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BRIEFING ON COMBATING FRAUD AGAINST THE COMMUNITY BUDGET, LEGAL PROTECTION OF THE COMMUNITY'S FINANCIAL INTERESTS AND MONITORING COMMUNITY EXPENDITURE

(First update)

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These briefings have been drafted by the Parliament Secretariat Task Force on the Intergovernmental Conference. Their purpose is to gather together, in an organized, summary form, the proposals and suggestions which the authorities in the Member States, the Union's institutions and specialist commentators have put forward on the issues likely to be on the IGC/96 agenda. Briefings will be updated as negotiations proceed.

Already out:

1. The Court of Justice
2. The Commission
3. The Court of Auditors, ESC and COR
4. Differentiated integration
5. The common foreign and security policy
6. The role of the national parliaments
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**BRIEFING
ON
COMBATING FRAUD AGAINST THE COMMUNITY BUDGET,
LEGAL PROTECTION OF COMMUNITY FINANCIAL INTERESTS
AND MONITORING COMMUNITY EXPENDITURE**

I. SUMMARY

1. Although the combating of fraud, protection of the Community's financial interests and control of Community expenditure are being widely discussed by the public and experts in Europe, the subject has not yet been analysed systematically and in detail by the participants in the 1996 Intergovernmental Conference (IGC).
2. Discussions in the Member States and in some Community institutions have led to declarations of principle underlining the need to make progress with combating fraud and the provision of related instruments (see II below).
3. The position of some Community institutions and the Reflection Group chaired by Mr Westendorp (report SN520/1/95 REV 1) on the other hand reveals that more careful thought has been given to the matter; and that some ideas have emerged; such ideas - which at times coincide with the requirements expressed by the Member States - have been developed within the 'General Framework' submitted by the Irish Presidency with a view to preparing a draft revision of the Treaties (CONF 2500/96)⁽¹⁾. The matters with which the IGC has been confronted in the sphere of budgetary control are as follows:
 - (a) What is the correct institutional framework for combating fraud? (See III below.)
 - (b) What legal basis and what procedure in the 'Community pillar' of the Treaty on European Union (TEU) can best guarantee that legal protection of the Community's financial interests is based on the principles of the EC Treaty and on a solid democratic basis? (See IV below.)
 - (c) What bodies or institutions should be responsible for applying the rules governing protection of the Community's financial interests and control of expenditure? (See V below.) What powers should they have?
4. The conclusions that can be drawn from the positions of the Member States and the Community institutions are as follows.
 - A. Several Member States, the Community institutions and the Presidency of the Council on the IGC agree on the advisability of stepping up measures to combat fraud, legal

(1) Henceforth called 'General Framework'

protection of the Community's financial interests and control of Community expenditure (section II).

- B. The European Parliament's view is that the appropriate institutional framework for regulating the matter is the first and not the third pillar (justice and home affairs). The Commission and several Member States prefer communitarization of the third pillar, at least the part concerning international fraud; other Member States and the Presidency of the Council consider that measures against international fraud and corruption should take place within the framework of the third pillar. It remains to be clarified whether this orientation also refers to the anti-Community fraud and violations in respect of which the 'general framework' provides a substantial legislative apparatus in Article 209a of the ECT (section III).
- C. The first pillar does not provide a specific legal basis for general measures regarding controls and combating fraud. Only Article 235 would be applicable. A general consensus (Parliament, Commission, 'General Framework') appears to be emerging on the advisability of:
 - . creating a permanent legal basis for anti-fraud legislation;
 - . providing for a legislative procedure which closely involve Parliament (co-decision) (section IV)
- D. The 'General Framework' and a number of Member States feel that in order to step up the fight against fraud greater powers should be given to the European Court of Auditors which should consolidate its relations with national audit bodies (section V).
- E. The Reflection Group wondered about the advisability of increasing the power to control expenditure of the European Parliament (section V). The 'General Framework' is silent on this matter, while Parliament encourages the IGC to take measures with a view to defining the draft treaty (section V).

II. STRENGTHENING THE LEGAL AND INSTITUTIONAL MEANS OF COMBATING FRAUD

- 5. Several Member States and Community institutions say they intend to step up measures to combat fraud by consolidating the legal and institutional means available to Community operators:
 - (a) The Belgian government's policy note to Parliament on the 1996 Intergovernmental Conference (IGC) advocates making measures to combat fraud more stringent by strengthening the role of the Court of Auditors (which would be responsible for informing national parliaments of cases of fraud) and improving the Community's legal instruments for combating fraud.

- (b) The reports submitted by the Member States at the request of the Essen European Council on national measures to combat waste and misappropriation of Community funds, which will be submitted to the European Council in December 1995, all agree on the need for effective legal instruments to combat fraud. The Italian government's memorandum advocates that the system of penal sanctions applicable to fraud involving the Community budget be aligned more closely in the legal systems of the Member States with the provisions of the Convention on the protection of the Community's financial interests signed in July 1995 as part of the third pillar.
 - (c) The European Parliament resolution of 17 May 1995 on the operation of the Treaty of European Union in the run-up to the 1996 IGC (report by the Committee on Institutional Affairs A4-0102/95) advocates that tougher measures be taken to combat fraud and other infringements of EU law (paragraph 36); Parliament's resolution on the agenda for the 1996 Intergovernmental Conference with a view to the Madrid European Council also calls for stronger 'Community and national instruments for combating fraud and maladministration at European Union and Member State level' (B4-1563/95).
 - (d) The Commission report on the operation of the TEU (SEC(95) 731 final) points out that despite the changes effected by the TEU as regards combating fraud, 'substantial interests are at stake, but the new legal weapons supplied by the Treaty hardly measure up to them' (paragraph 68).
6. The report by the Reflection Group has considered the possibility of tougher measures to combat fraud and control Community expenditure and has recommended more effective measures against fraud by the Community institutions, in particular Parliament and the Court of Auditors, with harmonized rules in the national penal codes to protect the Community's financial interests (paragraph 133).
7. Throughout 1996 several contributions by Member States to the IGC have confirmed a general tendency towards strengthening the institutional and legislative framework of measures to combat fraud (see contributions: of Austria - CONF 3857/96; Greece - CONF 3845/96; Italy - CONF 3839/96; UK - CM 3181).

III. IN WHICH INSTITUTIONAL FRAMEWORK CAN FRAUD BE COMBATED?

- 8. All the anti-fraud measures implemented by the Community (sanction and control mechanisms) are to be found in the regulations drawn up under the EC Treaty. Title VI of the TEU however provides that 'fraud on an international scale' is one of the areas covered by the third pillar (Article K.1). What then is the appropriate institutional framework?
- 9. Parliament's resolution of 15 December 1994 on the protection of the Community's financial interests (B4-0470/94) called on the Council to 'acknowledge that the Community alone is entitled to draw up the general rules governing the protection of its own financial interests' (paragraph 2). The resolution of 15 March 1995 therefore

rejected the proposal for a Council decision establishing a convention for the protection of the Communities' financial interests under the third pillar of the TEU (A4-0039/95).

10. Parliament considers it inappropriate to deal with fraud under the third pillar since the legislation governing controls and sanctions is of such a nature as to limit individual rights and thus necessitates the application of legislative procedures proper ('nulla poena sine lege': see opinion of the Committee on Budgetary Control for the Committee on Civil Liberties and Internal Affairs annexed to report A4-0039/95). The third pillar's decision-making procedure however departs from the legislative process in several respects (rule of unanimity; non-elective decision-making body; absence of judicial control: see abovementioned opinion of the Committee on Budgetary Control and Mr Brinkhorst's working document on justice and home affairs annexed to the Martin/Bourlanges report A4-0102/95/part III, No. 5).
11. The advisability of clearly integrating protection of the Community's financial interests into the 'Community' pillar or of 'communitarizing' the third pillar (at least as far as aspects affecting certain areas of Article K.1 such as fraud are concerned) is highlighted at several levels.
12. Parliament's resolution on the functioning of the TEU thus advocates an end to dismemberment of the institutional system and the inclusion in the Community system of the areas of justice and home affairs (paragraph 14i). This position by Parliament has been confirmed by the resolution of 19.9.1996 on the follow-up to the interparliamentary conference on combating fraud against the Community budget (report of Committee on Budgetary Control A4-0263/96).
13. The Member States that have examined the question of 'communitarization' of the third pillar (particularly as regards combating fraud and international crime) are divided in their opinions:
 - (a) those probably in favour are:
 - Italy, which clearly speaks of communitarization, *inter alia*, of joint strategies for combating international crime (memorandum from the Minister of Foreign Affairs of 12 October 1994);
 - the Netherlands, which considers various options for total or partial communitarization (note of 14 November 1994);
 - Belgium, which advocates communitarization or the adoption of 'Community' methods as regards the Commission's right of initiative, majority voting, and strengthening of Parliament's role, while acknowledging that other Member States might be opposed in the case of police matters (note of 1 August 1995);

- Austria, Finland, Sweden and Greece, which also seem to be in favour of introducing Community methods in the third pillar (declarations during the Justice and Home Affairs Council in La Gomera, 16 October 1995);

(b) those probably not in favour include:

- Spain, which is reluctant to move on to the qualified majority rule (Spanish government document which forms the discussion paper for the 1996 IGC) and proposes instead that the instruments for combating international crime within the framework of the third pillar should be strengthened (CONF 3925/96);
- France and the United Kingdom, which are opposed to abandoning intergovernmental cooperation (declarations at the Justice and Home Affairs Council in La Gomera, 16 October 1995, and for the UK, contribution 3918/96);

14. Apart from Parliament, the Community institutions other than the Council are in favour of communitarization of the third pillar:

- on the basis of a disappointing analysis of the functioning of the field of justice and home affairs (report on the operation of the TEU), the Commission advocates communitarization in full, save for judicial and police cooperation (thus including fraud: statements by Commission member Mrs Gradin at the Justice and Home Affairs Council in La Gomera, 16 October 1995).
- the Court of Justice suggests that powers be allocated to enable it to ensure the interpretation and uniform application of justice and home affairs matters.

15. Lastly, the Reflection Group report on the IGC indicates that most members of the group are in favour of total or partial communitarization given the disappointing results indicated in the Parliament and Commission reports (see points 47 and 49).

The 'General Framework' is in favour of maintaining measures to combat international fraud in the third pillar within a broader context: the aim is to take preventive and repressive action against both fraud and corruption. It is unclear whether measures to combat international fraud against the Community budget should take place within this broader context. As an interpretation, one might take the view that the author of the 'General Framework' wished to locate in the first pillar specific cases of fraud and violations against the Community's financial interests. The amendments which the 'General Framework' would like to introduce in Article 209a of the Treaty establishing the European Community (ECT) would seem to confirm this interpretation (see next paragraph).

IV. THE 'COMMUNITY' PILLAR: LEGAL BASES AND DECISION-MAKING PROCEDURES FOR COMBATING FRAUD

16. According to the Commission, the EC Treaty (ECT) provides no specific legal basis for combating fraud (either controls or sanctions). It is for this reason, for example, that the Commission did not follow up Parliament's request for rules governing administrative and penal sanctions for acts detrimental to the Community budget. According to Parliament such regulations would have had to be based on Articles 209a and 100a of the ECT (see EP resolution on the independent power of investigation and inquiry which the Union may exercise for the purposes of legal protection of its financial interests (A3-0074/94) and Commission reply in COM(94)214 final).
17. In the absence of a specific legal basis, the entire range of legislative actions in the fight against fraud should therefore be based on an article of the Treaty that is used only exceptionally, namely Article 235 which applies where one of the objectives of the Community has to be attained and 'this Treaty has not provided the necessary powers'.
18. In order to remedy this situation, Parliament has called on the participants in the IGC to create within the Treaty the instruments that are essential for effectively prosecuting fraud, e.g.:
 - (a) a legal basis permitting the adoption of anti-fraud legislation under a codecision procedure;
 - (b) a duty to safeguard Community finances in the various Member States in an equivalent manner; (paragraph 1 of the resolution on the follow-up to the interparliamentary conference on combating fraud against the Community budget - A4-0263/96).

This demand by Parliament has not gone unnoticed by the Member States. Denmark has presented a contribution providing for the inclusion in Article 209a of the ECG of a legal basis permitting measures to be taken to encourage the sound financial management of Community funds and to prevent and combat irregularities and fraud (including the provision concerning administrative controls and sanctions) (CONF 3891/96).

The 'General Framework' has gone even further and adopted the reforms advocated by Parliament in their entirety. It provides that Article 209a of the ECT should comprise (see Chapter 18 'Other Institutional Matters', text under (e) (measures to combat fraud));

- . a legal basis allowing necessary measures to be taken to combat fraud and any other breach affecting the Community's financial interests;
- . the adoption of a legislative codecision procedure;

- . the application of the principle of equivalent protection in respect of measures adopted in all Member States.

Such a broad definition of the Community's power to intervene in combating fraud might lead to a situation in which the Union's intervention within the framework of the third pillar were confined to international fraud which does not solely or necessarily affect the Community budget.

V. WHO SHOULD BE RESPONSIBLE FOR COMBATING FRAUD?

19. The Member States and the Reflection Group seem to favour Parliament and the Court of Auditors, which should be given more effective powers to ensure that all institutions and bodies are subject to proper control (point 133).
20. Thus the Westendorp report spoke of increasing the powers of Parliament and the Ombudsman in combating fraud and in monitoring the executive power of the institutions. Parliament should also have more direct say in the appointment of the Court of Auditors (paragraph 89).
21. The report suggests strengthening the role of the Court of Auditors in the fight against fraud and establishing cooperation with national audit bodies. The Court's control should also be extended to external policy and the field of justice and home affairs. The Belgian Government has made similar suggestions (in the note mentioned above). At a meeting of Parliament's Committee on Institutional Affairs, Mr Wiggins, member of the Court of Auditors who presented his institution's position, recommended that the revised Treaty provide for a greater right of access to information and power of control over all management bodies, not just at Community but also at national level.
22. The approach taken by the Westendorp report and the Court of Auditors is shared by the 'General Framework' and numerous Member States as regards the Court of Auditors. For it should be noted that:
 - the 'General Framework' provides that the Court may apply to the Court of Justice to safeguard its prerogatives (modification of Article 173 of the ECT) and questions the advisability of authorizing the Court of Auditors to verify all the expenditure and revenue of the Community, whatever the management body concerned (Chapter 18 'Other Institutional Matters' text under (a));
 - a position of reinforcing the powers of the Court of Auditors has been adopted in different forms by several Member States:
 - . Greece and Italy (CONF 3845/96 and 3839/96);

- Denmark (CONF 3981/96): Article 188c of the ECT should provide that rules adopted by the Council will establish more detailed provisions on the effectiveness of auditing by the Court;
- the United Kingdom (CONF 3825/97/ANNEX): several amendments to Article 188(c) and (d) have been proposed in order to ensure that the Court monitors the 'channel' taken by Community funds until the final beneficiary; that it takes decisions to this effect; and that it can apply sanctions in the case of a failure to respect these decisions and its right of access to information.

However, the 'General Framework' has failed to act to strengthen the European Parliament's powers of control. The resolution embodying Parliament's opinion on the IGC (of 13 March 1996) addressed the problem of strengthening the powers of budgetary control and demanded that, as regards the European Parliament, decisions of discharge should be recognized as binding. The 'General Framework' has not adopted a position on this matter, as Parliament's resolutions evaluating the 'General Framework' of 16.1.1996 (paragraph 38.ii) points out.

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