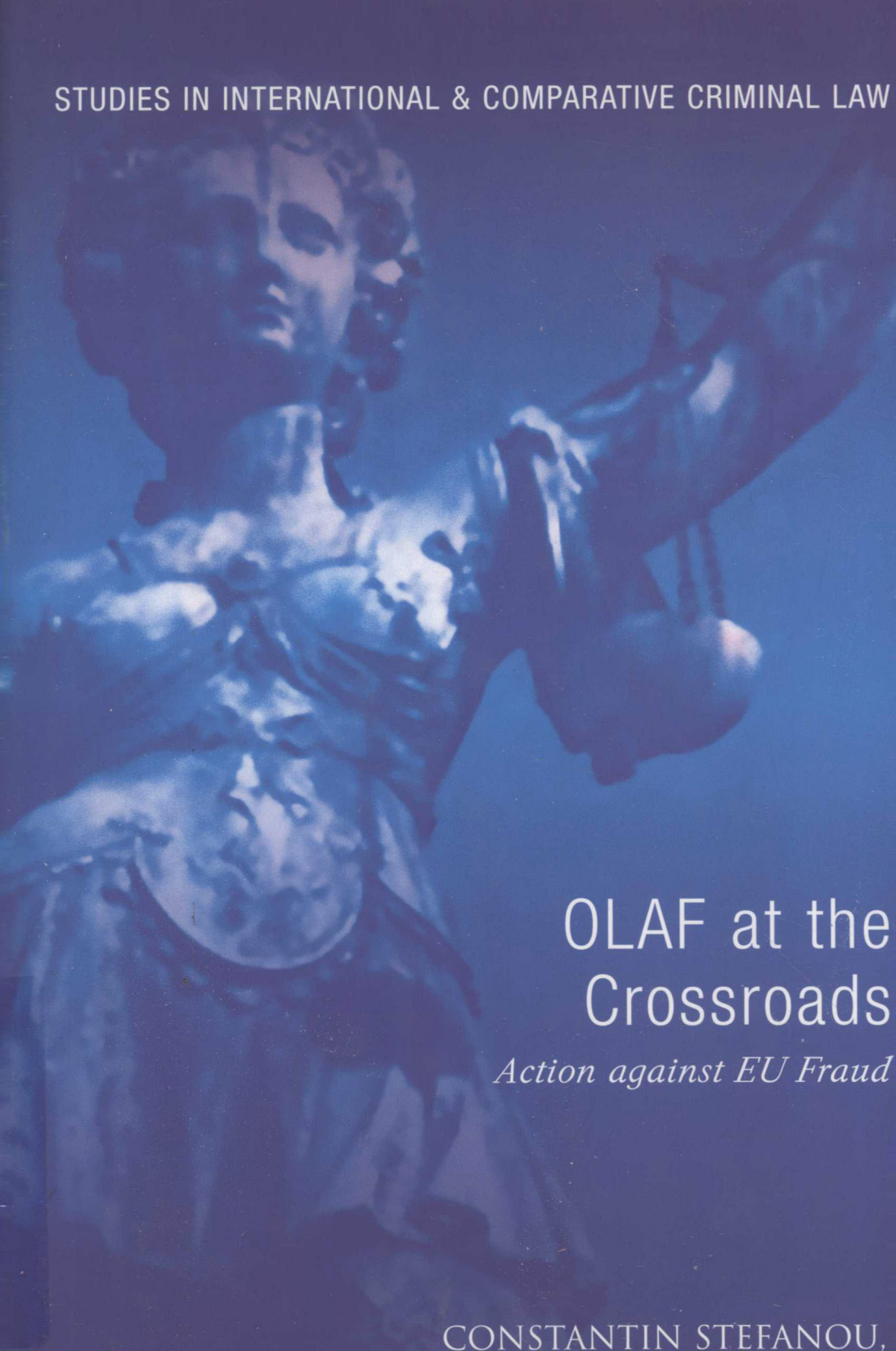

OLAF at the Crossroads

Action against EU Fraud

CONSTANTIN STEFANOU,
SIMONE WHITE AND HELEN XANTHAKI

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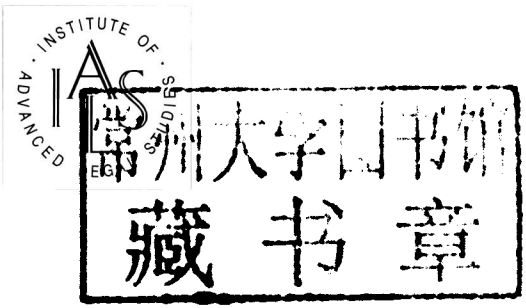

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OLAF AT THE CROSSROADS

The authors offer many insights into the regulatory, operational and institutional opportunities and challenges for OLAF, the European Commission's Anti-Fraud Office. Since OLAF was set up in 1999, significant changes in its functional environment have taken place including in EU criminal law and especially in mutual assistance and substantive criminal law; the reconstruction of Eurojust and Europol though Regulations and Memoranda of Cooperation; and the entry into force of the Lisbon Treaty. The authors advance the view that OLAF's current legal framework must address these issues adequately. The approach they take is multi-disciplinary.

The approach chosen by the authors is multi-disciplinary. OLAF is examined through the prism of law and EU politics, thus focusing not only on the identification of current problems in regulation and procedure, but also on the feasibility of the institution in the future of European integration. The book's approach is dialectic in that after the exposure of regulatory and institutional defaults, operational solutions are then discussed. Although there is little doubt that OLAF suffers from regulatory discrepancies and lacunae and from institutional inefficiencies, there is value in the argument that its staff have managed to devise operational and functional mechanisms that address some of these problems and allow OLAF to proceed with its crucial role of combating fraud within the EU. Notwithstanding the efficiency and ingenuity of its staff, the need for express rules covering procedural and operational issues—amongst others—must be safeguarded in regulation.

Studies in International and Comparative Criminal Law: Volume 7

Studies in International and Comparative Criminal Law

General Editor: Michael Bohlander

Criminal law had long been regarded as the preserve of national legal systems, and comparative research in criminal law for a long time had something of an academic ivory tower quality. However, in the past 15 years it has been transformed into an increasingly, and moreover practically, relevant subject of study for international and comparative lawyers. This can be attributed to numerous factors, such as the establishment of ad hoc international criminal tribunals and the International Criminal Court, as well as to developments within the EU, the UN and other international organisations. There is a myriad of initiatives related to tackling terrorism, money laundering, organised crime, people trafficking and the drugs trade, and the international 'war' on terror. Criminal law is being used to address global or regional problems, often across the borders of fundamentally different legal systems, only one of which is the traditional divide between common and civil law approaches. It is therefore no longer solely a matter for domestic lawyers. The need exists for a global approach which encompasses comparative and international law.

Responding to this development this new series will include books on a wide range of topics, including studies of international law, EU law, the work of specific international tribunals, and comparative studies of national systems of criminal law. Given that the different systems to a large extent operate based on the idiosyncracies of the peoples and states that have created them, the series will also welcome pertinent historical, criminological and socio-legal research into these issues.

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Tom Obokata

Volume 6: Sentencing in International Criminal Law: The Approach of the Two ad hoc Tribunals and Future Perspectives for the International Criminal Court
Silvia D'Ascoli

Volume 7: OLAF at the Crossroads
Constantin Stefanou, Simone White and Helen Xanthaki

Foreword

It is rare that a team of authors happens to be as fortunate as this. First, each member of the team is an expert in his or her own right, in similar, yet distinct fields. Dr Xanthaki is a renowned expert on the regulatory framework of OLAF and the other agencies in the field of EU criminal law; Dr Stefanou is an imaginative and creative political scientist with distinct insight into the institutional framework of the EU, and specifically EU criminal policies; and Dr White is a rare example of a breed of EU civil servant—one who uses her insight into the operational activities of OLAF to award praise where it is due and to identify weaknesses when they occur. Second, the team managed to complete the book on OLAF, the first of its kind, at a time when the agency is ready and willing to take its existence to a higher level.

It is an established fact that OLAF plays a very significant role in the budgetary control of the EU. OLAF is a key player not only in the protection of the European Community's financial interests, but also in ensuring that citizens are able to reap the benefits from the European Community's economic policies. The European Parliament has been a focal actor in the scrutiny and the debate over a new reformed OLAF. In its 2008 Resolution the European Parliament introduced a number of amendments to the proposal for a new Regulation on OLAF, thus contributing towards a better governance and stronger accountability for the anti-fraud office. At the same time, the European Parliament continues to assess annually OLAF's progress in fulfilling its tasks efficiently. Having survived such intense review at the European Parliament thus far, a review in which the authors were instrumental, OLAF seems open to criticism and eager to develop.

There is little doubt that accountability, transparency and democracy in all Community institutions and services, including OLAF, is a requirement of the people of Europe. This book is the only one of its kind that addresses all issues related to OLAF in such depth and breadth that it will undoubtedly become essential reading for academics, practitioners, researchers and beyond. I am delighted to endorse this book and to recommend it highly as a superb exposé of OLAF and as an example of a most amazing combination of academic expertise with practical insight.

Rodi Kratsa-Tsagaropoulou
Vice President, European Parliament

Table of cases

European Union

Court of Justice of the European Union

Council of Europe—ECtHR

United States

Introduction

One can identify very few examples of agencies of such importance in the European Union that have received as little attention as OLAF by academics and professionals alike. The Anti-Fraud Office of the European Commission has been awarded the task of combating fraud against the financial interests of the Union. It suffices to consider the negative impact that cases of fraud against the Union's budget make in national and EU publications for one to realise the importance of the task for Europhiles and Eurosceptics alike. But if one takes into account the source of the income involved as deriving ultimately from national taxpayers of the Member States, the stakes become even higher.

OLAF is operating within a fluid, fragmented, and often uncertain environment of EU criminal law. So, where does OLAF stand in the context of European integration? Is the development of OLAF a solid pro-European supranational move aiming to augment the powers of the central EU institutions in the neofunctionalist vein or is it an intergovernmental afterthought aiming to appease the European public in the aftermath of the 1999 Commission crisis?[1] When looking back at the historical development of EU anti-fraud bodies we broadly distinguish between two distinct periods: pre-1999 and post-1999.[2]

The first period starts in the mid 1970s with the Member States' decision to grant 'own resources'. This decision led to the establishment of the Court of Auditors and cases of fraud against the Community's financial interests brought to light by the Court of Auditors, led to the establishment of a dedicated Unit for the Co-ordination of Fraud Prevention (UCLAF)[3] in 1987. In the 1980s the Court of Auditors reported fraud cases mainly in CAP programmes (back then the CAP accounted for almost 70 per cent of the Community budget) but the need for a dedicated unit to combat CAP subsidies fraud and more generally irregularities and mismanagement of Community-funded programmes was noted by the European Parliament's Budgetary Control Committee (COCOBU)

[1] See the two working hypotheses in V Pujas, 'The European Anti-Fraud Office (OLAF): a European policy to fight against economic and financial fraud?', *Journal of European Public Policy* 10 October 2003, 778–97.

[2] Simone White distinguishes several periods pre-1999 arguing that progress was uneven because of the sectoral approach that was adopted. See S White, *Protection of the Financial Interests of the European Communities: The Fight against Fraud* (The Hague, Kluwer Law International, 1998).

[3] See COM(87) 572 and COM(87) 891.

as early as 1984,[4] when there were calls for 'the constitution of a "flying squad" to carry out random on-the-spot checks in the Member States'.[5]

The creation of UCLAF, following a report for tougher measures to fight fraud,[6] was supposed to mark a turning point in combating fraud. By the late 1980s CAP subsidies fraud was rife in some Member States and the main problem was the unwillingness of national authorities and enforcement agencies to investigate—let alone prosecute—the alleged offenders. Most national enforcement agencies were geared towards the protection of domestic financial interests and fraud which involved 'Community funding' was not seen as a priority. Anecdotal stories of half-built roads in Italy that were abandoned because the money to finish the programme disappeared or of Greek farmers with a couple of olive trees who claimed subsidies for thousands of trees were rife. The general picture that emerged was that in some Member States EU funding was seen as 'fair game' and the inability of national authorities to investigate and prosecute reinforced the misconception that fraud against the EU was somehow not a priority. Back in the 1990s, as Vervaele noted, most of the fraud occurred in the Member States themselves.[7] The Member States were responsible for the collection (customs duties and a percentage of VAT and GNP) and financial management of around 80 per cent of EU revenues.[8] Not that the Commission was a better manager: as Vervaele noted, around 12 per cent of EU expenditure was used by the Commission for direct subsidies and the Commission was completely ill-equipped to manage and audit its aid programmes, to the point that it had to employ external services with inadequate control mechanisms.[9] It is a measure of how quickly circumstances can change within the EU that nowadays it is third countries that are emerging as the real problem. Fraud in areas such as external aid or humanitarian aid is rife and OLAF is concentrating its efforts in those directions.[10]

[4] See EP Document 1–1346/83, January 1984. There were more such reports in the 1990s; see Report on the independence, role and status of the Unit for the Coordination of Fraud Prevention (UCLAF) (Special Report No 8/98 of the Court of Auditors concerning the Commission departments responsible for fighting fraud) (C4–0483/98) (The Bosch Report), A4–0297/98, 22 September 1998, 10.

[5] Ibid.

[6] Report from the Commission on Tougher Measures to Fight Against Fraud Affecting the Community Budget, COM(87) 572 final, 20 November 1987.

[7] JAE Vervaele, 'Towards an Independent European Agency to Fight Fraud and Corruption in the EU?' (1999) 7 *European Journal of Crime Criminal Law and Criminal Justice* 333.

[8] Ibid.

[9] Ibid.

[10] As OLAF's 2009 Annual Report noted: '. . . areas in which Member States do not exercise specific responsibilities—'*Internal EU Policies*' and '*External Aid*' cases—have represented a growing proportion of the new cases opened by OLAF since its creation (around or above 30% since 2005). This evolution is in line with the Office's policy to focus on areas where the added-value of its work is the highest.' See European Anti-Fraud Office, 'Annual Report 2009 Ninth Activity Report for the period 1 January 2008 to 31 December 2008', http://ec.europa.eu/anti_fraud/reports/olaf/2008/EN.pdf, 28; for a good description of problems in EU Development Assistance see G Gaskarth, B Farrugia and M Sinclair, 'Reforming European Development Assistance Ensuring Transparency and Accountability' (2008), http://www.taxpayersalliance.com/EUDevelopmentAid.pdf.

Between 1987 and 1999 UCLAF went through various transformations as the Member States and the Commission attempted to tackle the problem of fraud. However, the main problem, which was the small number of prosecutions by national authorities, remained. Especially after the creation of the single market, one reason for the reluctance of national authorities to investigate was the difficulties these cases presented; often they involved transnational crime which, in the absence of a single judicial area, presented difficulties in the collection of evidence and, therefore, the prosecution of offenders. There were, of course, some attempts by the Member States to tackle the problem of fraud. For example the 1994 Convention on the protection of the Communities' financial interests[11] defined the Commission's activities in the battle against fraud. But there were also some serious operational problems with UCLAF. For example, at a practical level, the competences of UCLAF were divided between DG VI (Agriculture), DG XX (Financial Control), DG XIX (Budgets) and DG XXI (Customs and Indirect Taxation). UCLAF did not have real powers of investigation and, as the Court of Auditors Reports indicated fraud continued to be a serious problem. Essentially the first period in the development of EU anti-fraud bodies was characterised by Commission attempts to convince the Member States that tackling fraud against the interests of the Community is a serious problem and one that should be tackled directly.

The post-1999 period is obviously characterised by the establishment of OLAF. However, it is important at this stage to note that the prevailing conditions at the time, namely the collapse of the Santer Commission, were political. What this meant was that OLAF was not exclusively the well-thought-out EU response to the specific fraud problems identified in the first period. Rather it was the Member States' quick response to the political problems that the EU experienced at the time. In this sense the creation of OLAF addressed three issues:

— the long-identified need to tackle fraud against the EU's financial interests;
— the need to show that the specific lacuna in European law identified by the collapse of the Santer Commission was filled; and
— the need for positive pro-EU PR, as the corruption issues in the Santer Commission had prompted a portion of the European media to adopt Eurosceptical arguments.

The highly political overtones of the corruption accusations against the Santer Commission meant that time was not on the Member States' side. Therefore, the final legislative framework setting up OLAF was highly influenced by the historical circumstances surrounding it. Pujas makes two hypotheses about the creation of OLAF.[12] The first is that the Commission's and the EP's push to create an anti-fraud agency was part of a wider neofunctionalist approach aiming to

[11] See: OJ C316 of 27 November 1995; OJ C320, 28 October 1996.
[12] See Pujas, above n 1, 783–87.

'institutionalise' anti-EU-fraud policy as part of a wider push for the integration of the Third Pillar. She cites the Commission's use of its role as agenda-setter and its attempt to use various windows of opportunity, such as the Corpus Juris project,[13] to push forward with anti-fraud policy. In other words the supranational European institutions pushed to integrate a 'high political'[14] area in an attempt to further the course of European integration. The second, intergovernmentalist, hypothesis is that the Member States who had been resisting the attempts of supranational institutions to further European integration in the area of anti-EU-fraud policy actually utilised the Commission's weakness in this field, especially the lack of an effective anti-corruption policy, and pushed the blame on the College of Commissioners, who eventually had to resign. The logic of this hypothesis is that the Member States dismissed the ability of the supranational institutions to fight transnational crime effectively and, therefore, by creating a dubious legal framework for OLAF[15] safely kept this responsibility in the hands of their public administrations. In fact when comparing the Commission's 'Proposal for a Council Regulation (EC, Euratom) establishing a European Fraud Investigation'[16] and the Commission Decision 1999/352/EC of 28 April 1999 establishing the European Anti-Fraud Office (OLAF) it becomes obvious that the final legal framework is a type of intergovernmental arrangement aiming to preserve the superior position of national enforcement agencies.

It is interesting to note here that despite the fact that the Member States managed to thwart the attempts by supranational institutions to establish a purely European anti-fraud policy, all actors appeared to be happy in the end. In other words, after a crucial period (the resignation of the Santer Commission) the quick establishment of OLAF appeared to please all those involved. The EU appeared to move quickly to establish an anti-fraud legal framework, thus appeasing the media and the European public. OLAF was added to the Commission's roster (despite its independence OLAF is, administratively, part of the Commission) and, therefore, the Commission augmented its powers. The Member States, through the Council, managed to defend their sovereignty since the proposal that was finally accepted had been stripped of the original proposal's

[13] See S White, 'EC criminal law: Prospects for the Corpus Juris' (1998) 5(3) *Journal of Financial Crime* 223–31; JR Spencer, 'The Corpus Juris Project—Has it a Future' (1999) 2 *The Cambridge Yearbook of European Legal Studies* 355–67.

[14] In Hoffmann's well-known distinction 'high politics' included issues vital to the existence of the nation-state while 'low politics' included less controversial, largely admin-istrative issues. Hoffmann maintained that agreement on issues of low politics was easier than agreement on matters of high politics because national governments felt less threatened and were, therefore, able to make some concessions which facilitated agreements. S Hoffmann, 'Reflections on the Nation-State in Western Europe Today' in L Tsoukalis (ed), *The European Community Past, Present and Future* (Oxford, Basil Blackwell, 1983) 21–38.

[15] Eg, as the Court of Auditors' Special Report noted, there is not even independent control concerning the legality of investigative action. See Court of Auditors' Special Report No 1/2005 concerning the management of the European Anti-Fraud Office (OLAF) para 83.

[16] COM(1998) 717 final—98/0329(CNS), 4 December 1998.

communitarian orientation. From a tactical point of view this negotiating model is referred to as 'win-win' and naturally it was quickly accepted, not necessarily as the most 'appropriate' proposal but as the most popular proposal. From the point of view of policy making this is consistent with the 'Incremental Model' in which the best policy is the one on which all or most actors agree.[17]

There is a third possible hypothesis here. As mentioned earlier, the quick setting-up of OLAF seems to have been influenced by the prevailing conditions at the time. This observation seems to be perfectly in line with the concepts introduced by advocates of new institutionalism. Based on the pioneering work of March and Olsen,[18] and largely based on the simple premise that institutions matter,[19] the 'institutionalists' or 'new institutionalists'[20] attempt to draw general conclusions about the integration process by examining the role of institutions. The main areas of focus for advocates of this approach are:[21] the organisational structure of the EU and the 'autonomy' of key institutions; the day-to-day dynamics of policy making; structures of individual policy areas; and the process of 'institutionalisation' and the creation of path dependencies. There are two main variants of new institutionalism: rational choice institutionalism and historical institutionalism. The latter, which is of interest to us here emphasises the fact that '... policy choices and institutional reforms tend to produce profound and unintended consequences'.[22] The basic logic of neo-institutionalism is 'that political struggles are mediated by prevailing institutional arrangements'[23] and that institutions are capable of influencing political behaviour. Within this logic, a basic tenet of new institutionalism—often applied to central EU institutions such as the Commission and the Parliament—is that institutions will attempt to take advantage of opportunities to augment their roles and strengthen their positions. The reason new institutionalist perspectives are relevant to our argument here rests with one of its main tenets: acceptance that EU institutions, such as the Commission, pursue their own agendas and policy choices, which must be studied over time in order to understand 'path

[17] CE Lindblom, 'The Science of Muddling Through' in RJ Stillman II, *Public Administration: Concepts and Cases* (Boston, Houghton Mifflin Co 2005).

[18] J March and J Olsen, *Rediscovering Institutions, The Organizational Basis of Politics* ([New York, Free Press, 1989).

[19] PA Hall and RCR Taylor, *Political Science and the Three New Institutionalisms*, Max-Planck-Institut für Gesellschaftsforschung, Discussion Paper 96/6, 1996.

[20] Originally called 'institutionalism', the terms *neo-institutionalism* or *new-institutionalism* are also acceptable—although strictly speaking advocates of different versions of this approach tend to use different terms. See B Rosamond, *Theories of European Integration* (London, Macmillan, 2000) 113–22.

[21] See K Armstrong, 'New Institutionalism and European Union Legal Studies' in C Craig and P Harlow (eds), *Lawmaking in the European Union* (London, IALS/Kluwer, 1998) 101.

[22] S Hix, *The Political System of the European Union* (London, Macmillan, 1999) 16.

[23] S Bulmer, 'The governance of the European Union: A new institutionalist approach' (1994) 13 *Journal of Public Policy* 355. See also S Bulmer, 'Institutions and Policy Change in the European Communities' (1994) 72 *Public Ad-ministration* 423–44; S Bulmer, *New Institutionalism, The Single Market and EU Governance*, ARENA Working Papers, WP 97/25, 1997.

dependencies' (by path dependency new institutionalists mean that by adopting a particular preference institutions ensure that future preferences will have to operate in the context of the initial preference, even if its consequences were not understood at the time it was originally made).[24]

Of course, the new institutional paradigm can happily coexist with the basic integration dialectic,[25] that is, neofunctionalist versus intergovernmental perspectives. After all, in terms of European integration theory, the former is one of the 'micro-theoretical' perspectives while the latter are two of the basic 'macro-theoretical' approaches to the study of the EU. In this sense we do not need to make a specific choice when it comes to examining OLAF. Clearly the wider area of judicial integration, which includes the EU's anti-fraud policy, is subject to the basic integration dialectic with the supranational institutions pulling towards the direction of communitarian solutions while the Member States attempt to stop further encroachments on their autonomy and sovereignty. The fact that OLAF remains in the intergovernmental sphere can and does serve as a benchmark of integration (or lack of it) at least in the area of judicial integration. New institutional perspectives can offer reasonable and plausible explanations for specific developments in EU institutions. Thus, from a practical point of view the neo-functionalist versus intergovernmental argument will help us understand the general direction (hence macro-theories) of European integration while new institutionalism will help us understand the 'nitty-gritty' of the specific development we are examining.

Our view is that while OLAF's basic legal framework remains the same, OLAF displays all the basic characteristics of an intergovernmental victory in the integration dialectic. Despite the efforts of supranational institutions the Member States managed to stop the Commission and the EP from bringing their communitarian proposals for an anti-fraud office to fruition. It is also our view that the reasons for this intergovernmental victory rest on path dependencies set by the prevailing EU developments at the time.

[24] C Stefanou, *The Dynamic of the Maastricht Process* (Brussels/Athens, Bruylant/Sakkoulas, 2007) 83.

[25] C Stefanou and H Xanthaki, *A Legal and Political Interpretation of Article 215(2) [new Article 288(2)] of the Treaty of Rome: The Individual Strikes Back* (Aldershot, Ashgate, 2000) Chapter 2.

Contents