

Towards and Area of Freedom, Security and Justice

Customs cooperation

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I) General overview – “Customs cooperation in the third pillar?”

a) Treaty of Maastricht

-First pillar : European community (customs cooperation : see chapter 29)

[- Second pillar : Common Foreign and Security Policy]

- Third pillar : cooperation in the fields of Justice and Home Affairs (chapter 24)

b) Title VI of the TUE « provisions on police and judicial cooperation in criminal matters »

Article 29 stated that "*...the Union's objective shall be to provide citizens with a high level of safety within an area of freedom, security and justice by developing common action among the Member States in the field of police and judicial co-operation in criminal matters.*" This objective shall be achieved by preventing and combating crime, organised or otherwise, through closer co-operation between police forces, **customs authorities** and other competent authorities in the Member States, both directly and through Europol.

Article 30 explains that common action in the field of police co-operation shall include **operational co-operation** between the competent authorities, including the police, **customs** and other specialised law-enforcement services of the Member States in the prevention, detection and investigation of criminal offences.

- The acceding countries should be ready to implement the hard core of the “acquis” in the area of third-pillar customs co-operation represented by:

- the **Convention on Mutual Assistance and Co-operation between the Member States (Naples II)** and,

- the **Convention on the use of Information Technology for customs purposes (CIS)**.

- **By the date of accession**: to accede to these conventions, which have been drawn up by the Council in accordance with Title VI of the EU treaty.

II) Convention of 18 December 1997 on Mutual Assistance and Co-operation between customs administrations (Naples II-Convention) *OJ C 24 of 23 January 1998, pp 1-21 (41998A0123(01) (Eurlex 19.30.30)*

➤ *See also : the “Explanatory report on the Convention drawn up on the basis of Article K.3 of the treaty on European Union, on mutual assistance and cooperation between customs administrations” OJ 189 of 17 June 1998, pp 1-18*

➤ *The Convention is intended to improve cooperation between the customs administrations of the EU Member States in preventing, investigating and prosecuting contraventions of customs laws.*

a) Historical background

- It builds on an earlier Convention for customs cooperation - the Convention of the Member States of the European Economic Community on the provision of mutual assistance by their customs authorities - signed in Rome on 7 September 1967 ('the 1967 Naples Convention').
- Discussions on a new Convention had begun in 1990. Early drafts of the Convention included proposals for a customs information system (CIS) which were subsequently removed and dealt with under a separate Convention.

Within the Community framework, Council Regulation (EC) No 515/97 provides for mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs and agricultural matters (OJ L 82, 22.3.1997, p. 1). The Regulation's provisions for assistance on request and for spontaneous assistance are similar to the provisions for these matters in the Convention. (The table in Annex A of the Explanatory Report sets out the parallel provisions.)

➤ Whilst Regulation (EC) No 515/97 provides for assistance and cooperation in the detection and investigation of infringements of Community customs provisions, this Convention provides for the necessary forms of cooperation at the stage of prosecuting and punishing these infringements, in particular through criminal proceedings.

b) Entry into force

➤ The Convention will enter into force 90 days after the last Member State has completed its constitutional procedures in relation to the Convention.

Until the Convention enters into force any Member State may declare that it will apply the Convention with other Member States which have made the same declaration. This means that Member States do not have to wait for the last Member State to complete their constitutional procedures before they can apply the provisions of the Convention (Article 32.4 - declaration).

➤ **Once the Convention enters into force, Member States will be obliged to apply its provisions.** The only exceptions are set out in Articles 19(3), 19(4) and 28 of the Convention which provide for exemptions from the obligation to provide assistance and in Article 30 of the Convention which allows for reservations in relation to optional provisions on hot pursuit, cross-border surveillance and covert investigations.

➤ Article 33 provides that the **Convention will be open to accession by any Member State that joins the European Union in the future**. It also lays down the procedures to be followed by new Member States wishing to accede to the Convention.

- The text of the Convention in the language of the acceding Member State, as drawn up by the Council of the European Union, shall be authentic.

- The instruments of accession shall be deposited with the depositary (Secretary-General of the Council of the EU).

c) Relationship with other provisions for cooperation in criminal matters

- Article 1 provides shall **not affect provisions applicable regarding mutual assistance in criminal matters between judicial authorities**, and more favourable provisions in bilateral or multilateral agreements already in place.
- Article 3 provides that when a **judicial authority** carries out or directs a criminal investigation, that authority **will choose** whether to use the provisions of the Convention or provisions relating to mutual assistance in criminal matters. Whether a judicial authority is involved, and the decision of a judicial authority on which provisions to use will depend on national law and on the particular circumstances of any given case.
- Article 30 sets out the relationship between the Convention and the Schengen arrangements. **The Convention does not affect more favourable provisions of the Schengen** Implementing Convention of 1990, and does not allow Member States who are also Schengen members to withdraw from any obligations they have entered into under the Schengen Convention.

d) Brief outline of the provisions of the Convention on mutual assistance and cooperation between customs administrations

➤ **General provision**

-The scope of the Convention extends to Member States providing each other with mutual assistance with a view to **preventing and detecting infringements of national customs provisions and prosecuting and punishing infringements of Community and national customs provisions.**

(In this context it should be noted that prevention and detection of infringements of Community customs provisions is covered by Regulation (EC) No 515/97).

-'Community customs provisions' and 'national customs provisions' are defined in Article 4 of the Convention.

- Article 2 makes clear that the customs administrations can only apply the Convention within the limits of their national powers and that the Convention does not affect the national powers of customs administrations.

- In Article 4, **Customs administrations** for the purposes of the Convention are defined: **“Member States’ customs authorities as well as other authorities with jurisdiction for implementing the provisions of the Convention”** (this definition allows other law enforcement agencies (for example the police) to apply the provisions of this Convention where they are competent to act in relation to customs infringements as defined in Article 4(1) and 4(2) of the Convention).
- Article 5 states that requests for assistance under the Convention are to be coordinated **by a central unit and that a central unit is to be appointed in each of the customs authorities of the Member States for this purpose.** It adds, however, that direct cooperation between other services of the customs administrations of the Member States is not excluded particularly in an emergency.

If a request for assistance falls outside the competence of a customs authority, it must be forwarded by the central coordinating unit to the competent authority. This provision recognises that different agencies and administrations in different Member States have different areas of responsibility and competence. The provision is intended to ensure that cooperation is not hindered by the Member State seeking assistance not knowing the precise allocation of competence in another Member State.

➤ **The Convention provides for assistance on request (Title II) and spontaneous assistance (Title III) between customs administrations.**

-The provisions in Title II cover the manner in which requests for assistance should be made and the actions to be taken by a Member State when it receives a request for assistance under the provisions of this Convention.

This Title provides for the form and content of written **requests** for information; it provides that Member States should respond fully to such requests; it provides that on request Member States should as far as possible carry out surveillance on behalf of another Member State; it provides that on request enquiries should be carried out on behalf of another Member State; it also provides for the use as evidence of information obtained in this way. Requests for assistance may only be refused for the reasons specified in Article 28 of the Convention (threat to public policy or other essential interests of the State concerned, or where it is obvious that the scope of the action requested is disproportionate to the seriousness of the presumed infringement).

- The principle underlying this Title II is that **Member States should honour requests for assistance from other Member States**. In signing up to the provisions of the Convention, Member States are entering into a commitment to provide information and assistance on request to other Member States where possible and within the bounds of national law.

(Regulation (EC) No 515/97 also contains similar provisions on assistance on request in relation to Community customs matters).

- **The provisions of the Title III (spontaneous assistance)** cover arrangements for customs administrations to provide assistance to other Member States without requests being made. The general principle underlying this Title is that Member States should, without being asked, carry out relevant investigative activity and offer up any evidence or information they come across which may be of use to another Member State in detecting, investigating or prosecuting customs infringements.

(Regulation (EC) No 515/97 also contains similar provisions in relation to Community customs matters.)

➤ **It provides for 'special forms of cooperation' between customs administrations (Title IV).**

- This Title sets out special forms of cooperation for detecting, investigating and prosecuting customs infringements. The special forms of cooperation are **hot pursuit across borders, cross-border surveillance, controlled delivery, covert investigation and the use of joint special investigation teams.**

- A number of the forms of cooperation outlined in this Title involve the possibility of officers from one Member State being present or engaging in activities in the territory of another Member State for the purpose of investigating cross-border customs infringements as defined in Article 19(2).

- When they deposit their instruments of adoption of the Convention, **Member States may declare** that they are not bound by some or all of the provisions in certain specified articles of this Title, namely **Article 20 on hot pursuit, Article 21 on cross-border surveillance and Article 23 on covert investigations.** Member States may withdraw their declarations in relation to these provisions at any time.

Commentary on particular Articles of this Title IV:

- **Article 19** set out general principles relating to special forms of cooperation. It makes clear that the special forms of cross-border cooperation described in this Title will only be allowed in relation to infringements concerning:

- (a) illicit traffic in drugs and certain other prohibited goods;
- (b) trade in precursor substances (i.e. substances intended for the illegal manufacture of drugs);
- (c) illegal cross-border commercial trade in taxable goods to evade tax or obtain unauthorised State payments where the potential financial cost to the budget of the European Communities or a Member State is considerable; or
- (d) any other trade in goods prohibited by Community or national customs rules.

- For **Article 20** (hot pursuit) : the precise circumstances in which hot pursuit can be carried out are set out in this Article and in declarations made by Member States as provided for in Article 20(6) of the Convention. Each Member State which has opted to participate in the hot pursuit provisions has made a **declaration** on signing the Convention defining the procedures for implementing pursuit in its territory. Such declarations include the limits in space or time in which hot pursuit is permitted, and whether service weapons may be carried. These declarations may be replaced by other declarations provided the latter do not restrict the scope of the former.

-For **Article 21** (cross-border surveillance) : The conditions under which cross-border surveillance may be carried out include the following. Officers conducting an observation must comply with the law of the Member State in whose territory they are operating and must obey the instructions of the competent authorities of that Member State; they must be able to prove their official identity and that they are acting in an official capacity and are not allowed to enter private homes or non-public places. Such officers will have no powers of intervention; they may neither challenge nor arrest the person under observation. The officers may carry their service weapons unless the Member State whose territory they wish to enter has made a declaration prohibiting this.

At the time of depositing their instruments adopting the Convention, Member States may make a **declaration** that they are not bound by all or part of this Article. Such declarations may be withdrawn at any time.

- For **Article 23** (covert investigations): The way in which Member States apply this Article will depend on the provisions of their national law. At the time of depositing their instruments adopting the Convention, Member States may make a **declaration** that they are not bound by all or part of this Article. Such declarations may be withdrawn at any time.

➤ **The Convention includes data protection provisions (Title V)**

- The Convention includes data protection provisions which cover data exchanged outside the CIS. This will largely be non-automated exchanges of data. The CIS Convention includes its own data protection arrangements.
- Article 25 commits Member States to respecting the relevant provisions of the **1981 Council of Europe Convention** for the protection of individuals with regard to automatic processing of personal data. Member States may assign a supervisory role to the national data protection authorities who perform this role in relation to the CIS Convention. The term 'processing of personal data' in this Convention is to be understood as having the meaning defined in Directive 95/46/EC.

➤ **The Convention also includes in Article 26 a role for the Court of Justice of the European Communities in interpreting the Convention (Title VI).**

- The Court will have jurisdiction to resolve disputes between Member States in relation to the interpretation or application of the Convention where the Council itself is unable to do so within six months. The Court will also have jurisdiction in relation to disputes between Member States and the Commission concerning the interpretation or application of the Convention.
- The Court will also have jurisdiction to give preliminary rulings on the interpretation of the Convention but only for those Member States who **make a declaration** that they will accept this role for the Court.

III) Convention of 26 July 1995 drawn up on the basis of Article K.3 of the Treaty on European Union, on the use of information technology for customs purposes (“CIS Convention”) OJ C 316 of 27 November 1995, pp 33-42, 31995F1127(02) (Eurlex 19.30.30)

➤ **+ 3 Protocols:**

- Council Act of 29 November 1996 drawing up, on the basis of Article K.3 of the Treaty on European Union, **the Protocol on the interpretation, by way of preliminary rulings, by the Court of Justice of the European Communities of the Convention on the use of information technology for customs purposes** OJ C 151 of 20 May 1997 pp. 15-29 31997F0520(02) (Eurlex 19.30.30)

- Council Act of 12 March 1999, drawing up, on the basis of Article K.3 of the Treaty on European Union, the **Protocol on the scope of the laundering of proceeds** in the Convention on the use of information technology for customs purposes **and the inclusion of the registration number of the means of transport** in the convention *OJ C 91 of 31 March 1999, p. 2-7 31999F0331(01)* (Eurlex 19.30.30)

- Council act of 8 May 2003 drawing up a **Protocol amending, as regards the creation of a customs files identification database**, the Convention on the use of information technology for customs purposes *OJ C 139 of 13 June 2003, pp. 1-8 42003A0613(01)* (Eurlex 19.30) (see also corrigendum *OJ C 56 of 5 March 2005 42003A0613(01)R(02)*)

a) Entry into force

- This Convention shall be subject to adoption by the Member States in accordance with **their respective constitutional requirements**. This Convention shall enter into force with respect to any State that accedes to it ninety days after the deposit of its instrument of accession.
- Article 25 provides that this Convention shall be **open to accession by any State that becomes a member of the European Union**.
 - The text of this Convention in the language of the acceding State, drawn up by the Council of the European Union, shall be authentic.
 - Member States shall notify the Secretary-General of the Council of the European Union of the completion of their constitutional requirements for adopting this Convention.

- **The Protocol on the interpretation, by way of preliminary rulings, by the Court of Justice of the European Communities and the Protocol on the scope of the laundering of proceeds** provide that any State that becomes a member of the European Union and accedes to the Convention on the use of information technology for customs purposes in accordance with Article 25 thereof **shall accept** the provisions of this Protocol.

- **The Protocol amending as regards the creation of a customs files identification database** that any State that becomes a member of the European Union and accedes to the Convention in accordance with Article 25 thereof after the entry into force of this Protocol **shall be deemed** to have acceded to the Convention as amended by this Protocol.

(This Protocol shall, 90 days after the notification by the State, member of the European Union at the time of adoption by the Council of the Act drawing up this Protocol, which is the eighth to complete this formality, enter into force for the eight Member States concerned).

b) Brief outline of the provisions of the CIS Convention

➤ **The aim** of the Customs Information System, in accordance with the provisions of this Convention, shall be to assist in preventing, investigating and prosecuting serious contraventions of national laws by increasing, through the **rapid dissemination of information**, the effectiveness of the cooperation and control procedures of the customs administrations of the Member States.

➤ **The convention explains the use of the customs information**

- The CIS shall consist of a **central data-base** facility and it shall be accessible via terminals in each Member State. It shall comprise exclusively data necessary to achieve its aim, including personal data, in the following categories: (i) commodities ; (ii) means of transport; (iii) businesses; (iv) persons; (v) fraud trends; (vi) availability of expertise.

- Data in categories (i) to (iv) shall be included in the CIS only for the purpose of **sighting and reporting, discreet surveillance or specific checks**.

- For the purpose of the suggested actions, personal data within any of the categories (i) to (iv) may be included in the Customs Information System only if, **especially on the basis of prior illegal activities, there are real indications to suggest that the person concerned has committed, is in the act of committing, or will commit serious contraventions of national laws.**
- **The Commission** shall ensure the technical management of the **infrastructure** of the Customs Information System in accordance with the rules provided for by the implementing measures adopted within the Council.
- **Direct access to data** included in the CIS shall be reserved exclusively for the national authorities designated by each Member State. These national authorities shall be customs administrations, but may also include other authorities competent, according to the laws, regulations and procedures of the Member State in question.
- Each Member State shall send the other Member States and the committee referred to in Article 16 **a list of its competent authorities** which have been designated to have direct access to the CIS, for each authority which data it may have access to and for what purposes.

- Each of the Member States shall **designate a competent customs administration which shall have national responsibility** for the Customs Information System.

➤ **The Convention includes data protection provisions**

- Each Member State intending to receive personal data from, or include it in, the System shall, adopt the national legislation sufficient to achieve a level of protection of personal data at least equal to that resulting from the principles of the **1981 Strasbourg Convention**.

- Each Member State shall **designate a national supervisory authority** or authorities responsible for personal data protection to carry out independent supervision of such data included in the Customs Information System.

- The Joint Supervisory Authority shall perform its task in accordance with the provisions of this Convention and of the 1981 Strasbourg Convention taking into account Recommendation R (87) 15 of 17 September 1987 of the Committee of Ministers of the Council of Europe.

➤ **The Convention provides some liabilities concerning the cost**

- The costs incurred in connection with the operation and use of the Customs Information System by the Member States on their territories shall be borne by each of them.
- Other expenditure incurred in the implementation of this Convention, except for that which cannot be kept separate from the operation of the Customs Information System for the purpose of applying the customs and agricultural rules of the Community, shall be borne by the Member States. Each Member State's share shall be determined according to the proportion of its gross national product to the sum total of the gross national products of the Member States for the year preceding the year in which the costs are incurred.

IV) Other European Union Instruments and documents

- Joint Action of 9 June 1997 for the refining of **targeting criteria, selection methods and collection** of customs and police information *OJ L 159 of 17 June 1997 31997F0372 (Eurlex 19.30.00.00)*

➤ This joint action provides notably that MS customs authorities shall strive to optimise the use of targeting criteria and structured selection methods, and collection of customs and police information regarding the combating of drugs.

See also in relation to customs cooperation:

- The Council Resolution of 29 November 1996 on the drawing up of **police/customs agreements** in the fight against drugs OJ C 375, 12/12/1996 41996Y1212(01).

➤ In this resolution the Council urges MS to establish, without prejudice to national legislative and administrative provisions, formal agreements or other arrangements at national level in order to emphasize the need for a close working relationship between police and customs services in the fight against drugs.

- Joint action of 29 November 1996 on **Cooperation between customs authorities and business organisations** on combating drugs trafficking OJ L 322 of 12 December 1996

➤ The Council demands that MS shall establish Memoranda of Understanding programme at national level between customs authorities and business organization in order to consolidate cooperative relationship in combating drug trafficking.