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From: German delegation
To: Customs Cooperation Working Party
Subject: Draft Final Report on Action 5.10: “To find and recommend best practice for customs cooperation in criminal matters”

1. Introduction

The work of the Customs Cooperation Working Party (CCWP) is set out in the Strategy for Customs Cooperation in the third pillar.¹ To achieve the aims of the strategy, relevant actions are carried out according to action plans. The Fifth Action Plan to Implement the Strategy² for the period from 1 July 2011 until 31 December 2012 covered 10 actions, including action 5.10.

The following strategic objectives (according to the Strategy for Customs Cooperation) are applicable to this action:

- to continue to further develop existing forms of cooperation
- to improve and make more flexible the existing cooperation process

¹ doc. 15198/09 ENFOCUSTOM 118 ENFOPOL 272. For the new Strategy, adopted by the Council of the European Union on 6/ December 2012, please refer to Council document 17778/12 ENFOCUSTOM 142 COSI 13

² doc. 10223/3/11 REV 3 ENFOCUSTOM 45

2. Mandate

The mandate for Action 5.10 (“To find and recommend best practice for customs cooperation in criminal matters”)³ was approved by the CCWP on 15 December 2011. The mandate set out that the project group is to develop an overview describing which legal basis for cooperation in criminal matters should best be used in certain situations and how possible obstacles may be overcome. The analysis is moreover to draw up recommendations serving as a basis for practical guidelines that are to be established in a Best Practice Guide. The aim of the project group’s work is to improve cooperation and information exchange among the Member States in the field of the preventing, detecting and investigating criminal offences in breach of customs law.

3. Project Group

A project group was established with representatives from Austria, Belgium, Cyprus, Estonia, Finland, Hungary, Luxemburg, the Netherlands, Poland, the United Kingdom and Germany (lead country). Eurojust joined the project group as an observer.

The project group held two meetings in Brussels, one in March and one in October 2012. Additionally, the project group communicated via e-mail.

4. Working Method

As a first step, the project group agreed on a list of existing European law instruments which should be examined. The annex to the final report on action 3.7⁴ served as a starting point for this list. The list was designed in such a way that it also contained legal instruments at the cut-off points in relation to (1) administrative assistance and (2) mutual legal assistance.

³ doc. 18246/11 ENFOCUSTOM 173 COPEN 360 ENFOPOL 467

⁴ doc. 16761/09 ENFOCUSTOM 134

The draft Directive of the European Parliament and of the Council regarding the European Investigation Order in criminal matters (EIO) was deliberately not examined. At the time of drafting the final report, the legislative work had not yet reached a sufficiently mature stage. The general approach agreed by the Council on 13 and 14 December 2011⁵ states as follows in its footnote 8: “It is understood that the Naples II convention will not be included in the list of conventions which will be replaced by the present Directive”. Consequently, at the time of drafting the final report, all statements made with respect to the Naples II Convention were still valid. The project group did not therefore believe that an analysis of the future EIO legal instrument would be fruitful.

As a second step, the project group decided to split its analysis into two parts – one taking a theoretical, comparative approach departing from the text of the respective legal instrument itself (comparative study of legal instruments) and elaborating the above-mentioned cut-off points, and one part taking a practical approach departing from the outcome of a research via a questionnaire (case study). For the case study, the project group developed a questionnaire, distributed it among the Member States, and evaluated the answers. 19 Member States answered the questionnaire.

Finally, recommendations were derived from the conclusions of the comparative study of the legal instruments on the one hand, and the conclusions of the case study gathered from the evaluation of the questionnaire on the other hand.

⁵ doc. 18918/11 COPEN 369 EUROJUST 217 EJM 185 CODC 2509

5. Conclusions

On the basis of the working method described above, the project group reached the following conclusions:⁶

a. Legal instruments for customs cooperation in criminal matters

The core instrument for the cooperation between the customs administrations of the Member States in criminal matters is the Naples II Convention.⁷ A second instrument is the Swedish Framework Decision.⁸

It must be noted that the Naples II Convention not only constitutes a basis for customs cooperation in criminal matters, but also constitutes a basis for administrative mutual assistance in certain cases.⁹

As a legal basis for customs cooperation in criminal matters, the Naples II Convention is complemented by the CIS Decision.¹⁰ The CIS Decision regulating the CIS and FIDE MS databases provides for a particular form of information exchange among the Member States for the purpose of cooperation in criminal matters.

Finally, there are very rare cases in which direct cooperation between the customs administrations of some Member States for law enforcement purposes is possible on the basis of the 1959 EU MLA Convention (namely between Cyprus and Finland).¹¹ These cases were not examined.

⁶ For further information please refer to Annex, Part I B. and Part II.

⁷ Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on mutual assistance and cooperation between customs administrations dated 18 December 1997.

⁸ Council Framework Decision 2006/960/JHA of 18 December 2006 on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union.

⁹ Please see below under 6. c. bb.

¹⁰ Council Decision 2009/917/JHA of 30 November 2009 on the use of information technology for customs purposes.

¹¹ European Convention of 20 April 1959 on Mutual Assistance in Criminal Matters.

b. Naples II Convention vs. Swedish Framework Decision

The project group found that applying the Naples II Convention has several advantages in comparison to applying the Swedish Framework Decision.

In particular, a request on the basis of the Naples II Convention obliges the requested Member State to undertake investigative measures (as if it were acting on its own account) if necessary to gather the requested information. This is not the case if the Swedish Framework Decision is applied.

Furthermore, information received on the basis of the Naples II Convention may be used as evidence in criminal proceedings without asking for the consent of the competent judicial authorities of the requested Member State by means of a separate MLA request.

Contrary to the Swedish Framework Decision, the Naples II Convention moreover offers special forms of cooperation (hot pursuit, cross-border surveillance, controlled delivery, covert investigations, and joint special investigations teams) and requests (for surveillance, enquiries and notification).

c. Relation between the customs cooperation in criminal matters and mutual legal assistance

For offences in the customs area, the judicial authorities may choose whether or not a request is to rest upon the MLA Conventions (1959 EU MLA Convention, 2000 EU MLA Convention¹²) or the Naples II Convention.

¹² Convention of 29 May 2000 established by the Council in accordance with Article 34 of the Treaty of the European Union, on Mutual Assistance in Criminal Matters between the Member States of the European Union.

The project group reached the conclusion that choosing the Naples II Convention as legal basis offers the following practical benefits:

- It reduces the workload of the competent judicial authority of the requesting Member State because the customs authorities draft and send the request, and receive the requested information.
- It is less time-consuming and cumbersome because there is direct communication between the customs authorities of the requesting Member State and the customs authorities of the requested Member State.
- It ensures the request is directed to the competent authority, e.g., prevents the judicial authorities of the requested Member State from tasking the officers/authorities with conducting the necessary investigations who do not possess the jurisdiction and/ or the expertise for this task.
- It helps to avoid situations in which the investigation into the basis to collect customs duties (traditional own resources, TOR) by the requesting Member State could be thwarted and the financial interests of the European Union could therefore be threatened. This may occur in all cases in which the requested information is urgently needed for administrative purposes as well as for law enforcement purposes and may only be gathered through further criminal investigative measures on the part of the requested Member State where the necessary investigations depend on the execution of an MLA request. Any time delays caused by the MLA requesting procedure (due to the fact that the requested Member State may obtain the MLA request later than the request for administrative purposes and may wait before undertaking the required investigations) can be avoided by sending a request on the basis of Regulation (EC) No 515/97¹³ and on the basis of the Naples II Convention at the same time in one document.

It was noted by the project group that applying the Naples II Convention instead of the MLA Conventions does not mean that any existing allocation of competences pursuant to applicable national law is affected.¹⁴

¹³ Council Regulation (EC) No 515/97 of 13 March 1997.

¹⁴ Article 2 of the Naples II Convention.

The Swedish Framework Decision, due to the above-mentioned disadvantages, does not offer a legal basis on a par with the Naples II Convention.

d. Role of CIS and FIDE

The project group identified CIS and FIDE as databases providing particular methods of communication for mutual assistance in criminal matters. Both databases also serve to the benefit of the judicial authorities.

As far as CIS is used in order to “alert” other Member States about suspicious goods, means of transport and persons asking for a certain action, CIS permits requests to be sent to all other Member States. To the extent that CIS is used by inserting information for the purpose of “operational analysis”, CIS provides the Member States with another method of exchanging spontaneous information with each other.

FIDE enables the Member States to send spontaneous information, which is done by indicating any ongoing or terminated investigations against certain natural or legal persons, and by indicating the investigative authority and reference number. A “hit” in FIDE may lead to a request for law enforcement purposes or for administrative purposes.

Both CIS and FIDE exist as the CIS/FIDE EU – on the basis of Regulation (EC) No 515/97– and CIS/FIDE MS – on the basis of the CIS Decision. While CIS/ FIDE EU are used for administrative purposes, law enforcement purposes may only be an adjunct; CIS/FIDE MS are mainly used for law enforcement purposes. As a consequence, the CIS Decision may be seen as a legal basis for particular forms of customs cooperation in criminal matters.

e. Practical issues

The evaluation of the Member States’ answers to the questionnaire led to a conclusion that different legal systems in the Member States, and different national systems with respect to the allocation of competences between the customs authorities and the judicial authorities especially, may create the following trouble spots.

- A requested customs authority may be obliged to undertake criminal investigative measures although, from its national perspective that deviates from the assessment of the requesting Member State, the case would still be at the administrative stage.
- There may be investigations pending in the requesting and the requested Member State in parallel which are at different stages (that is, administrative vs. criminal).
- The competent authority of the requesting Member State may be a customs authority, while the competent authority of the requested Member State is a judicial authority and vice versa.
- In most cases, it is rather difficult for the requesting Member State to exactly predict which authority is the competent authority in the requested Member State.
- The requesting Member State may indicate a legal basis in its request which the requested Member State deems inapplicable.

These trouble spots may lead to various obstacles in customs cooperation in criminal matters. In the final part of the recommendations, the project group provides suggestions about how to overcome these obstacles.

6. Recommendations

Departing from the conclusions above, the project group developed the following recommendations.

a. Customs cooperation in criminal matters (infringements of national and Community customs provisions)

With regard to the cooperation among the customs administrations of the Member States in criminal matters concerning either infringements of national or Community customs provisions, the applicable or recommendable legal basis depends on the content of the request. A distinction has to be drawn between requests for information on the one hand (1.) and special forms of cooperation or requests on the other hand (2.). Particular communication channels are offered by CIS EU/MS and FIDE EU/MS (3.).

The recommendations regarding the customs cooperation in criminal matters are summarized in a checklist (Appendix C of the Annex).

aa. Requests for information

A request for information may be based either on the Naples II Convention or the Swedish Framework Decision, if

- the case at hand concerns (potential) infringements of
 - national customs provisions,¹⁵ or
 - Community customs provisions,¹⁶and
- the information is intended to serve the purpose of law enforcement.

The same applies to the rendering of spontaneous assistance without any request.

In such cases, the request for information should be based on the Naples II Convention rather than on the Swedish Framework decision if

- the requesting Member State does not know exactly whether or not the requested information is already available in the requested Member State without further investigative measures, or
- the requesting Member State wishes to use the gathered information as evidence in criminal proceedings without additionally sending an MLA request in order to obtain the consent of the requested Member State's judicial authorities for this purpose.

¹⁵ According to Article 4 paragraph 1 of the Naples II Convention, national customs provisions means all of a Member State's laws, regulations and administrative provisions concerning the cross-border traffic of goods subject to prohibitions, restrictions or controls and non-harmonized excise duties.

¹⁶ According to Article 4 paragraph 2 of the Naples II Convention, Community customs provisions means all provisions governing the import, export, transit and presence of goods traded between Member States and third countries and – with regard to goods not having Community status traded between Member States. Moreover, this comprises the provisions of the Common Agricultural Policy and Community provisions adopted for harmonized excise duties and for value-added tax on importation, including the national implementation provisions.

bb. Special forms of cooperation or requests

In the case mentioned above, the request has to be based on the Naples II Convention¹⁷ if one Member State intends to send a request for

- special forms of cooperation (hot pursuit, cross-border surveillance, controlled delivery, covert investigations or joint special investigation teams)¹⁸
or
- surveillance, enquiries or notification.¹⁹

The Swedish Framework Decision does not provide a legal basis for these types of requests.

b. CIS and FIDE

Both, CIS and FIDE constitute particular channels of communicating for the purpose of providing mutual assistance in criminal matters.

Both CIS and FIDE exist as CIS/FIDE EU – on the basis of Regulation (EC) No 515/97– and CIS/FIDE MS – on the basis of the CIS Decision. While CIS/FIDE EU are used for administrative purposes, law enforcement purposes may only be an adjunct; CIS/FIDE MS are mainly used for law enforcement purposes.

aa. It is recommended that CIS be used in the following way:

Firstly, personal data should be inserted in CIS in order to “alert” other Member States with the aim of requesting for a particular investigative measure for criminal purposes if it is not known exactly where the respective goods, means of transport or persons will be encountered.

¹⁷ If the request shall not be based on the MLA Conventions.

¹⁸ Articles 19-25 of the Naples II Convention.

¹⁹ Articles 11-13 of the Naples II Convention.

Secondly, personal data on detained, seized or confiscated goods or cash should be inserted in CIS without requesting a particular measure so that it can be used for “operational analysis”.

Member States should search for information in CIS if an incident gives them reason to do so.

bb. It is recommended that FIDE be used in the following way:

Member States should insert information in FIDE about the respective national authority that is leading criminal investigations against certain natural or legal persons on account of the incorrect application of or an infringement against customs provisions.

Member States should search in FIDE if they wish to establish whether or not (administrative or) criminal investigations are being led against a specific natural or legal person on account of the incorrect application of or an infringement against customs provisions in another Member State and by which authority. They should do so with the aim of coordinating their investigations with the investigative authorities in other Member States.

In the event of a “hit”, the recommendation is to examine whether or not a request for criminal purposes or possibly also for administrative purposes, is to be addressed to the competent authority of the Member State leading the investigations.

c. As cut-off point: Customs cooperation in administrative matters

In order to determine the applicable or recommendable legal basis, customs cooperation in criminal matters has to be distinguished from customs cooperation for administrative purposes.

For mutual administrative assistance, two different legal bases – Regulation (EC) No 515/97 or the Naples II Convention are applicable, depending on what customs provisions are concerned (namely – Community (1.) or national (2.) customs provisions).

aa. Incorrect application of Community customs provisions

Any request for information, surveillance, enquiries or notification has to be based on Regulation (EC) No 515/97, if

- the case at hand concerns the (potentially) incorrect application of Community customs provisions,²⁰
and
- the information requested is intended to serve administrative purposes.²¹

Regulation (EC) No 515/97 does not constitute a legal basis for submitting requests in criminal matters for law enforcement purposes.

The same applies to the rendering of spontaneous assistance without any request.

Information received on the basis of Regulation (EC) No 515/97 may not only be used as evidence for administrative proceedings but in criminal proceedings as well if the following conditions are fulfilled:

- if/ as far as the information refers to the (potentially) incorrect application of customs provisions which also constitutes a criminal offence
and
- provided that no criminal investigations had been conducted or was likely/ intended to be conducted against the action concerned at the time the request was sent. Otherwise, the request has to be based on the Naples II Convention or the Swedish Framework Decision.

²⁰ This comprises all Community provisions governing the import, export, transit and presence of goods traded between Member States and third countries and – with regard to goods not having Community status traded between Member States. Moreover, it comprises Community provisions stipulating Community prohibitions and restrictions with respect to the cross-border movement of goods and Community provisions on the control of cross-border cash movements. For further information, please refer to Annex Part I, A. II. 2. a. The notion of Community customs provisions under Regulation (EC) No 515/97 slightly deviates from the notion pursuant to the Naples II Convention (see Fn. 16).

²¹ This comprises all measures for the administrative purposes of recovery or reimbursement.

bb. Incorrect application of national customs provisions

Any request for information, surveillance, enquiries, notification or joint special investigation teams²² has to be based on the Naples II Convention, if

- the case at hand concerns the (potentially) incorrect application of national customs provisions,²³
and
- the requested information is intended to serve administrative purposes.²⁴

The same applies to spontaneous assistance.

Information gathered on this basis may be used as evidence in administrative proceedings.

d. As cut-off point: Mutual legal assistance (cooperation between judicial authorities)

In cases in which offences in the customs area are concerned, it is recommended that the judicial authorities consider applying the Naples II Convention instead of the MLA Conventions.

The reason is that applying the Naples II Convention offers the following practical benefits:

- **Less work for judicial authorities**

It reduces the workload of the competent judicial authority of the requesting Member State because the customs authorities draft and send the request, as well as receive the requested information.

- **Less time-consuming and cumbersome**

It is less time-consuming and cumbersome due to the direct communication between the customs authorities of the requesting Member State and the customs authorities of the requested Member State.

²² Please see Article 24 paragraph 1, second tiret of the Naples II Convention (“to prevent and detect particular types of infringement”).

²³ Please refer to explanation in Fn. 15.

²⁴ Please refer to explanation in Fn. 21.

- **Direction of the request to the competent authority**

It ensures the request is directed to the competent authority, e.g., prevents the judicial authorities of the requested Member State from tasking the officers/authorities with conducting the necessary investigations who do not possess the jurisdiction and/or the expertise for this task.

- **Protection of financial interests of the European Union:**

- No time delay in identifying the basis for collecting customs duties**

It avoids situations in which the investigation of the basis for collecting customs duties (traditional own resources, TOR) by the requesting Member State could be thwarted and the financial interests of the European Union could therefore be threatened. This may occur in all cases in which the requested information is urgently needed for administrative and as well as law enforcement purposes, and may only be gathered by means of further criminal investigative measures on the part of the requested Member State.

The time delay regarding the execution of the requested measures (due to the fact that the requested Member State may obtain the MLA request later than the request for administrative purposes and may wait before undertaking the required investigations) which ultimately leads to the said problems, can only be avoided by sending a request on the basis of Regulation (EC) No 515/97 and on the basis of the Naples II Convention at the same time in one document.²⁵

It is suggested that COPEN undertakes to examine

- the scope within which the Naples II Convention may be applied by the judicial authorities,
- how FIDE may be effectively used by the judicial authorities.

²⁵ For further information please refer to Annex, Part I, A. V. 3.

e. General practical recommendations

Based on the outcome of the questionnaire, the project group furthermore developed the following practical recommendations regarding the drafting and sending of a request.

- aa. A request should generally be drafted in a manner which takes into account the perspective and understanding of the requested Member State in order to avoid misunderstandings.
- bb. A request should clearly indicate
 - the legal basis of the request,
 - the purpose for which the requested information is intended,
 - the fact that it traces back to instructions given by a judicial authority and the reference number of the judicial authority (if applicable),
 - all known reference numbers and competent authorities so that cases resting on the same factual basis as well as the authorities involved in the administrative and criminal investigations can be identified,
 - the number of the MA communication (Mutual assistance communication) from OLAF (Office européen de lutte antifraude; European Anti-Fraude Office) (if applicable).
- cc. The request should be sent via the information channels stipulated in the respective legal basis – the central coordination units in the case of the Naples II Convention and the authorities named by the Member States in the case of the Swedish Framework Decision so as to avoid problems in the cooperation procedure.
- dd. The requested Member State should rely on the purposes indicated in the request by the requesting Member State.

For instance, even if the Member State – from its own national law perspective takes the view that the requested information belongs under the *administrative* procedure, it has to conduct its investigations in compliance with its national law (especially criminal procedure), so that the information gained by means of this request may be validly used as evidence.²⁶ The reason is that the event initiating the commencement of criminal investigations may vary according to the respective national law of the Member State concerned.

- ee. If the requesting Member State indicates a legal basis in its requests which the requested Member States does not deem to be applicable, the requested Member State should not apply a different legal basis which it considers to be valid instead. Rather, it should contact the requesting Member State, and both should communicate with each other in order to clarify any open questions regarding the circumstances, purpose for which the information is needed, and the applicable legal basis.
- ff. If the gathering of information would jeopardize the investigations of the requested Member State, for instance, because the person concerned would be alerted, the conflict should not be solved by immediately rejecting the request. Rather, the requested Member State should contact the requesting Member State, and both should communicate with each other in order to coordinate their investigations as to achieve the comprehensive (administrative and criminal) enforcement of customs provisions on the European level. This procedure would also serve the financial interests of the European Union and respect OLAF's interests

For further information, please refer to the ANNEX.

²⁶ These statements are valid for application of the Naples II Convention, but not of the Swedish Framework Decision because the latter does not oblige the requested Member State to undertake investigations in order to gather the requested information.

[To be discussed:

There was a dissent among the participants of the project group as to the question whether the requested Member State is bound to the legal basis indicated in the request (e.g. the Naples II Convention) or whether it may at its own discretion decide to provide the requested information on the basis of another legal basis (e.g. the MLA Conventions). If the requested Member State answers the request in applying another legal basis this may lead to crucial legal aspects such as a possible use of the provided information as evidence. The impacts of such an interpretation of law have not yet been examined in detail by the project group.

This dissent may be closely connected to the question whether Article 1 paragraph 2 of the Naples II Convention stipulates that the Naples II Convention and the MLA Conventions are equally ranking or that the MLA Conventions is prior-ranking with respect to the Naples II Convention; please refer to Council document 8282/3/08, page 6 pp.]
