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# The Convention on the Protection of the European Communities' Financial Interests

A Case Study of Negotiations in Networks in the EU

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This paper is based on a Master Thesis entitled *Spelet om bedrägeribekämpningen. En studie av förhandlingar i den europeiska unionen* which in November 1999 was awarded first prize in the Centre for European Studies' competition for theses on European themes.

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## Abstract

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The focus of this work is on the negotiations concerning the Convention on the Protection of the European Communities' Financial Interests and its protocols. The Convention has been designed to ensure greater compatibility between Member States' criminal law in order to tender more effective efforts to combat fraud to the detriment of the budget. Criminal law is of an intergovernmental character (third pillar) whereas the fight against fraud requires a complex sharing of competencies between Member States and EU-institutions (first pillar). In order to find an efficient way to combat Community fraud there have been negotiations under the first and the third pillar in parallel. A Regulation on the Protection of the European Communities' Financial Interests was developed under the first pillar. However, the negotiations preceding the Convention, which is a third pillar legal act, were more complicated given the complex decision-making procedures of the third pillar. Informal networking between different actors turned out to be important in order to reach an agreement. The Convention on the Protection of the European Communities' Financial Interests introduces for the first time a definition of fraud affecting the Communities' financial interests, which will be common to all of the Member States. Nevertheless, the final result must be defined as being a compromise solution.

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# 1. Introduction

The protection of the European Communities financial interests has for a long time been a high priority for the governments and parliaments in the Member States and for the Community institutions. In the 1960s, with the implementation of CAP, the first steps were taken to find a way of dealing with fraudulent behaviour (Ruimschotel 1994, p. 319). Different measures were discussed in order to improve the protection of the financial interests. In 1976, the Commission presented a draft Treaty amending the European Communities so as to permit the adoption of common rules with regard to criminal law on the protection of the Community's financial interests, and the prosecution of infringements of the provisions of said treaties. This draft underwent lengthy negotiations throughout the 1980s, but no result was achieved.

However, in an important judgement of 21 September 1989 *68/88 Commission v. Greece*, the European Court of Justice ruled that Member States are obliged to handle EU fraud cases in a manner similar to the treatment of fraud cases under national law (Sherlock & Harding 1991, p. 21 / see also White 1998, pp. 12). The rules applied in the Greek case were added into the Maastricht Treaty, as a new principle called the *principle of assimilation*. However, as the definition of what constitutes an offence against the financial interests of the Community is determined according to provisions of national law, it is difficult to establish how the rules laid down in the Greek case are being applied. In order to find a more efficient way of combating fraud targeting the EU finances, negotiations continued and finally resulted in the Convention on the Protection of the European Communities' Financial Interests in 1995.

The overall aim of this working-paper is to analyse the negotiations which led to this Convention. Some attention is also given to certain other important legislative acts on fraud prevention. In line with the focus on the aforementioned negotiations the author aims to examine the importance of different actors and the impact of networking during the decision-making phase. For this study a qualitative interview method has been chosen, meaning that the author has concentrated on a limited number of interviews. The purpose of qualitative interviewing is to understand the per-

spectives and the experiences of the respondents and this method was accordingly well suited to the objectives of the study. The interview method used may be characterised as *semi-structured* (Patton 1983, pp.198) and *informal* (Hellevik 1984).

### *The political, empirical and theoretical interests of this case study*

The problem of fraudulent dealings targeting the Communities' finances has excited greater media interest in recent years and the Community institutions and the Member States have had to pay more attention to this issue. The exact level of fraud against the budget is impossible to establish with any accuracy but estimates run between 7 and 10 per cent (Laffan 1997, p. 428). As we have seen, negotiations regarding the adoption of common rules with regard to criminal law on the protection of the Community's financial interests had been going on for many years. However, the Convention on the Protection of the European Communities' Financial Interests was not signed until 1995. Why has it been so difficult to arrive at common measures to combat Community fraud? This study will show that there are a number of factors which complicate the efforts to combat Community fraud. Furthermore, this working-paper will explain why this particular negotiation situation is politically, empirically and theoretically interesting:

1. The question of fraud prevention is very sensitive from a *political point of view*. The credibility of the EU risks being undermined as a result of the bad management of the Communities' finances and also because of the lack of transparency within the Union. The management of the Communities' finances is today characterised by a division of responsibility between the Member States and the EU-institutions. Fraud prevention should thus be a high priority for all parties involved in financial management. However, fraud prevention touches a very sensitive issue area, criminal law, which is one of the things characterising the sovereignty of the State. The different governments see the need to enlarge the scope of EU activities, yet on the other hand they are reluctant to give up control over their policies. Reluctance to give up a part of sovereignty thus outweighs their wish to have a

more effective legal control in this area. The EU-institutions are involved in the fight against fraud but the Member States alone have the right to stipulate criminal penalties. The fundamental division of responsibility and the difficulties of communication between Community and Member States bodies makes the fight against fraud very complicated.

Pursuant to the provisions laid down in the Maastricht Treaty, decisions regarding the application of national criminal justice are to be taken within the co-operation on justice and home affairs (third pillar), as they are of an intergovernmental and not of a supranational character. The intergovernmental status prevents Community institutions from playing a more substantial role in the decision-making. As a result, community fraud has revealed strains in relations between the Community and the Member States, as well as in intra-Community institutional relations. As co-operation within the third pillar is of an intergovernmental character, unanimity is required when voting. Furthermore, ratification by all the Member States is required before the coming into force of a legal act. Every participant in the negotiations must therefore be at least partly satisfied with the result because otherwise no agreement is reached. This empirical case shows that throughout the decision-making phase it has been necessary to continue the process without asking any of the Member States to change their national legislation too drastically. Therefore, the final result was a compromise solution.

2. It is important to stress that this *empirical case* presents some original characteristics. On the one hand, it is a *high politics* matter, *criminal law*, which is only to be dealt with through intergovernmental co-operation (third pillar). This means that “[u]nlike a low politics game, only governments, not diverse network consisting of many non-state actors, will sit down at the implementation table in order to put flesh on the many fudged postponement clauses” (Friis 1998, p. 325). Yet on the other hand the issue is also the *fight against fraud*, which is of a more *day-to-day* character, involving the EU-institutions (first pillar). As co-operation on criminal law is imperative when combating trans-border fraud targeting the Communities' financial interests the two issues are deeply related. Fraud prevention is thus an issue where *high politics are mixed with day-to-day politics*. Therefore, the negotiations under study have been very complex, as there have been negotiations within the first and third pillar in parallel.



3. The complexity of the empirical case makes it very interesting from a *theoretical point of view*. The author wanted to find out whether negotiation and network theories could meet the challenges of analysing this empirical case. A *negotiation* can be seen as a process where two or more parties participate, where the parties have a conflicting as well as coinciding interests and where they communicate to reach an agreement (Sannerstedt 1996, p.20 / Fischer & Ury 1983 / Zartman 1983, pp.7 / Jönsson 1991, p.299). The link to network theories is that networking also implies that the actors perceive co-operation to be advantageous for all parties. Most analysts using network theories tend to focus on the meso-level or sectoral level of decision-making, meaning that single policy sectors become the object of study (Adshead 1996, p.585). The term *policy-network* implies that clusters of actors representing multiple organisations interact during the decision-making phase. Network theories are said to be best used when describing day-to-day integration and not high politics issues. Nevertheless, as this case presented a mixture of both day-to-day and high politics questions network theories the author wanted to try and see if a combination of network and negotiation theories could be a useful theoretical tool. The idea was that a combination of these theories should provide a larger perspective with several different actors and negotiation situations.

In a negotiation concerning a high politics issue only Member States have a real possibility to influence the decision-making process. However, in this particular case the Commission has had a very favourable position, as its negotiators were used to the negotiation climate within the Union and had contacted different national experts on criminal law before the negotiations started. Moreover, it could exert an influence on the decision-making process in the negotiations under the first pillar. The interviews show that the Commission has been more involved than is usual when negotiating in sensitive areas. During the negotiations there were certainly tendencies showing that the different participants joined together in informal networks, that were important arenas of negotiation. The Commission was involved in several different networks. In addition, the Commission has had close contact with the different presidencies that had a lot to gain from such co-operation. The dynamic of success that was created facilitated the achievement of the convention and its protocols. Further-

more, coalitions emerged between persons with similar posts in the different Member States.

We have now seen the political, empirical and theoretical factors explaining why this case is so interesting. In order to understand the difficulties related to these particular negotiations it is imperative to know the background and to understand the complicated decision-making procedures. The author has therefore chosen the following structure for this working-paper: Chapter one of this paper covers the different problems related to Community fraud. Section one explains the division of responsibility between the Community and the Member States regarding the management of EU finances. The co-operation with regard to criminal matters and its intergovernmental form are examined in section two. Sections three and four explore the procedures of the decision-making within the third pillar and the different roles and competencies of the EU-institutions in the fight against fraud. The case study analysis is covered in Chapter two.

## 2. The fight against Community fraud: a difficult case of problem-solving

### *The division of responsibility regarding the management of the budget*

The management of the Communities' finances is characterised by the division of responsibilities between Community and Member State bodies. All in all, 80 per cent of the budget is administered in the Member States. The Member States seek to maximise their receipts from the EU budget and have been less concerned with problems of effective control of how the money is spent. Member States often tend to see frauds against the Community budget as an EU-problem. It has also been asserted that the risk of a sanction may discourage national authorities from investigating or prosecuting suspect frauds (Ahnfelt & From 1996, p.242). National cultures differ considerably in the extent to which they condone fraud. According to John Peterson the problem is that fraud prevention cannot have

much of an impact if cultural norms persist which condone ineffective controls over national expenditure (Peterson 1997, p. 576). Instead there must evolve a “*value-for-money*” culture, where all Member States are aware of the importance of managing the Community finances in a sound way. Brigid Laffan argues that with the growth of net contributors to the budget, more and more Member States will be concerned about how the financial management is administered as they want “value for their money” (Laffan 1997, p. 436).

In recent years the expanding policy competence of the Community has been accompanied by the introduction of new spending programmes and this expansion of the budget demands a financial management beyond the capacity of the Commission. In December 1998, when discussing the annual assessment of the management of the 1996 budget, the majority of the parliamentarians refused to grant the discharge to the Commission. The socialist group proposed a motion of censure. All the 20 commissioners resigned in March 1999, after a scathing report compiled by an independent panel of experts. In that report the commissioners were accused of losing control over the Brussels bureaucracy that proposes and implements EC laws.

As stated before, the division of management responsibility between the Member States and the EU institutions undermines the efforts to combat Community frauds. According to Maria Mendrinou the existence of fraud can be “a stimulus in the debates about the future of the EU; in particular, it provides the Commission with an argument for the expansion of its administrative capacities”(Mendrinou 1994, p.88). It should be stressed that “(...) many parties have a legal or policy duty to expose or prevent fraud, but the Commission and the States share most of the responsibility and should therefore be expected to formulate a criminal policy” (Ruimschotel 1994, p. 333).

### *Criminal law and the special status of EC law*

Pursuant to international law intergovernmental agreements may create reciprocal rights and obligations for the signing parties that are binding for the signatories. The States’ approach to international law determines whether

the agreement will be received automatically into national law or whether international law has to be incorporated by a domestic statute to become binding internally.

In Europe, co-operation regarding criminal law has been developed through the Council of Europe and various legislative acts exist in this field (Ahnfelt & From 1996, pp. 139). However, criminal law was neither a priority nor even discussed when the Rome Treaty was signed in 1957. The reason for that is that the type of co-operation applied by the Community differs from other types of intergovernmental co-operation. Decisions taken at the EC level are binding for the States and provisions of EC law are found to be capable of application by national courts. This is why EC law constitutes a new legal order in international law for whose benefit the Member States have limited their own sovereign rights, although in limited fields (Gidlund 1995 p. 10). Where a provision of national law is in conflict with a provision of the Treaty the latter takes precedence (Andersen & Eliassen, p. 24). This primacy of EC law explains why the Member States are reluctant to legislate in sensitive areas at the Community level.

There are administrative sanctions that can be imposed by the Commission in case of infringements of EC competition law. However, such sanctions have been rare in other legal areas. As it stands Community law does not give the Community the right to lay down criminal penalties. However, Article 100 (new Art. 94) and 100 (a) (new Art. 95) EC enable the Council to adopt measures for the harmonisation of measures laid down by law, regulation or administrative action in the Member States, which directly affect the establishment and functioning of the internal market. Moreover, Article 235 (new Art. 308) EC stipulates "if action by the Community should prove necessary to attain in the course of operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the EP, take appropriate measures".

The procedural questions concerning decision-making on criminal justice matters will be discussed below. This is important as "[m]ost features of the European policy process are incomprehensible without an understanding of the special setting of the EU, its institutional rules and norms, and

institutional behaviour. The particular pattern of institutions makes some policy outcomes possible and others impossible..." (Wallace 1996, p.38).

### *Decision-making within the third pillar*

The overall objective of framing common policies in justice and home affairs in the Maastricht Treaty was to improve transnational co-operation in response to developments in trans-border terrorism, drugs traffic and crime after the abolition of border control on 1 January 1993. Title VI of the Maastrich Treaty, as the third pillar is called, defines the co-operation regarding the area of justice and home affairs.

As justice and home affairs represent an acutely sensitive sector closely linked to issues of sovereignty, Member States are reluctant to develop further the policy of the third pillar. "For the new 'high politics' issue of foreign and security policy, and justice and home affairs, the price of their inclusion within the scope of what would thereafter be the Union was that they would be subject to different and weaker institutional regimes" (Wallace 1996, p.55). The Member States are to inform and consult one another in the justice and home affairs Council (JHA) on how to co-ordinate their action (Art. K.3). The JHA Council can adopt *joint provisions* and *joint actions*, and draw up *conventions* to be recommended to the Member States for adoption. Whereas conventions are legally binding on the Member States, joint provisions and joint actions are only politically binding (Guild 1998, p.69, see also Müller-Graff 1994). Decision-making within the third pillar is different from decision-making regarding first pillar matters. Under the first pillar, voting may be by simple majority, by qualified majority or by unanimity (Kjellström 1997, p.24). However, decisions taken regarding third pillar matters require voting by unanimity, as it is part of intergovernmental co-operation.

In general, the Commission has important powers, above all the right to initiate Community legislation. This "(...) power of initiative allows the Commission to frame the terms of the debate in Council and Parliament through the way it drafts the proposals" (Steiner & Woods 1998, p.28). But in the area of justice and home affairs, the Commission has only co-initia-

tive rights and only in the first six areas defined in Article K.1. (Asylum, Migration, Immigration, Fight against drug abuse, *Fight against fraud on an international basis*, Civil right co-operation, *Co-operation in criminal matters*, Customs co-operation, Police co-operation). This means that with regard to co-operation in criminal matters, the Council alone retains the right of initiative (Art. K.3). However, Article K.4 (2) gives the Commission the right to *participate* in work concerning all matters of common interests defined in Article K.1.

Concerning the European Parliament, Article K.6 rules that the Presidency and the Commission shall regularly inform it of discussions in the area of Title VI. Furthermore, the Presidency shall consult the EP on the principal aspects of activities and the EP may put questions to the Council or make recommendations to it. Nevertheless this means that the EP does not have a legislative or supervisory role in matters concerning justice and home affairs. As regards the competence of the Court of Justice, Article K.3 states that conventions drawn up by the Council *may* stipulate that the Court of Justice shall have jurisdiction to interpret their provisions and rule on any disputes regarding their application. Its powers are thus much more restricted in this area than in areas concerning the first pillar.

To change a "matter of common interest" into a Community matter (first pillar) the Member States must adopt it in accordance with their respective constitutional requirements. By employing the so-called passerelle article of Title VI, namely Article K.9, members of the Council can decide unanimously that Article 100 (new Art. 94) EC should be applicable to article K.1-6, thereby involving the EP in the decision-making process (Art. K.9, see also Müller-Graff 1994, p. 496). Some matters of common interest are more sensitive and therefore they are less transferable to the first pillar. "The transfer of justice and home affairs will therefore depend on whether or not common interests matters are considered to be controversial; intense negotiations will precede the establishments of consensus about these matters" (Den Boer 1996, p.405).

## *The role of EU institutions in the fight against fraud*

As mentioned before, the ruling in the Greek case stated that infringements of Community law were to be penalised under conditions analogous to those applicable to infringements of national law. The principle of assimilation was enshrined in Article 209 (*cf.* new Art. 280) EC, which requires Member States to take the same measures to counter fraud affecting the financial interests of the Community as they take to counter fraud affecting their own financial interests. Furthermore, Article 209 (*cf.* new Art. 280) EC stipulates that the Member States must co-ordinate their actions aimed at protecting the financial interests of the Community against fraud. To this end they must organise close and regular co-operation between the competent departments of their administrations, with the help of the Commission. The fight against fraud harmful to the Community budget is thus primarily the responsibility of the Member States.

The Council and the EP make up what are called the two branches of budgetary authority. The EP exercises direct political control over the Commission in its supervisory role, through its power to pass a grant of discharge. The EP makes an annual assessment of the management of the budget before approving the accounts and granting the Commission a discharge on the basis of the Annual report of the Court of Auditors. Since 1979, the Parliament's Committee on Budgetary Control manages the continuous monitoring of expenditure. Furthermore, the committee has the task of improving the fight against fraud targeting the Communities' financial interests. For the EP, the most negative impact of Community fraud is that it discredits the Community's image in European public opinion (Mendrinou 1994 p. 90). Over the years, the Parliament has therefore made several reports regarding fraud prevention and recently it has sought to make the reduction of fraud one of its most important issues (White 1998, p. 43, see also Vervaele 1992, p. 83).

The Parliament's role regarding fraud prevention is mostly of a political character. It is supposed to draw public attention to the problem and to put pressure on the other EU institutions to improve measures to combat fraud. The Parliament's right to be consulted and informed has increased under the Maastricht Treaty, but it still does not have any real powers over second and third pillar matters. Elspeth Guild argues that "[i]nsofar as the third

pillar constitutes a partial transfer of incomplete competence in the relevant fields this transfer is not accompanied by an equivalent transfer of responsibility to the European parliament in order to counterbalance the strengthening of the executive power” (Guild 1998, p. 87). Simone White (1998) is of the same opinion, arguing that it is awkward that EU institutions have some important budgetary powers, but are not allowed to decide the way to prevent frauds targeting the EU budget (White 1998, p. 24).

The Court of Auditors was created in 1975 with its seat in Luxembourg. It is not to be seen as a court but as a “financial watchdog”. Under the Maastricht Treaty, the Court of Auditors has become one of the EU institutions and it has a mandate to examine all EC revenue and expenditure in all Member States and in third countries receiving EC funds (Levy 1996, p. 517, see also White 1998, p. 26). The Court is required to provide the Council and the EP with a statement of assurance as to the reliability of the accounts and the legality and regularity of the underlying transactions. The Commission has to inform the Court of Auditors about the anti-fraud measures taken. Furthermore, Member States must hand over all necessary information needed by the Court of Auditors, to enable it to carry out its tasks (Art. 188 (c) , new Art. 248, EC). The Court retains the right to make investigations in the Member States but it is dependent on co-operation from national administrations. The annual reports of the Court of Auditors constitute the basis of the grant of discharge following the assessment of the management of the budget. In its reports the Court has often been very critical. As a result there have been tensions between the Court and the Commission not the least as the latter claims that the Court has tried to stretch its legal mandate (Ruimschotel 1994, p. 332).

Until the end of the 1980s it appeared as though fraud prevention was a matter stressed only by the EP and the Court of Auditors. But, in 1988, the Commission intensified its antifraud actions by establishing a Unité de la Coordination Anti-Fraude, called UCLAF (Ruimschotel 1994, p. 320). The UCLAF co-ordinates the fight against fraud and one of its important tasks is investigating suspect fraud cases. However, UCLAF cannot act in all cases. If criminal prosecution is necessary, the Member States alone have the necessary powers to investigate, arrest and charge suspects, as well as bring cases before the courts (Peterson 1997, p.577, see also Ruimschotel 1994, p.331).



We have now seen the different problems complicating the fight against fraud. Let us next address the case study on the negotiations resulting in the Convention on the Protection of the European Communities' Financial Interests and its protocols.

### 3. Case Study Analysis

#### *The various proposals for a legal act*

At the Copenhagen European Council in June 1993, the Commission was invited to submit a proposal, by March 1994 at the latest, on how to strengthen the protection of the Communities' financial interests under the new provisions laid down in the Maastricht Treaty. In March 1994 the United Kingdom tabled a draft *joint action*, based on Title VI regarding the protection of the Communities' financial interests. In parallel, the Commission tabled a draft Council Act establishing a *convention* for the protection of the Communities financial interests. This draft based on Article K.3. was accompanied by a proposal for a Council Regulation on the protection of the Communities' financial interests, based on Article 235 (*cf.* new Art. 308) EC. The Commission had realised that the establishment of common definitions was necessary to protect the financial interests in an effective way. The proposal thus provided not only scope for administrative sanctions but also general rules concerning measures to prevent fraud within the Union. One of the respondents commented that:

We elaborated a draft in which we put both the questions on administrative controls and the questions on a harmonisation of criminal law (...) But we could not table a draft on a harmonisation through a first pillar act. Therefore we decided to divide the proposal into two different parts; one which was under the first pillar, i.e. concerning matters on administrative control and administrative sanctions and one that considered third pillar issues, i.e. a harmonisation of criminal law. (...)

As can be discerned, the objective of the Commission was thereby to try and legislate within the first and third pillar simultaneously, by elaborating

both administrative and penal sanctions. Let us firstly deal with the proposal regarding the administrative sanctions (first pillar).

The proposed draft Council Regulation aimed at developing the legislation and framing administrative sanctions in fraud cases. By using Article 235 (*cf.* new Art. 308), the EP had to be consulted on this matter. The EP gave its opinion in March 1995 in which some modifications had been made. The modifications concerned the possibility of the Commission to do on-the-spot checks in the Member States. This was discussed in the Council and then the EP had a second opportunity to give its opinion. In December 1995 the Council adopted *Regulation 2988/95 on the protection of the Communities' financial interests*, after having rejected the modifications made to it by the EP on improving the investigation power of the Commission. This Council Regulation is the first horizontal instrument to define the notion of irregularity against the EU budget, and to frame Community administrative sanctions. The most important step taken in the Regulation is thus that it is supposed to reduce control disparities between sectors, by harmonising the administrative sanctions (Kommissionens årsrapport 1996 p. 13).

The Commission bore the proposals of the EP in mind and made a draft proposal for a Council Regulation concerning on-the-spot checks and inspections carried out by the Commission in order to protect the Communities' financial interests against fraud and other irregularities. This Council Regulation aims at reinforcing the Commission's existing powers of investigation in the Member States in order to fight fraud. At the ECOFIN Council in early 1996 consensus was reached and the EP approved the proposal in October the same year. The Council Regulation concerning on-the-spot checks and inspections is a big step in the fight against fraud, as it improves the Commission's capacity for action. It complies with the principle of subsidiarity meaning that the Commission will only investigate and make on-the-spot checks where this action can more effectively be implemented.

Simultaneously with the negotiations within the first pillar, negotiations went on concerning the third pillar legal act. Let us next address these negotiations. The author will start by presenting the attitudes of the Member States regarding the co-operation on criminal matters. This will be followed by an analysis of the negotiation climate.

## *Attitudes of the Member States*

When asking which Member States were the most reluctant to enlarge the scope of EU activities in the field of criminal justice, the interviewer always got the same answer. The United Kingdom and Denmark were mentioned and also Sweden, which was only an observer in the negotiations before its accession in 1995. Knowing that these Member States are those most reluctant to accept the supranationality of the EU, this was maybe not very surprising. However, fraud prevention is an area where all the Member States should see the need to enlarge the scope of EU activities and therefore the author wanted to find out the reasons to why these Member States seemed to be more reluctant than the others did.

According to the respondents, the attitudes of the British and the Danish were based on grounds of domestic policy. The United Kingdom often claims that its legal system is not compatible with the other Member States' legal systems. As the United Kingdom has no written constitution the legal system is based upon *common-law*. The unwritten common-law is nevertheless as binding as written laws (Strömberg & Melander 1989, p. 19). One of the respondents argued that the British attitude "is bullshit! It is only a question of adaptability".

As regards the Danes, their approach is that criminal law is one of the exclusive powers of the State. In the case *326/88 Anklagemyndigheten v Hansen & son I/S* this point of view was stressed:

The imposition of penalties is, and must remain, a matter for national law because policy in the field of criminal law has not been the subject of international co-operation except sporadically and each country thus retains its own traditions with regard to the severity of penalties and the discretion of the courts. The Danish Government considers that a country's policy in the field of criminal law is bound up with its national culture, and it is therefore crucial for the evolution of society as a whole that the possibility for Member States to pursue an independent policy in that area should not be completely nullified.

The Danish respondents underlined that there exist provisions for a very far reaching protection of minorities laid down in the Constitution, giving

a small minority within the Folketing the possibility to prevent or at least delay legislation which implies a concession of sovereignty (Nergelius 1997, p. 39). A legal act in the field of criminal law elaborated in the EU and demanding ratification to be binding, can thus be stopped if a sufficient number of Folketing members vote against it.

Concerning Sweden, some of the respondents mentioned that there was a fear of going too far in the eagerness to harmonise criminal law. Sweden wanted of course as much as the other Member States to reduce the number of frauds targeting the Union's budget not least as major organised crime does not confine its attacks to European finances, but also damages other interests of the Union. However, the Swedish wanted to wait and see what was really needed instead of "rushing things".

Among the Member States distinguishing themselves as the most positive when it comes to harmonising criminal law were Italy, Spain, Belgium, the Netherlands and Luxembourg. Italy in particular, has shown a great understanding of the importance of having a transnational legal system as the lack of such a system is one problem the Italians have discovered when fighting against the Mafia. Throughout the negotiations, Italy was most helpful according to all of the interviewees.

### *The question about the form of the legal act*

During the first rounds of negotiations, the discussion was to a large extent concentrated on the question of the *form* of the legal act that was to be elaborated. As mentioned above, there were two different proposals on how to strengthen the protection of the Communities' financial interests; the British draft *joint action* and the Commission's draft Council act establishing a *convention*.

It is interesting to note that the United Kingdom wanted to speed up the process and find a common form of legislation within the field of the third pillar. As stated above, the British have been very reluctant about harmonisation of criminal law, claiming that their common-law system is not compatible with the other Member States' legal systems. When discussing the draft joint action all of the respondents guessed the reason be-

hind this British proposal. The Member States were aware of the fact that the Commission was preparing a draft proposal regarding fraud prevention, as it had been invited to do so by the Council. In the United Kingdom, there was fear that the Commission might elaborate a draft directive on the harmonisation of criminal law, despite the fact that this matter was to be dealt with within the third pillar. Furthermore, the British did not want a proposal that would be too difficult to accept. Therefore the British initiated their own draft joint action, as "prevention is better than cure".

The Commission tabled its draft Convention in July 1994. The German Presidency opened the discussion regarding the British proposal and the Commission's proposal at the same time in order to elaborate a resolution to give guidelines to its successor France. One of the respondents stated that these negotiations went on for months:

We worked with two different texts, and this was very difficult, yes as a matter of fact there were even three different texts as the French tabled a compromise proposal similar to the proposal prepared by the Commission. It was a very complicated situation. Thus there were two or three proposals to be discussed at the same time and moreover some of the Member States' delegations also made proposals as all Member States have the right of initiative under the third pillar (...) Sometimes, there were three or four meetings a week; two concerning the Commission's proposal and then there were meetings regarding the British proposal. The negotiating atmosphere was not the best one, as the Member States did not want to accept, or let us say that we negotiated with the ministers of justice and that they were not used to the working procedures within the Union, but used to intergovernmental negotiations.

When comparing a joint action to a convention only the latter is legally binding for a Member State that has ratified it. Therefore, the protection of the Communities' financial interests is less secured by a joint action than by a convention. This was the crucial difference between the two proposals, even though they both aimed at strengthening the protection of the Community budget.

As regards negotiations in the field of the third pillar, the EP has no powers to exercise control over the executive. The Council is not obliged to consult the EP, but Article K.6. rules that the Presidency must consult

the EP on the principal aspects of activities. This drew the following comment from one of the respondents:

In the beginning, after the entry into force of the Maastricht Treaty, there were many discussions about how we were supposed to relate ourselves towards the Parliament. Some people thought that we should consult it on all matters while others thought that we should never consult it. The first time we consulted the EP it was on ad hoc basis (...) At that time everybody accepted the fact that this issue was related to Community matters which were to be dealt with under the provisions of the first pillar. Therefore it felt right to consult the EP.

By a resolution presented in March 1995, the EP rejected both the British' and the Commission's proposals. Instead, the EP suggested that a *directive* should be elaborated, as it was the most appropriate way to deal with the problem. By using the form of a directive, the freedom of action of the Member States would be less limited according to the EP, as a directive is in concordance with the principle of subsidiarity (see opinion A4-0039/95b). Furthermore, the EP argued that the protection of the Communities' financial interests was a matter to be dealt with by using Article 100(a) (new Art. 95) , as it affects the internal market (*cf.* p.8).

However, the Commission wanted to use the intergovernmental procedure, stated in Article VI of the Maastricht Treaty. This was partly due to the fact that this area was to be dealt with according to the provisions of the third pillar, and partly because the intergovernmental procedure is more familiar to the different Ministries. One of the respondents from the Commission stated that "it would be very provocative to try and sneak in the field of criminal justice under Article 100(a) (new Art. 95). The EP continues to say that we have to do so. We have tried to tell the EP that if the Member States do not ratify this convention, we will initiate a draft directive! The EP is not very satisfied with this answer..." According to one of the interviewees from the Commission, the EP has not yet understood its role in this area. "The problem is that neither Santer nor Anita Gradin has been precise, they have not managed to say: You have to stay Parliamentarians! We are the executives and we work like this. If you don't like it, then kick us out of office. That's the rule of this game."

We have now analysed the conflicts of competence between the Mem-

ber States and the EU institutions. It is interesting to note that the different actors chose different methods of dealing with community frauds. The discussion about the form of the legal act clearly reveals the strains between the different actors. They all wanted to have the form of the legal act that suited their own needs in this power struggle. However, the negotiators finally agreed that a convention would be the most appropriate way to proceed. According to the interviewees the UK realised that a convention was better than to have no agreement at all. One respondent claimed that most of the Member States preferred a convention to a joint action, as the former “has the advantage to be legally binding and that it involves the national Parliaments in the process.”

### *The negotiating climate*

In the paper “Negotiations in the EU: Problem-Solving or Bargaining?” Ole Elgström and Christer Jönsson argue that even though national interests are very important or maybe just because of that, negotiations in the EU often result in “consensus-building and high degrees of problem-solving behaviour” (Elgström & Jönsson 1998, p. 21). The reason for this is that EU negotiations never cease which means that participants know they will meet again (Héretier 1996, p. 157, cf. Axelrod 1984, p. 174). The Member States generally want to maximise their individual interests, but the shadow of the future may discourage them from doing so. In this particular case we have seen that the UK finally agreed to have a convention instead of a joint action. At the same time it is interesting to note that the UK obtained some important derogations from the final convention (see the section concerning the result of the negotiations). This implies that a high degree of problem-solving behaviour within the EU can result in compromise solutions, where the final result is more or less watered down.

One of the greatest obstacles to progress in EU negotiations is the arrival of a negotiator unwilling to change his position. This unwillingness is caused by the fact that national negotiators do not only operate “in a Brussels vacuum, but operate primarily in a national context from which they sally forth periodically to seek EC solutions to domestic policy problems”

(Wallace 1985, p. 455). The negotiators can have difficulties to persuade their organisations, as there are often different opinions within the organisation. Internal negotiations are therefore also important and this results in negotiations at two different levels, “a two-level game” (Putnam 1988). “Negotiators representing two organisations meet to reach an agreement between them, subject to the constraint that any tentative agreement must be ratified by their respective organisation (Putnam 1988, p. 435).

When asked whether there had been any conflicts within the different parties, the respondents were of the opinion that such disagreements had been of minor importance. However, one problem mentioned was the degree of resistance within the Directorates Generals for agriculture and structural funds. These Directorates Generals had built their own systems to prevent fraud targeting the EU budget and they were concerned that the establishment of a general instrument would undermine these sectoral instruments. Thus the resistance was caused by the fear that the protection of the Communities' financial interests would be weakened.

Within the Member States there were certainly also internal differences of opinion, but none was really exposed. However, according to the respondents, disagreement existed between the different ministries in the United Kingdom. The Lord Chancellor's Office was opposed to harmonisation in the field of criminal law whereas the Treasury argued that harmonisation was necessary to cope with the problems of EU fraud. One respondent who had been in touch with some persons representing the Treasury related that they had said “those crazy people in the Lord Chancellor's Office are idiots who do not understand what reality looks like!”

The personal behaviour of the negotiators determines the negotiation climate. One of the respondents gave an example from the working group on criminal law that was set up to discuss the question regarding the protection of the EU funds (see Kommissionens årsrapport 1994).

In the working group, during the French Presidency, there was a French woman as president. She was very determined and then there was a British woman who was also very stubborn. It was as if there had been electricity in the air! These two persons could not stand one another! This means that irrespectively of how much we discuss the institutions, administrations and Member States, when negotiating a specific issue, in real life it is all about different persons (...) The outcome of the negotiations depends very much



upon the personal behaviour of the negotiators. Most of the work during the negotiations is done within the working group and therefore the persons involved in such a group play a very important role.

This quote shows that personal contact problems were an obstacle to the development of a harmonious negotiating climate within this working group. When this happens in a negotiation, more informal negotiation methods have to be used in order to find a solution. One of the respondents mentioned that “if it’s really difficult to find a solution we decide to have a break of 20 minutes. During this break some bilateral conversations take place and hopefully you find a compromise solution. Then we start all over again and try to use this compromise solution.”

### *The role of the Commission*

To understand the dynamics of decision-making within the EU it is essential to know the multidimensional role of the Commission: “On the one hand, it is supposed to be a radical supporter of the realisation of the EC visions. On the other hand, it must try to reach complicated political compromises” (Andersen & Eliassen 1993, p. 146). The Commission is a *linking-pin organisation* in the decision-making process, as most networks emerge around this institution and as it is an important actor in most negotiations (cf. Jönsson 1991, pp. 1989). The Commission creates contacts with third parties to improve its knowledge in a certain area before starting the negotiations (Andersen & Eliassen 1993, p. 19). “By assisting the formation of networks of ‘relevant’ state and non-state actors (...), the Commission can maintain its position as an ‘independent’ policy-making institution and can increase its leverage with the Council of Ministers and the European Parliament. Information and ideas are important building blocks in this process” (Richardson 1996, p. 15).

We have already seen that decision-making concerning the third pillar is primarily the responsibility of the Member States. However, the Commission is allowed to participate in the negotiations according to the provisions laid down in Article K.4 (2).

The negotiators did not like that the Commission was represented in the negotiations, and the British delegation often pointed out that it did not understand why the Commission was represented. The Commission did not have the competence to do so! But all the other States accepted that the Commission should take part in the negotiations and therefore we could continue to be in the negotiations and in the texts we put footnotes, as we did not have the right to put anything in the text itself!

In the negotiations examined in this case study the Commission seems to have been more involved than is usual concerning matters in the field of the third pillar. One interviewee from the Commission explained that:

When speaking of procedures there are no differences between different negotiations with regard to third pillar matters. However, in this case the Commission was very involved as it was closely related to the negotiations within the first pillar. (...) The Commission has played two key roles: the first is that it has made an effort to co-ordinate the negotiations within the first and third pillar. The other is that it was particularly active in the negotiations in the working groups, but also at a higher level and it has presented documents with analyses which were very useful in the negotiations. The Commission has really been very involved.

Being the Commission's responsible unit when it comes to preventing fraud, UCLAF, was a key actor in the negotiations. "Networking is very important for UCLAF for the very reason that it doesn't have strong powers. But it does have knowledge and receives information that proves useful to people in national networks" (Peterson 1997, p. 578). In the negotiations analysed here, UCLAF had very close contact with different experts of the field of criminal law, at least before the negotiations begun. One of the respondents from the Commission mentioned that "we contacted several persons outside of the Commission. (...) It is always important to have a support group, which gives the intellectual rationale and arguments for your proposal." Furthermore, UCLAF had a close ally in the Committee of Budgetary Control, as they both had much to gain from the elaboration of a legal act to protect EU finances.

Networks based on knowledge and ideas have been called *epistemic communities*, defined as "network[s] of professionals with recognised expertise

and competence in a particular domain and authoritative claim to policy-relevant knowledge within that domain or issue-area” (Haas 1992, p. 3). According to John Peterson epistemic communities are not to be seen as genuine policy-networks as it rarely happens that “all actors within any policy-network be ‘experts’ as in epistemic communities” (Peterson 1995, p. 79). Instead epistemic communities form a part of a policy-network in which they compete for influence (Peterson 1995, pp. 79). The type of network that provides UCLAF with information could be seen as an epistemic community, as the actors share the same values and are experts in the field of criminal law. However, this author shares the opinion of John Peterson, that an epistemic community is not a genuine policy-network but rather a part of such a network.

To be effective, the fight against fraud is dependent on the extent to which national authorities, specialised in fraud prevention, are informed about the measures taken at the EU level. The Commission is in close contact with these national authorities and this marks the importance of co-operation in order to fight fraud involving more than one jurisdiction. In recent years, the Commission’s co-operation with national authorities has become more and more informal (see Kommissionens årsrapport 1996 p. 32) and the author considers that to be a sign of the existence of networks in the field of fraud prevention, even though they are still hard to define.

### *Coalition-building within the EU*

When discussing informal relations in different networks one inevitably thinks of *coalitions*. Networks and coalitions are built for the same reasons: to gain an advantage by exchanging resources. However, networks are said to be more stable and enduring (Risse-Kappen 1996, p. 70).

Helen Wallace considers that coalition-building in the EU is becoming increasingly frequent. She believes that the reason is that the negotiations of today treat policy issues other than those at stake in the early days of European integration. These new conditions of co-operation require prenegotiations before the real negotiations start. Therefore, a greater en-

agement of both the Member States and the Commission is needed and the different parties discuss informally how to address particular policy problems (Wallace 1985, pp. 460). Another common phenomenon in EU negotiations is the close relation between the Commission and the Presidency. "The Presidency (...) sets certain priorities and tries to do so in concert with the Commission. (...) Some priorities are more or less directed to it: business of the Commission which is spread over several presidencies and needs to be kept going by each" (Nicoll & Salmon 1994, p. 76).

In this case study, coalition-building has occurred at several stages of the process. It seems as though coalition-building between the Presidency and the Commission has been particularly relevant:

The Commission always found a coalition partner in the Presidency. The Presidency usually feels obliged to achieve a lot during its time as president and it does not want the evaluation afterwards to be negative. (...) The Commission can do much to help the Presidency to turn its work into a great success. That's why the Presidency prefers to have a harmonious relation with the Commission. The combination Commission-Presidency overturns everything. Everybody thought that it would be impossible to act in this area, as it is very sensitive and as unanimity is required when voting. We realised that it would be very hard to get this proposal through during only one Presidency and therefore one of our tactics was to divide this proposal into different parts so as to create a dynamic of success. By doing so, many presidencies could participate in this dynamic.

In the negotiations analysed here, the Presidencies have pushed themselves forward to be able to reach an agreement before the end of the six months period. As an example, the first protocol on corruption of officials was proposed upon the request of the Spanish Presidency, as an additional instrument to complement the convention (Kommissionens årsrapport 1996 p. 51). This protocol aims at framing effective measures to punish bribery involving officials of the European Union in relation to the financial interests of the Communities. The following Presidency, Italy, tabled a draft Council act establishing a genuine convention on corruption, to promote an adequate response at the European level and to secure greater convergence in the manner by which Member States' criminal law apprehends

forms of corruption with international ramifications (Kommissionens årsrapport 1996 p. 51). As the quote above states, the Presidency wants to achieve as much as possible and the Commission can help it to achieve good results. A second draft protocol on money laundering was tabled by the Commission as these issues had to be removed from the convention. The removal of the issue on money laundering had been necessary to help France, which was the Presidency at that time, to present the final convention on time.

However, coalition-building did not only emerge between the Commission and the Presidency during the negotiations. According to the respondents there had also been a certain tendency towards coalition-building between persons having the same position in the different States. "There were coalitions between persons playing a similar role in the Member States. Thus there were transnational alliances between people at the Ministries of Finance, the national Court of Auditors etc. On the other hand, there were the Ministries of Justice and the courts..." This quote is very interesting as it indicates an important characteristic of the negotiations in this empirical study. The negotiations concerned criminal law matters and therefore it should have been logical that the Ministers of Justice had the negotiation mandate and played the *boundary roles*, representing their parties. However, from the very start, the Ministers of Justice had problems with the reform of criminal law. Therefore the Commission adopted a strategy of co-opting the Finance Ministers into the reform process. The reason for this was that it was "the only way the Commission could have proceeded since it has no hierarchical control over the Member States and limited coercive capacity. The emphasis is on creating a group of like-minded people..." (Laffan 1997, p. 437). One respondent said:

[T]he ones that really helped us, not only concerning the convention but also with the regulation, the persons that helped us and understood the reality and not only those metaphysical sovereignty concepts, those were the Finance Ministers. The Finance Ministers realised that something was needed to get to grips with the problem and what we did was to change arena from one Council to another. Every time things were blocked in the JHA Council we put it on the agenda of ECOFIN, and ECOFIN said: why the hell does not anything happen on this matter? (...) Then we brought it up at the European Council and after this there went an order to the

Ministers of Justice to do something. All these persons at the Ministries of Justice are a bunch of reactionary people. They don't take an active interest in the economic integration. They don't know that the common market already exists and they are surprised when you tell them that there are penal sanctions within the agricultural and competition law sectors etc. If that's not criminal law, then I don't know...

### *The result of the negotiations: a compromise*

The final Convention on the Protection of the European Communities' Financial Interests was signed on 26 July 1995. Two protocols have been added to the Convention since that date. As unanimity is required when voting in negotiations in the field of high politics all the negotiators must thus be at least partly satisfied with the outcome. Without this requirement to find a solution where all parties are at least partly satisfied "the EU would in the worst scenario run the risk of losing the States' willingness to participate in the EU structure" (Friis 1998, p. 324). Therefore all EU negotiations have to have a win-win and not win-lose outcomes (Wallace 1985, p. 455, see also Friis 1998, pp. 323). This means that the final result is often a compromise solution.

In addition to the requirement of unanimity, Conventions elaborated within the field of justice and home affairs must be ratified by all the Member States according to the provisions laid down in their constitutions (Ds 1997:64 p. 42). This means that it can take a long time before a convention enters into force. At the European Council in Amsterdam a last date for ratification was set to end June 1998 (Kommissionens årsrapport 1997 p. 9). However, the Member States have not complied with this.

When discussing the outcomes of the negotiations all the respondents seemed to be more or less satisfied with the result. On the one hand, the interviewees from the Commission tended to think that they should take credit for the elaboration of the convention. On the other, the respondents representing the Member States argued that the negotiations had been of a pure intergovernmental character in which the Commission had no possibility to influence anything. All the respondents were very dissatisfied with the slow pace of ratification. One of the respondents from UCLAF stated

that “as regards the results, i.e. the convention, I think we are almost as happy with that text that we are with the Regulation within the first pillar. Actually we did not change as much as we feared; maybe the Convention is even better in some regards than what we had expected. The problem is that no country has ratified it yet.”

According to the answers given in the interviews the reason for the slow pace of ratification of the Convention is quite clear, namely that it concerns a very sensitive area. Before ratifying every Member State has to check whether its criminal law as it stands covers some of the provisions laid down in the Convention. However, one of the interviewees gave another explanation to why everything has been so slow:

The real explanation is that the national Ministers of Justice are extremely conservative and totally incapable of establishing a working and binding judicial co-operation on criminal law. They live in their intergovernmental sky and believe that the instruments from the interwar period work in this fully implemented modern economy we are heading for in the 21st century. This is really crazy!

The most important step taken in the Convention is that it introduces for the first time a definition of fraud affecting the Communities' financial interests, which will be common to all of the Member States (Article 1). The importance of this is confirmed by the fact that as regards community administrative penalties in the recitals of Council Regulation N° 2988/95, reference is made to fraudulent acts as defined in this article. In order to cover various types of fraud, Article 1 contains two definitions of fraud, one applying to expenditure and the other to revenue. Furthermore, Member States are required to stipulate criminal penalties for the punishment of conduct constituting fraud. However, Member States retain a margin of discretion in deciding the severity of criminal penalties, although they must be in line with EC case law. In instances of serious fraud the Convention stipulates that Member States must lay down penalties involving deprivation of liberty, which can give rise to extradition (EGT Nr C 191 p. 3).

The author mentioned that the outcome of the negotiations turned out to be a compromise. What then was the compromise in the Convention? One of the respondents from the Commission mentioned that “one of the problems was that we could not cover everything in the Commission's

proposal as it would require too much time. As a result, some things are missing in the final version.” This quote implies that the Commission’s proposal contained some controversial things that would have taken a very long time to negotiate. The interviewees from the Commission were of the opinion that the final text is a little more lenient than the proposal. As an example, the Commission wanted to use the term “serious neglect” in the definition in Article 1 but the Council chose to use the term “intention” (Kuhl 1998, p. 326).

Apart from different terms and definitions there are some important compromises in the Convention. Here it is important to mention that there are possibilities for derogation if a Member State has difficulties in complying with the provisions because of its national legal system. As an example, Article 4 requires each Member State to establish the jurisdiction of its national courts to prosecute and judge offences of fraud against the Communities’ financial interests. This is to be followed when fraud, participation in fraud or attempted fraud has been committed in whole or in part within the State’s territory. Furthermore, Article 4 stipulates that jurisdiction of the national courts is to be applied where a person within its territory has knowingly committed the offence of participating or instigating fraud committed in the territory of another Member State or third country (Prop. 1998/99:32 p. 18). Not all the Member States’ legal traditions recognise such extra-territorial jurisdiction and therefore Article 4 permits Member States to declare that they will not apply this provision. The British legal system does not recognise extra-territorial jurisdiction and the British will not apply the provisions under this article (EGT Nr C 191 p. 7).

One of the respondents commented on the compromises of the Convention by saying, “the Member States could agree to almost anything as long as it did not affect their national legal system.” As a result, the final Convention is not a very powerful instrument.



## 4. Conclusion

This study has shown that there are a number of factors which complicate the fight against Community fraud. We have seen that this issue has revealed strains in relations between the Community and the Member states, as well as in intra-Community institutional relations. To sum up we should bear in mind the three different points of view mentioned in the introduction; the political, the empirical and finally the theoretical views making this case study particularly interesting.

1. Governments are concerned to retain exclusive powers over criminal law, as it is one of the cornerstones of a nation state's sovereignty. Therefore, co-operation with regard to criminal matters has always taken an intergovernmental form. The Member states are all aware of the need to find a common solution in the fight against fraud, yet on the other hand they are reluctant to give up a part of their sovereign powers. The Member states' unwillingness to transfer sovereign powers to the Community in relation to their criminal justice systems, or even to share such powers, thus outweighs their desire to deal with the problem in an effective way. In this case we have seen that the UK, Denmark and Sweden turned out to be the most reluctant towards a harmonisation of the criminal law.

Pursuant to the provisions laid down in the Maastricht Treaty, decisions regarding the application of national criminal justice must be taken within the co-operation on justice and home affairs (third pillar), as they are of an intergovernmental and not of a supranational character. The legal base of the decision-making within the third pillar is of a complex nature, which implies division of competencies between different actors. In this particular case the discussion about the form of the legal act clearly reveals the strains between the different actors. They all wanted to have the form of the legal act that suited their own needs in this power struggle. However, the negotiators finally agreed that a convention would be the most appropriate way to proceed.

As co-operation within the third pillar is of an intergovernmental character, unanimity is required to achieve a result in the negotiations. The requirement of unanimity determines that the speed at which an agreement is reached equals the speed of the most reluctant member. This case

study shows that it was better to settle for a modest result than to risk the Member states' backing out of the co-operation. The final result of the negotiations is therefore to be seen as a compromise solution. As an example, the final text contains possibilities for derogation if a Member State has difficulties in complying with the provisions because of its national legal system.

2. This empirical case presents some original characteristics. On the one hand, criminal law is of a high politics character. We have seen the reluctance of some Member states towards the harmonisation of criminal law. On the other hand, fraud protection is an issue that concerns the EU institutions very closely and is more of a day-to-day character. The EU institutions have the possibility to act to improve fraud prevention as long as such actions do not interfere with the different national systems of criminal law. However, as co-operation on criminal law is imperative when fighting against Community frauds the two issues are deeply related. Fraud prevention is thus an issue where *high politics are mixed with day-to-day politics*. This point has already been underlined, as negotiations within the first and third pillar went on in parallel. The objective of the Commission was to try to legislate within the first and third pillar simultaneously, by elaborating both administrative and penal sanctions. The fact that there were first and third pillar discussions in parallel made the negotiations very complicated.

3. In a negotiation concerning a high politics issue only Member states have a real possibility to influence the decision-making process and we have stated above that the Member states were the most important actors in the negotiations in this study. However, the interviews show that the Commission has been more involved than is usual when negotiating in sensitive areas. The Commission used a cautious negotiation strategy, as it realised that it was better to establish a convention rather than trying something under the provisions of the first pillar. We have seen the differences of opinion of the EP and of the Commission regarding this question. By drafting a proposal for a Council regulation on the protection of the Communities financial interests the Commission involved the EP in the process. Nevertheless, it must be asserted that EP has not had any real powers concerning the elaboration of a third pillar act and this is in accordance with the provisions of the Maastricht Treaty.

Throughout the decision-making process the Commission kept close

contact with the different presidencies, which had much to gain from such co-operation. The dynamic of success that was created facilitated the achievement of the convention and its protocols. In this case study, coalition building occurred at several stages of the process. It seems as though coalition building between the Presidency and the Commission was particularly relevant. Furthermore, there was a certain tendency towards coalition-building between persons having the same positions in the different Member states.

A combination of negotiation and network theories is useful when analysing the EU, as it provides a broader perspective with several different actors and negotiation situations. The author believes that both theories provide instruments to explain the negotiations in this empirical case. Network theories are best used when describing day-to-day integration and not high politics issues. Nevertheless in this study the issue was a mixture of both day-to-day and high politics questions and the author has been able to identify a tendency to informal networking in the fight against fraud. The author has mentioned UCLAF's co-operation with different national experts, in the form of a network called an epistemic community, using Haas' concept. We have also seen that a more stable relation is developing between the national administrations and the Commission. However, there is certainly a need for more case studies to try to identify well-defined policy networks in this field.

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Following the ratification of the Amsterdam Treaty the Community will have a new legal base (Art. 280) for the protection of the financial interests and the fight against fraud. This will benefit the development of a new dynamic and will allow the Council and the EP to take the necessary measures to ensure effective and equivalent protection in the Member States. The use of qualified voting has been extended to this new provision.

## Endnotes

- 1 The Communities consist of the European Coal and Steel Community, Euratom, and European Economic Community. The original three Communities (ECSC, Euratom, and EEC) constitute what is called the *first pillar* of the European Union, or the "community pillar". The first pillar has a high degree of integration between the Member States. The Maastricht Treaty added two other pillars to the European Union covering areas which are sensitive in terms of national sovereignty: one concerns the common foreign and security policy (*the second pillar*) and the other covers co-operation on justice and home affairs (*the third pillar*). The second and the third pillars have a lower degree of political integration than the first one.
- 2 NB that this study was started in late 1998 and finished in February 1999, just before the Commission resigned. Therefore some things are not up to date, but this does not affect the relevance and purpose of the study.
- 3 *List of interviewees: Gisèle Vernimmen*, Head of Unit of the Task force for judicial co-operation, Brussels 981208, *Claus Haugaard-Sørensen*, responsible officer for questions regarding the fight against fraud at the Gradin cabinet, Brussels 981208, *Kazimir Åberg*, Director of Ekobrottsmyndigheten, negotiator for the Swedish Ministry of Justice, Stockholm 990125, *Francaesco de Angelis*, former director of DG Financial Control, Brussels 981209, *Claude Lecou*, director of UCLAF, Brussels 981208, *Lothar Kuhl*, administrator at UCLAF, Brussels 981208, *Bent Mejborn*, principal administrator at the Council Secretary General, Brussels 981211, *Jean Darras*, member of the Parliament's Committee on Budgetary Control, Luxemburg 981210. Throughout the study the anonymity of the respondents has been stressed.
- 4 In a semi-structured interview central questions are formulated in advance, but there is also preparedness to follow up on relevant issues raised by the respondent. In an informal interview questions emerge from the immediate context and are asked in the natural course of things. The respondent has to formulate an answer and this increases the naturalness and relevance of the answer. This type of interview in relating to particular individuals and circumstances increases the possibility to get unexpected information from the interviewee. This approach allows the interviewer to be highly responsive to situational changes and individual differences and to be able to establish a more conversational style.
- 5 When discussing policy-networks, R A W Rhodes and David Marsh (1992) differs between different kinds of networks. A continuum has emerged and at one end of it Rhodes and Marsh put *policy communities* and at the other end, *issue networks*. The model conceptualises some important dimensions characterising policy-networks. These dimensions are the strength of resource dependency, the relative stability of network

membership and the insularity of the network (Rhodes & Marsh 1992). A *policy community* is tightly integrated and is characterised by high resource dependency, constant membership and lack of insularity. Co-operation is advantageous to all parties. At the other end of the continuum are *issue networks*, in which actors are more self-reliant, membership is more fluent and the degree of permeability is higher (Rhodes & Marsh 1992, pp.186).

Jönsson et al propose seven different dimensions or sets of characteristics to identify a policy-network: *informality, the degree to which networks transcend organisational boundaries, the degree of hierarchy, the degree of density* (i.e. means of interconnectedness of the network), *degree of consensus and the degree to which networks are based on knowledge and ideas*. The seven presented dimensions “are not entirely separated but interrelated “(...) [t]he main point (...) is that the exact combination of network characteristics is an empirical rather than a definitional question” (Jönsson et al 1997, p. 13).

- 6 There are analysts who claim that there are difficulties in applying the network concept at the EU level. Keith Dowding argues that the policy process can be understood “(...) without recourse to the language of networks...” (Dowding 1995, p. 145). This critic is more of a general outburst against the concept of network and its difficulties to form the centrepiece of explanation. In my opinion, Dowding neglects the fact that the policy-network model can be a useful tool when analysing difficult negotiation situations, characterised by a multitude of actors related to each other in different ways. Another analyst questioning the usefulness of the application of policy networks at the EU level is Hussein Kassim. Kassim argues that the concept has little to offer, as the EU decision-making process is too fragmented and changeable (Kassim 1994). “The elusive fluidity of EU processes, the importance and complexity of EU institutions and the problems of delineating a network for a multinational organisation that may not be the only competent body in a particular domain” present the network approach with great difficulty (Kassim 1994, p.).
- 7 A definition of Community fraud is: “fraudulent behaviour in the Member States against the financial resources and allocative functions of the EC. The fraudulent actors vary widely: they can be individuals, groups, organisations or the States themselves through their administrations. The ‘victims’ of Community fraud are directly the Community and its fiscal resources and indirectly (...) other Member States or individuals, organisations, etc, in the Member States” (Mendrinou 1994, p. 82).
- 8 The statistics of fraud in the agricultural sector for the period 1971-1991 reveal that Italy stands out, as it has been responsible for more than half of the total value of detected fraud committed (see Ruimschotel 1994, p. 326 and Brehon 1997, p.189).
- 9 The EP has the power to dismiss the Commission, by passing a vote of censure. This must be carried by two thirds majority, which must represent a majority of the Members of Parliament (Art. 144 , new Art. 201, EC).

- 10 There are two approaches to international law, monism and dualism. If a state is monist international law will be received automatically into national law from the moment of its ratification. But if dualist, international law will not become binding internally as part of domestic law until it is incorporated by a domestic statute (see Strömberg & Melander 1989, pp.18).
- 11 See for example the European Convention on Mutual Assistance (1959), the European Convention on Extradition (1957) European Convention on Laundering, Search, Science and Confiscation on the proceeds from Crime (1990).
- 12 See 26/62 Van Gend den Loos v Nederlands Administrative der Belastingen [1962] CMLR 105.
- 13 See for example 6/64 Costa v ENEL [1964] CMLR 425 (See Allgårdh et al 1993/ Kjellström 1997)
- 14 Both the EP and the Council may request the Commission to submit any appropriate proposal on matters on which it considers that a Community act is required for the purposes of implementing the Treaty (Art. 152 , new Art. 208, and 138 (b), new Art. 192, EC).
- 15 Hereinafter the author will call the European Parliament *EP* or *the Parliament*
- 16 The Council adopts a draft budget on the basis of a proposal formulated by the Commission in its preliminary draft budget. The budget is forwarded to the EP which may approve the budget within 45 days, in which case it stands adopted. Alternatively the EP may suggest modifications or amendments. For a detailed examination of the budgetary procedures see Laffan & Shackleton 1996 och Nugent 1994.
- 17 See for example the De Keersmaecker Report 1977, the Gabert Report 1984, the Dankert report 1989 and the Theato Report 1991 (for an overview of the reports see Vervaele 1992).
- 18 During the discussion on the discharge resolution of the 1987 budget the Parliament adopted a resolution<sup>19</sup> aiming at preventing fraud targeting the EU funds. By viewing fraud as partly caused by the inadequacies of Community legislation, the Parliament stressed the importance to sort out the problem: “[U]nder the institutional set-up laid down in by the European Treaties, the Council can (and still does) draw up legislation that tends to encourage fraud, without being answerable in this connection to a body of elected representatives...” (PE doc. A2-20/89/A pp. 317). Thus EP argued that the legislative complexity of the Community system itself contributes to fraudulent exploitation. The EP criticised the Council and its failure to give the Commission the necessary powers to control how money is actually spent in the Member States. The result is that “...the Commission’s efforts to discharge its responsibilities for the implementation

of the Community budget are being frustrated and Parliament's right to grant discharge to the Commission is being undermined" (PE doc. A2-20/89/A p. 320). However, the Commission has also been criticised although the EP usually sees the Commission as an ally (Ahnfelt & From 1996, p. 258).

- 20 The Court of Auditors' main task is to monitor the EU finances and point out where management needs to be improved. Before 1975, the audit of the Communities' finances was carried out by national auditors. However, the Court of Auditors had a predecessor, the Audit Board, which had only marginal influence on the way the audit itself was implemented (for a detailed examination on the Audit Board and the Court of Auditors *see* Kok 1989).
- 21 *See* Vervaele 1992 and Kok 1989 for a more detailed study on the annual reports of the Court of Auditors. *See* EGT C 17.11.98, annexe II for a list of the reports 1993-98.
- 22 In 1999 the Commission has strengthened its anti-fraud service and transformed UCLAF into a Task force directly answerable to the Secretary General, OLAF. *See* EGT N° L 136, 31/05/1999
- 23 5342/94 JUSTPEN 12.
- 24 EGT Nr C 216 a and b 6.8.94.
- 25 EGT Nr C 89/83 10.4.95
- 26 EGT Nr L 312 23.12.95
- 27 Much of the fraud control measures taken at the EU level have taken place against the increase in the size and complexity of the CAP. Administrative sanctions within this sector have been proved very efficient and that is why a step has been taken to frame horizontal administrative sanctions.
- 28 EGT Nr C 84 21.3.96
- 29 Council of Finance ministers
- 30 EGT Nr L 292 15.11.96
- 31 "in areas which do not fall within its exclusive competence, the Community shall take action in accordance with the principle of subsidiarity, only if and so far as the objectives of the proposed action can not be sufficiently achieved by the Member States and can therefore by reason of scale or effects of the proposed action, be better achieved by the Community."

- 32 Opinion A4-0039/95 EGT C 89/82a, and EGT C 89/82b
- 33 Negotiations within the EU are similar to negotiations in the United States' Congress, where negotiators are part of a system of 'log-rolling' or 'pork-barrel trading' (see Bacharach & Lawler 1980).
- 34 EGT Nr C 316 23.10.96
- 35 EGT Nr C 83 20.3.96
- 36 EGT Nr C 316 27.11.95, EGT Nr C 313 23.10.96 samt EGT Nr C 221 19.7.97
- 37 Only Denmark, Sweden (*cf. Proposition 1998/99:32 EU-bedrägerier och korruption* and Ds Ju 1998:1 *Sveriges tillträde till bedrägerikonventionen*) Austria and Finland have ratified so far.
- 38 EGT is the Swedish version of Official Journal
- 39 "The Community and the Member States shall counter fraud and other illegal activities affecting the financial interests of the Community through measures to be taken in accordance with this Article, which shall act as a deterrent and be such as to afford effective protection in the Member States" (cf. Art. 209 Maastricht Treaty).



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