

Brussels, 27 February 2019
(OR. en)

15280/1/18
REV 1

LIMITE

ENFOCUSTOM 267
ENFOPOL 602
FRONT 440
JAI 1259
DAPIX 378
COSI 316

NOTE

From: Austrian delegation
To: Customs Cooperation Working Party

Subject: Review of the legal framework to exchange information with (in) Member States, European Commission, Europol and Frontex
– Evaluation report

Delegations will find in Annex the evaluation report on the review of the legal framework to exchange information with (in) Member States, European Commission, Europol and Frontex, which now includes comments from the Member States, the Commission, Europol and Frontex.

Review of the legal framework to exchange information/data with (in) Member States, European Commission, Europol and Frontex

Evaluation report

General issues

Cooperation between authorities with competence for investigations of a fiscal or criminal nature in customs-related matters was one of the priorities of the Austrian presidency.

For the purpose of effective and efficient operational cooperation the Austrian presidency considered it necessary to review the existing legal framework and instruments.

In the light of ever-growing challenges for EU the customs administrations in detecting, preventing and fighting new and fast-changing methods of cross-border fraud, it is crucial to continually enhance cooperation between the competent authorities of the EU Member States, the European Commission, Europol and Frontex.

The Austrian EU Presidency produced a questionnaire in the framework of the Customs Cooperation Working Party (CCWP) with a view to identifying possible weaknesses in the legal cooperation framework and/or in the operational application of the legal framework. The answers from the Member States constitute the basis of this evaluation report.

The scope of the review of the legal framework for cooperation was to:

- analyse the existing legal framework which is applicable to two specially selected customs risk areas in order to detect weaknesses in the legal basis and/or to detect weaknesses in the operational application of the legal framework which could have a negative impact on the correct application and execution of the customs authorities' tasks and responsibilities;
- if necessary, make proposals for amendments of the legal basis and/or proposals for enhanced/harmonised operational application of the existing legal framework.

It was outside the scope of the review to:

- analyse the comprehensive legal acts which regulate the cooperation in customs matters on an article-by-article basis.

This report summarises the facts and findings based on the replies of the Member States to the questionnaire as well as conclusions and recommendations from the Austrian presidency.

The following legal instruments were subject to the review:

- **Council Regulation (EC) No 515/97** of 13 March 1997 on 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 the customs authority and agricultural matters
- **Council Regulation (EU) No 389/2012** of 2 May 2012 on administrative cooperation in the area of excise duties and repealing Regulation (EC) No 2073/2004
- **Council Regulation (EU) No 904/2010** of 7 October 2010 on administrative cooperation and combating fraud in the area of value added tax
- **Naples II Convention:** Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on mutual assistance and cooperation between the customs authority administrations
- **Swedish Initiative:** 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
- **European Investigation Order:** Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters

- **Europol:** Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol) and replacing and repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA
- **Frontex:** Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC
- **Eurosur:** Regulation (EU) No 1052/2013 of the European Parliament and of the Council of 22 October 2013 establishing the European Border Surveillance System

The review covered the following issues:

- Cooperation of the competent authorities within the Member States (customs-police-tax)
- Cooperation between the competent authorities of the Member States (what legal basis in which case)
- Cooperation between the competent authorities of the Member States and the EU Commission
- Cooperation between the competent authorities of the Member States and Europol
- Cooperation between the competent authorities of the Member States and Frontex

The findings in detail

24 Member States (CCWP delegations) sent back the completed questionnaire.

The questions were limited to frequently occurring scenarios in two high risk customs areas which affect all Member States and cover the most common forms of cooperation and exchange of information between MS' authorities with competence for investigations of a fiscal or criminal nature in customs-related matters and between those authorities and the EU Commission, Europol and Frontex. The first risk area was mineral oil fraud; the second was the use of Customs Procedure Code 42 (CPC 42) - import of third-country goods released for free circulation by suspending the collection of the import VAT.

The first cluster of questions focused on the competences of the customs administrations in the areas of administrative and criminal investigative powers in the two risk areas in general.

The questions in the second and third cluster were related to the use of the appropriate legal acts for information exchange in each of the two risk areas for the purpose of administrative and criminal investigations in customs matters.

The questions in cluster four were dedicated to strategic and operational data analysis using data from several or all Member States.

The last question was about the cooperation of the MS' customs authorities with Frontex.

The answers to the questions are anonymised and cannot be connected to any specific Member State.

Cluster 1 General questions related to competences in excise fraud, customs fraud, fraud in CPC 42

Which authority is responsible to conduct preliminary enquiries?

All Member States stated that the customs authority and the tax authority conduct preliminary enquiries.

In eight Member States, in addition to the customs authority and the tax authority, the police are entitled to conduct preliminary enquiries.

Seven Member States replied that the customs authority and the tax authority are merged.

In the Member States where the customs authority and the tax authority are not merged, only the tax authority is entitled to conduct preliminary enquiries concerning VAT in CPC 42 cases.

What are the criteria to initiate formal criminal investigations? Which authority is competent to lead criminal investigations?

The answers provided by the Member States show a broad spectrum which is based on various national laws and regulations.

The criteria for initiating criminal investigations are defined in the national customs laws or in the national criminal codes.

In the majority of Member States the customs authority and/or police can conduct criminal investigations on behalf of the judicial authority.

In five Member States the customs authority has sole competence for conducting criminal investigations.

In most of Member States police have competence for conducting criminal investigations concerning VAT fraud in CPC 42 cases.

In five Member States the customs authority has no competence to conduct criminal investigations; it is involved in the preliminary phase and assists if necessary at any stage of the procedure at the request of the police. In such cases the public prosecutor leads the investigation.

Which authority is responsible to investigate and assist judicial authorities in criminal investigations?

All Member States reported that the customs authority and the tax authority are responsible for investigating and assisting judicial authorities in criminal investigations, even though they do not have competences to lead the investigations. Police can contact the customs authority and the tax authority at any stage of the procedure and request further information or customs documents.

The way and procedures for cooperation between the customs authority, the tax authority and police is regulated in national laws or cooperation agreements.

Which authority is responsible for the assessment and collection of the evaded taxes and duties (administrative procedure or compensation for loss within criminal proceedings)?

All Member States reported that the customs authority or the tax authority is responsible for the assessment and collection of the evaded taxes and duties.

Cluster 2 Risk area one: Mineral oil fraud

Scenario 1: Goods subject to excise duties, imported from third countries, put under suspension regime, then illegally withdrawn from the suspension regime

In case the customs administration conducts administrative investigations (assessment of customs/excise duties), which legal basis is used for international cooperation:

Multiple choices are possible

All Member States replied that they use Council Regulation (EU) No 389/2012.

Fifteen Member States additionally use Council Regulation (EC) No 515/97.

Eight Member States additionally apply the Naples II Convention.

Two Member States stated that they also cooperate with EUROPOL.

One Member State also makes use of the Swedish Initiative.

For the purpose of customs criminal investigations

Multiple choices are possible

Nineteen Member States apply the Naples II convention.

Fourteen Member States use the European Investigation Order.

Twelve Member States use the Swedish Initiative.

Fifteen Member States cooperate with Europol.

One Member State cooperates with Frontex.

Six Member States also apply Council Regulation (EC) No 515/97.

Which legal basis would police authorities use for international cooperation in relation to the above mentioned case?

Multiple choices are possible

Ten Member States provided their answers to this question.

Among the fourteen Member States which did not provide the answers are Member States where the police have no investigative competences in these cases. But there are also two Member States where the customs authority has no competence for criminal investigations, and no information as to the basis on which the police cooperate is available in those Member States.

All ten Member States which replied use the European Investigation Order.

Nine Member States stated that police would cooperate with Europol.

Four Member States would apply the Naples II Convention.

Six Member States cooperate with Frontex and one of those also uses Eurosur.

Three Member States reported that the police apply Council Regulation (EU) No 389/2012 or Council Regulation (EC) No 515/97.

Can results or information obtained from procedures above (fiscal, customs criminal and police investigations) be shared with other national authorities?

All Member States reported that the exchange of information is provided for in national legal acts, on a case-by-case basis, and at the decision of the public prosecutor.

Cluster 2 Risk area one: Mineral oil fraud

Scenario 2: Goods not subject to excise duties, but incorrectly used like excisable goods (Diesel)

In case the customs administration conducts administrative investigations (assessment of customs/excise duties), which legal basis is used for international cooperation?

Multiple choices are possible

Twenty-one Member States provided answers to this question.

Eighteen Member States apply Council Regulation (EU) No 389/2012, of which ten Member States additionally use Council Regulation (EC) No 515/97.

Three Member States only apply Council Regulation (EC) No 515/97.

Of the twenty-one Member States, seven also use the Naples II Convention when criminal investigations are already ongoing, one also uses the European Investigation Order and one also uses the Swedish Initiative.

For the purpose of criminal investigations

Multiple choices are possible

Twenty-two Member States provided answers to this question.

Sixteen Member States use the Naples II convention, nine the Swedish Initiative, thirteen the European Investigation Order, twelve cooperate with Europol and one cooperates with Frontex.

Of the twenty-two Member States, two also apply Council Regulation (EU) No 389/2012 and one applies Council Regulation (EC) No 515/97.

Which legal basis would police authorities use for international cooperation in relation to the above mentioned case?

Multiple choices are possible

Seven Member States replied to this question.

Of the seven Member States, three use the Naples II Convention when criminal investigations are already ongoing, six also use the European Investigation Order and five also use the Swedish Initiative.

All seven Member States cooperate with Europol, four with Frontex and three use Eurosur.

Among the seventeen Member States which did not provide the answers to this question are some Member States which indicated in their answers to question 1, that the police have no investigative competences in these cases. But there are two Member States where the customs authority has no competence for criminal investigations, and no information as to the basis on which the police cooperate is available in those Member States.

Cluster 3 Risk area two: Customs Procedure Code 42 (CPC 42) - import of third country goods released for free circulation by suspending the collection of the import VAT.

General questions related to access to VIES for customs officers and organisation of trainings

Access to VIES for customs officers

Twenty Member States replied that customs officers have access to VIES data.

Only one Member State of the four that do not have access sees a need to establish access for its customs officers.

Trainings

Do you organize trainings for customs officers related to VAT risk scenarios?

Seventeen Member States organise trainings for customs officers related to VAT risk scenarios, seven do not.

Of those seven, six see a need for such trainings.

Do you organize trainings for tax officers related to customs risk scenarios?

Eleven Member States organise trainings for tax officers related to customs risk scenarios, thirteen do not.

Of those thirteen, seven see a need for such trainings.

Do you organize joint trainings for customs officers and tax officers related to customs risk scenarios and tax risk scenarios?

Twelve Member States organise such joint trainings for customs officers related to customs and tax risk scenarios, twelve do not.

Of those twelve, eight see a need for such trainings.

Do you organize trainings for police officers related to customs and/or VAT risk scenarios?

Only one Member State organises such trainings, in two other Member States police can participate in trainings as external experts, twenty-one do not provide trainings.

Of those twenty-one, six see a need for such trainings.

Cluster 3 CPC 42, Specific questions

The tax administration in the Member State of destination detects a VAT fraud case deriving from a CPC 42 in your Member State as the Member State of importation and sends this information to the CLO of your Member State.

Do you have procedures foreseen that this information is forwarded to your customs administration by your CLO?

Twenty-four Member States replied.

Nine Member States reported that this information is not communicated to customs.

Scenario 1: The customs administration of the country of import is responsible for the proof, if pre-requisites for tax suspension of import VAT are fulfilled and at least supposes that the pre-requisites for tax suspension of import VAT are not met.

Which legal basis do you apply for the purpose of customs administrative investigations?

Multiple answers are possible.

Twenty Member States replied.

One Member State does not apply CPC 42.

One Member State collects guarantees until the consignments have reached the final destination.

One Member State has no competence in relation to CPC 42.

Nineteen Member States use Council Regulation (EU) No 904/2010, thirteen of those also use Council Regulation (EC) No 515/97.

One Member State only uses Council Regulation (EC) No 515/97.

One Member State also applies the Naples II Convention, the Swedish Initiative and cooperates with Europol.

For the purpose of customs criminal investigations

Multiple answers are possible

Nineteen Member States replied to this question. Most of them reported that Naples II, the Swedish Initiative, and the European Investigation Order are used and that they cooperate with Europol.

Two Member States only apply Council Regulation (EU) No 904/2010, and Council Regulation (EC) No 515/97, although these two instruments are only for administrative use.

In case police is competent

In eight Member States the police have no investigative powers in this area.

Only six Member States were able to answer this question. They reported that Naples II, the Swedish Initiative, and the European Investigation Order are used and that their police cooperates with Europol and Frontex.

Scenario 2: The customs administration of the country of import is NOT responsible for the proof, if pre-requisites for tax suspension of import VAT are fulfilled (in cases when after the customs procedure in the country of import the tax authority in the country of import is responsible for the proof, if pre-requisites for tax suspension of import VAT are fulfilled)

Does the customs administration in the described scenario has competences to assess/collect or recover import VAT when at a later stage of the procedure it turns out that the VAT suspension was granted illegitimately?

Twenty-two Member States replied to this question.

In twelve Member States the customs administration in the scenario described has competences to assess/collect or recover import VAT.

Does the customs administration in the described scenario have competences for criminal investigations regarding the evaded import VAT when at a later stage of the procedure it turns out that the VAT suspension was granted illegitimately?

Twenty-two Member States replied to this question.

Twelve Member States replied that in this scenario the customs administration has competence for criminal investigations.

Regarding the legal basis for investigations the Member States reported that Naples II, the Swedish Initiative, and the European Investigation Order are applied and that they cooperate with Europol.

One Member State reported that Council Regulation (EU) No 904/2010 and Council Regulation (EC) No 515/97 are applied, although these two instruments are only for administrative use.

Cluster 4 Possible processing of import data of all Member States which include personal data for operational and strategic risk analysis purposes according to the provisions laid down in the Council Regulation (EC) No 515/97

Are the data which are available in the IET directory (Import-export-transit module in MAB) suitable for carrying out efficient operational risk analysis by Member States?

Twenty-four Member States replied to this question.

Thirteen Member States confirmed that the data are suitable for operational risk analysis.

May import data of all Member States, which include personal data, according to the provisions of this regulations, be used for an EU wide risk analysis and may the results of this analysis (including personal data) be shared among all Member States?

For clarification: Analysis of imports including personal data are carried out in order to figure out, if a company which is settled in one member imports risky goods in different Member States.

Twenty-four Member States replied to this question.

Only twelve Member States confirmed that the Council Regulation (EC) No 515/97 provides the legal basis for EU-wide risk analysis with import data of all Member States.

Cluster 5 Does your customs administration cooperate with Frontex in the area of risk management?

All twenty-four Member States replied to this question.

Only five Member States cooperate with Frontex in the area of risk management, one on regular basis in the area of immigration, one on a case-by-case basis (smuggling cases), and three Member States in the framework of JADs.

Conclusions

Although not all Member States contributed to the questionnaire and the conclusions provide only a partial result, the following main points were noted.

General conclusions applicable for clusters 1, 2 and 3

It was observed that the legal instruments for administrative cooperation purposes (e.g. for proper assessment of VAT and customs duties) are occasionally incorrectly applied for criminal investigative purposes and vice versa.

Practically speaking, it seems that sometimes multiple legal bases are indicated in one request for assistance, thus leaving it to the requested authority to select the appropriate legal basis.

Additionally, legally stipulated channels of transmission of mutual assistance requests were not always respected (CLO regarding Council Regulation (EU) No 904/2010, ELO regarding Council Regulation (EU) No 389/2012, CCU regarding Naples II).

Different competences in the Member States between customs, tax and police were encountered in terms of assessment of VAT and customs duties as well as criminal investigations in these areas. Cooperation and information exchange is therefore necessary between all competent authorities is necessary.

Specific conclusions for Cluster 3, fraud in CPC 42 cases

Fraud using CPC 42 is primarily VAT fraud, involves more than one Member State, and starts with false statements in the customs declaration in the Member State of import. The VAT fraud is accomplished at the moment when the goods do not reach the destination which is declared in the customs declaration. This procedure involves customs and tax authorities in different Member States.

In order to detect, stop and fight the fraud, customs and tax administrations have to be aware of the risks in customs procedures as well as of the risks in tax procedures.

Additionally, the flow of information between customs and tax authorities, in particular across borders, and the feed-back procedure between the authorities involved have to be ensured.

The answers to the questionnaire show that, though all Member States have to apply the same legal acts (VAT Directive 2006/112/EU, Council Regulation (EU) No 904/2010 and the UCC), Member States in practice apply the legal provisions inconsistently. In some Member States customs is no longer involved in the tax suspension after the release of the goods for free circulation and is therefore excluded from the information flow between the tax authorities in the Member State of import and in the Member State of destination.

Furthermore, two-thirds of the Member States train their customs officers in VAT risks, but only around half of the Member States train tax officers in customs risks or organise joint trainings for customs and tax officers.

Specific conclusions for Cluster 4, processing of import data of all Member States, including personal data, for risk analysis purposes

Although Council Regulation (EC) No 515/97 provides the legal basis for the use Member States' import data for risk analysis purposes, it seems unclear which data - especially nominal data - can be shared among Member States and used for EU wide-risk analysis.

Perpetrators can misuse the customs regulations and apply for customs clearance in all Member States, even if they are not settled in the Member State of clearance, in order to remain undetected.

It is therefore necessary to share the relevant import data between Member States for risk analysis purposes on a suitable legal basis.

Conclusions for Cluster 5, cooperation with Frontex in the area of risk management

Less than 20% of Member States' customs administrations cooperate with Frontex in the area of risk management, although Frontex has tools and risk analysis products at its disposal which can be of added value for customs risk management purposes.

Recommendations

- Establish/enhance communication and information exchange processes between the competent authorities (tax, customs, police).
- If necessary establish the legal basis for such communication and information exchange at national level.
- Apply the proper legal basis in requests according to the principle “one request-one legal basis” to avoid multiple indication of legal acts in one request.
- Consider organising (joint) trainings for tax, customs and police in relevant complementary fields of competences.
- The Commission is invited to propose amendments to the Council Regulation (EC) No 515/97 in order to allow the exchange of relevant customs data (including nominal data) for risk analysis purposes.

Member States and Frontex are invited to liaise further in order to figure out possible ways for enhancing the cooperation between customs and Frontex.

Comments from the Member States, the Commission, Europol and Frontex

The Austrian Presidency presented this evaluation in the last CCWP plenary meeting on 12th December 2019 and invited the Member States, the Commission, Europol and Frontex to send comments (if there were comments) to this report until the end of January 2019.

The only comment to the report was provided by the Commission as follows:

The Commission welcomes the recommendations of the report on the Review of the legal framework to exchange information with (in) Member States, European Commission, Europol and Frontex. The cooperation between tax and customs administrations at national is essential for the tackling customs and tax fraud. At the same time, the Commission would like to draw the attention of the Member States to the new legal framework established by the Council Regulation (EU) 2018/1541 Of October 2018. It introduces new measures to fight VAT fraud that are relevant to tackle fraud in Customs Procedure 42.

In particular:

- *As from 1 January 2020, information on CP42 will be exchanged in an automated way between the country of importation and the tax authorities in the Member State of destination. This will allow tax administrations to react almost immediately when VAT fraud occurs by cross checking with the recapitulative statements.*
- *Tax administrations are now allowed to cooperate through Eurofisc with OLAF, which has detailed information on customs fraud. Customs fraud of undervaluation is closely correlated with VAT fraud on CP42 and allowing Eurofisc and OLAF to synergise their resources would result in a better targeting of suspicious transactions both for VAT and customs fraud.*
- *As from 1 January 2020, customs authorities will have access to VIES database to validate the authenticity of VAT data. In particular, it will be possible to automate the validation of VAT numbers at the moment of acceptance of a customs declaration.*

With all these measure, we hope that the flow of information on CP42 between different authorities and between Member States will be streamlined. The Commission is planning to launch a project group to establish guidelines on how to maximise the efficiency of these new measures and avoid missteps in their implementation.

Finally, we would like to reiterate that OLAF initiated the process of evaluation of the regulation 515/97, with the view to amend its provisions accordingly, taking into account the views and needs of MS within this regard.
