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Delegations will find attached annex and appendices to Draft Report on Action 5.10: “To find and recommend best practice for customs cooperation in criminal matters”

## Part I: Analysis

A.	Comparative study of legal instruments .....	6
I.	Naples II Convention .....	6
1.	Introduction.....	6
2.	Scope of application .....	8
a.	Overview	8
b.	Infringements of national and Community customs provisions	9
c.	Mutual assistance and cooperation in criminal investigations	10
d.	Assistance on request	11
e.	Spontaneous assistance	12
f.	Special forms of cooperation	12
(i)	Hot pursuit (Article 20).....	13
(ii)	Cross-border surveillance (Article 21) .....	15
(iii)	Controlled delivery (Article 22) .....	15
(iv)	Covert investigations (Article 23).....	16
(v)	Joint special investigation teams (Article 24).....	16
g.	Use as evidence	17
h.	Cooperation in terms of notification	17
3.	Formal prerequisites for requests.....	18
4.	Organisational means of implementation .....	18
a.	Central coordinating units	18
b.	Liaison officers	19
II.	Regulation (EC) No 515/97 .....	19
1.	Introduction.....	19
2.	Scope of application .....	20
a.	Overview	20
b.	Customs information system (CIS/CIS EU)	24
c.	Customs files identification database (FIDE/FIDE EU)	26
3.	Relation to the Naples II Convention .....	28

4.	Relation to national laws of criminal procedure and cooperation in criminal matters.....	30
a.	Article 51 of Regulation (EC) No 515/97	30
b.	Article 3 of Regulation (EC) No 515/97	31
c.	Article 2 paragraph 1 of Regulation (EC) No 515/97	31
III.	CIS Decision .....	32
1.	Introduction	32
2.	Scope of Application	32
a.	Customs information system (CIS/CIS MS)	32
b.	Customs files identification database (FIDE/FIDE MS)	35
c.	Relation to the Naples II Convention and Regulation (EC) No 515/97	36
d.	Relation to national criminal laws	37
IV.	Swedish Framework Decision.....	38
1.	Introduction.....	38
2.	Scope of application .....	39
3.	Relation to the Naples II Convention .....	42
V.	1959 and 2000 EU MLA Conventions.....	43
1.	Introduction.....	43
2.	Scope of the application.....	44
3.	Relation to the Naples II Convention .....	45
B.	Summary.....	48
I.	Legal instruments for customs cooperation in criminal matters .....	48
II.	Comparison: Naples II Convention vs. Swedish Framework Decision.....	49
III.	Comparison: Naples II Convention vs. MLA Conventions .....	50
IV.	Comparison: MLA Conventions vs. Swedish Framework Decision .....	51
V.	Relation of CIS/ FIDE towards mutual assistance in criminal matters.....	52
1.	CIS EU/ CIS MS.....	52
2.	FIDE EU/FIDE MS .....	53

## Part II: Case Study

A.	Different national classification – administrative vs. criminal investigations.....	54
B.	National investigations pending in parallel but at different stages.....	56
C.	Different national allocation of competences – customs vs. judicial authority.....	57
D.	Different national models of competence allocation – clear separation between customs and judicial authorities or overlaps.....	58
E.	Different national assessment of applicable legal basis .....	59

## Part III: Recommendations

A.	Customs cooperation in criminal matters (Infringements of national and Community customs provisions).....	60
	I. Requests for information.....	61
	II. Special forms of cooperation or requests .....	62
	III. CIS and FIDE.....	62
B.	As cut-off point: Customs cooperation in administrative matters.....	63
	I. Incorrect application of Community customs provisions .....	64
	II. Incorrect application of national customs provisions.....	65
C.	As cut-off point: Mutual legal assistance (cooperation between judicial authorities) .....	65
D.	General practical recommendations .....	67

**Bibliography** ..... 69

**Appendix A:** Declarations of the Member States regarding the special forms of cooperation pursuant to the Naples II Convention ..... 74

**Appendix B:** Declarations of the Member States according to Article 24 of the 1959 EU MLA Convention and Article 24 paragraph 1 of the 2000 EU MLA Convention ..... 82

**Appendix C:** Checklist for customs cooperation in criminal matters ..... 99

**Appendix D:** Progression Map for the selection of recommendations for the monitoring file..... 107

This Annex is sub-divided into three main parts, namely an Analysis (Part I), a case study (Part II) and recommendations drawn from the analysis and the case study (Part III).

## **Part I: Analysis**

Part I contains a theoretical analysis providing information about the main European law instruments for customs cooperation in general (A.). The results of this analysis are summarized comparatively and with the aim of filtering out the legal instruments for customs cooperation in criminal matters (B.).

### **A. Comparative study of legal instruments**

The following study examines the Naples II Convention (I.), Regulation (EC) No 515/97 (II.), the CIS Decision (III.), the Swedish Framework Decision (IV.), the 1959 EU MLA Convention and the 2000 EU MLA Convention (V.)

#### **I. Naples II Convention**

##### **1. Introduction**

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 dated 18 December 1997 (hereafter “**Naples II Convention**”) regulates the mutual assistance and cooperation between the Member States’ customs administrations in criminal matters. It replaced the Convention between Belgium, the Federal Republic of Germany, France, Italy, Luxembourg and the Netherlands on mutual assistance by their customs administrations dated 7 September 1967 (hereafter “**Naples I Convention**”).

The Naples I Convention had been intended to lead to a more accurate collection of customs duties and to ensure compliance with prohibitions and restrictions in the cross-border traffic of goods.

However, in the course of the European integration process, which resulted, among other developments, in the formation of a single European market on 1 January 1993 and a gradual reduction of border controls, national security authorities faced new challenges. In particular, because the reduction of border controls led to a diminished risk of detection on the part of offenders the Naples I Convention ceased to be regarded as a sufficient instrument for reacting adequately to threats against the internal security of the European Union.

The Naples II Convention, however, plays an important role within today's pan-European security strategy in the fight against crime. It not only establishes an improved instrument for mutual assistance but also provides for particular forms of cooperation in the customs area: The instruments available include the use of cross-border pursuit, cross-border surveillance, controlled delivery and under-cover agents/joint investigation teams.

Compared with the Naples I Convention, the Naples II Convention furthermore broadens customs cooperation between the Member States in order to keep pace with the bilateral and multilateral customs cooperation with third countries. Several customs cooperation agreements which had been concluded with Central and Eastern Europe countries for instance contained provisions that went far beyond the Naples I Convention – a circumstance which had to be reflected by the new convention.

From an internal European perspective, the Naples II Convention developed – as a counterpart and supplement to Council Regulation (EC) No 515/97 of 13 March 1997 (hereafter “**Regulation (EC) No 515/97**”; see below under II.) – against the backdrop of the former three so-called pillars of the European Union which were abolished by the Lisbon Treaty of 13 December 2007 which entered into force on 1 December 2009.

While Regulation (EC) No 515/1997 belongs in the realm of the former first pillar (e.g. customs union, single market, trade policy – competence of the European Communities), the Naples II Convention forms part of the former third pillar (police and judicial cooperation – exclusive competence of the Member States). Two separate legal instruments of mutual assistance were created because the law enforcement did not fall within the competence of the European Union and there was therefore no legal basis in the area of the former first pillar with regard to the customs cooperation in this field.

Therefore, the Naples II Convention not only governs customs cooperation with regard to preventing, detecting, prosecuting, and punishing infringements of *national* customs provisions, but it additionally encompasses the prosecution and punishment of infringements of the customs law of the European Union. This means that the Convention also applies to the implementation of customs law deriving from the former first pillar as far as criminal matters are concerned.

## 2. *Scope of application*

### a. Overview

The Naples II Convention governs cross-border cooperation within the European Union between the Member States, but not cooperation with third countries. Under Article 2 of the Convention, Member States are to apply the provisions of the Convention within the limits of the powers conferred upon them under national law.

Article 1 paragraph 1 stipulates that the customs administrations of the Member States shall cooperate with a view to

- infringements of *national* customs provisions:
  - in preventing and detecting, prosecuting and punishing them
  - (measures for administrative purposes *and* for the purpose of law enforcement),
  
- infringements of *Community* customs provisions:
  - in prosecuting and punishing them
  - (*only* measures for the purpose of law enforcement).

Since the Convention is, in the first instance, a legal instrument regulating cooperation with regard to infringements of national customs provisions and therefore falls within the realm of the Member States' competences, it encompasses cooperation with a view to both measures for administrative purposes and measures for the purpose of law enforcement. As a supplement to Regulation (EC) No 515/97 it moreover provides for cooperation with regard to prosecuting and punishing infringements of Community customs provisions, in other words, cooperation as to law enforcement measures within the Member States' competences.<sup>1</sup>

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<sup>1</sup> For a more detailed discussion of the differences between the Naples II Convention and Regulation (EC) No 515/97 please refer to II. 3. below.



Under the Naples II Convention, the requested Member State is to proceed as acting on its own account and, in doing so, use all its legal powers (Article 8 paragraph 1). Therefore, even the use of compulsory measures is covered by the Convention if provided for by the respective national law.

The authorities cooperating with each other on the basis of the Naples II Convention are the customs administrations of the Member States. Pursuant to Article 4 paragraph 7, the term “customs administrations” not only comprises the Member States’ customs authorities but also covers other authorities that are solely or even only partly competent for the implementation of the provisions covered by the Convention. It thus addresses the customs administrations of the Member States in a merely functional sense, taking into account the fact that the allocation of the competences between customs administrations, police and other law enforcement authorities may vary depending on the respective national law of the Member State concerned. Consequently, the Naples II Convention also applies to such authorities and may therefore also be used by judicial authorities (see Article 3 paragraph 2).

**b. Infringements of national and Community customs provisions**

As described above, cooperation under the Naples II Convention covers both infringements of national customs provisions and infringements of Community customs provisions. The terms “national customs provisions”, “Community customs provisions” and “infringement” are defined by the Convention itself.

The notion of national customs provisions covers all of a Member State’s laws, regulations and administrative provisions that are wholly or partly applicable within the jurisdiction of the respective Member State’s customs administration, but only those concerning:

- cross-border traffic of goods subject to prohibitions, restrictions or controls  
(e.g. narcotic drugs, fire arms, radioactive substances, paedophilic documents) and
- non-harmonized excise duties (Article 4 paragraph 1).

The notion of Community customs provisions refers to:

- (1) provisions of the Community governing the import, export, transit, and presence of goods traded
  - between Member States and third countries, or
  - between Member States, if the Community status of the goods in question does not exist or is still meant to be established by further controls or investigations,
- (2) provisions of the Common Agricultural Policy,
- (3) Community provisions adopted for harmonized excise duties and for value-added tax on importation, including their national implementation provisions (Article 4 paragraph 2).

“Infringements” of these provisions means all acts in conflict with them, including attempted acts, all forms of participation and the laundering of money deriving from the infringements (Article 4 paragraph 3).

**c. Mutual assistance and cooperation in criminal investigations**

With respect to infringements of national and Community customs provisions, the Convention also covers mutual assistance and cooperation in criminal investigations (Article 3 paragraph 1).

However, Article 1 paragraph 2 clarifies that mutual legal assistance (cooperation between judicial authorities) may still be based on different legal acts and agreements to those for the mutual assistance rendered under the Naples II Convention. The Convention does not affect any mutual legal assistance provisions applicable between judicial authorities. Furthermore, the Member States are able to conclude and make use of more favourable bilateral or multilateral agreements regulating either administrative or legal assistance.

Additionally, if criminal investigations in the area of customs law infringements are carried out by or under the direction of a judicial authority, that authority may choose to base its requests either on legal assistance provisions or on the Naples II Convention – depending on which legal instrument proves to be more effective in the respective case (Article 3 paragraph 2). As mentioned above, the Naples II Convention may therefore be applied by judicial authorities as well as by customs authorities.

Article 3 paragraph 2 moreover permits customs administrations to request and render assistance in criminal investigations directly from each other even if the judicial authorities are in full charge of the investigations.

**d. Assistance on request**

Under the Naples II Convention, the Member States may place the following three types of request:

(1) Requests for information (Article 10)

refer to the communication of all information which may enable the requesting state to prevent, detect and prosecute infringements.

(2) Requests for surveillance (Article 11)

refer

- either to a special watch being kept on *persons* if there are serious ground for believing that they have infringed, are infringing or are preparing to infringe national or Community customs provisions (restriction: “as far as possible”)

- or to a special watch being kept on *places, means of transports and goods* connected with potential breaches of said customs provisions.

(3) Requests for enquiries (Article 12)

refer to carrying out or arranging for appropriate enquiries regarding operations constituting or appearing to constitute infringements of said customs provisions. The enquiries are at all times carried out by officers of the requested Member State. However, the requested and the requesting Member State may agree on the presence of officers of the latter.

**e.** Spontaneous assistance

Furthermore, according to Articles 15 to 17, the Member States are to cooperate spontaneously without any request. Subject to any limitations of their national laws, they are obliged to

- (1) keep the special watch described above, as far as possible and where it serves the prevention, detection and prosecution of infringements within the other Member State concerned,
- (2) send all relevant information concerning planned or committed infringements. This also comprises personal data.

**f.** Special forms of cooperation

Beyond the pure information exchange, Article 19 to 24 of the Naples II Convention provide for special forms of cross-border cooperation which exclusively apply in terms of the especially serious infringements listed in paragraph 2 a to d. Article 19 paragraph 2 d contains a catchall element which was inserted in order to keep the Convention's scope open to newly emerging forms of serious crimes.

In this regard, the Member States are obliged to render to each other all necessary assistance in terms of staff and organisational support. In any case, the operations have to comply with the respective national law. If necessary under the applicable national law, the requested authorities apply to their judicial authorities for approval of the planned investigations. Article 19 paragraph 2 clarifies that any conditions and requirements set by the judicial authorities are observed in the course of the investigations.

The Naples II Convention establishes the following five forms of special cross-border cooperation.

(i) Hot pursuit (Article 20)

The pursuit of a person who has been observed in the act of committing or participating in one of the crimes listed in Article 19 paragraph 2 which could give rise to extradition may be continued on the territory of another Member State without prior authorisation. Such a pursuit serves the purpose to arrest the person concerned.

The right to hot pursuit is only applicable to extraditable infringements. This term has to be defined with recourse to Article 2 paragraph 1 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States. The Council Framework Decision replaces the European Convention on Extradition of 13 December 1957 which defined extraditable offences as “offences punishable under the laws of the requesting Party *and of the requested Party* by deprivation of liberty or under the detention order *for a maximum period of at least one year* or by a more severe penalty”. Pursuant to its Article 2, the Council Framework Decision now requires an act “punishable by the law *of the issuing Member State* by a custodial sentence or a detention order *for a maximum period of at least 12 months* or, *where a sentence has been passed or a detention order has been made, for sentences of at least four months*”. That means that the Council Framework Decision has broadened the scope of definition for extraditable offences considerably.

The Naples II Convention grants this right to all officers of the customs administrations that is competent for the pursuit under the respective national law.

As an emergency measure, the right of hot pursuit is only available in cases of particular urgency where it was not possible to notify the other Member State in advance. The other Member State has to be contacted once the officers cross the border. If so requested by the other Member State, the pursuit is to be ceased at any time.

The Member States may choose to opt-out of Article 20 or part thereof (paragraph 8). If one Member State has not declared a full opt-out, it has to define the further conditions under which it wants to grant the right of hot pursuit within the framework of Article 20 paragraphs 2, 3 and 4. However, it may not deviate from the conditions set out in Article 20 paragraphs 1 and 5 and Article 30 paragraph 1.

For an overview of the Member States which have declared a complete or partial opt-out, please refer to Appendix A.

(ii) Cross-border surveillance (Article 21)

The observation of a person likely to be involved in one of the infringements under Article 19 paragraph 2 may be continued on the territory of another Member State. However, this may in principle only be done with the prior authorisation of that State (Article 21 paragraph 1). As an exception, the authorisation does not have to be applied for in cases of particular urgency where the conditions listed in paragraph 2 are fulfilled. Any cross-border observation has to comply with the conditions stipulated in Article 21 paragraph 3. The observation is to be ceased if requested by the Member State concerned or if its approval is not available five hours after the border crossing.

In contrast to hot pursuit, cross-border surveillance serves the purpose of further investigations.

The Member States may choose to opt-out of Article 21 or part thereof (paragraph 5).

For an overview of the Member States which have declared a complete or partial opt-out, please refer to Appendix A.

(iii) Controlled delivery (Article 22)

Article 22 paragraph 1 obliges the Member States to allow another Member State (where the latter so requests) to undertake controlled deliveries in connection with and for the purpose of criminal investigations into extraditable offences on its territory in accordance with its national law. Pursuant to paragraph 3, the requested Member state is furthermore obliged to take over the lead and the accomplishment of this investigation measure at the time when the deliveries cross the border or at a time agreed upon with the requesting Member State.

The Naples II Convention moreover explicitly allows the delivered goods to be removed or replaced in whole or in part.

The Member States may not opt-out of this provision.

(iv) Covert investigations (Article 23)

Pursuant to Article 23, Member States may request authorisation to deploy customs officers operating as covert investigators – not confidential informants – for a limited period of time on the territory of the requested Member State. Covert investigation is to be authorised and carried out in accordance with the requested State's national law. This investigation measure is to be applied only as measure of last resort.

The Member States may choose to opt-out of Article 23 or part thereof (paragraph 5).

For an overview of the Member States which have declared a complete or partial opt-out, please refer to Appendix A.

(v) Joint special investigation teams (Article 24)

For a limited purpose and time frame, several Member States may establish a joint investigation team seated in one of these Member States in order to implement, for instance, difficult investigations requiring coordinated action. The investigations may serve the implementation of difficult and demanding investigations of specific infringements and the coordination of joint activities to prevent and detect particular types of infringements (Article 24 paragraph 1). The joint investigation teams are to operate in accordance with the conditions set out in paragraphs 2 and 3.

The establishment of joint investigation teams depends on the mutual agreement of all Member States involved which are not obliged to declare their consent.



**g.** Use as evidence

Papers obtained by the requesting Member State (Article 14) as well as any information received by a Member State in the case of spontaneous assistance (Article 18) may be used by the requesting/receiving Member State as evidence - also in criminal proceedings - in accordance with its national law.

This also applies to any information gathered by means of the special forms of cooperation (Article 19 paragraph 7). However, in this case the Member State in which the information was obtained may impose particular conditions on its use as evidence.

These three provisions are applicable within the Convention's scope as described above under I. 2.

a. and b., that is to say, they are applicable in the following sense:

(1) infringements of *national* customs provisions:

measures for administrative purposes *and* for the purpose of law enforcement  
→ use in *administrative and criminal* proceedings,

(2) infringements of *Community* customs provisions:

only measures for the purpose of law enforcement  
→ use *only in criminal* proceedings.

**h.** Cooperation in terms of notification

Finally, in Article 13 the Convention provides the legal basis for cooperation of the Member States in terms of notification. This comprises the notification of all instruments or decisions which fall within the scope of application of the Naples II Convention.

### 3. *Formal prerequisites for requests*

The formal prerequisites in terms of the form and substance of any request submitted under the Naples II Convention are stipulated in Article 9 of the Convention. This Article also applies to the special forms of cooperation (Article 19 paragraph 1).

Requests have to be submitted in an official language of the requested Member State or in a language acceptable to it (Article 9 paragraph 3). There are forms available for the cooperation under the Naples II Convention.<sup>2</sup> Moreover, in the case of a notification request, any official document sent to the requested Member State also needs to be translated into an official language of this Member State (Article 13 paragraph 2). It does, however, have the right to waive a translation.

### 4. *Organisational means of implementation*

In order to facilitate cooperation, the Naples II Convention provides for two organizational means: the central coordinating units and the liaison officers (Articles 5 and 6).

#### a. Central coordinating units

Firstly, the customs administrations of the Member States appoint a central coordinating unit that is responsible for receiving requests and coordinating mutual assistance (Article 5; see Article 19 paragraph 1 for the special forms of cooperation). This does not mean that the respective competent authorities of the Member States cannot cooperate directly. It does, however, relieve the requesting Member State from the burden of identifying the competent authority in the requested Member State.

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<sup>2</sup> Please refer to [http://www.consilium.europa.eu/policies/council-configurations/justice-et-affaires-interieures-\(jai\)/frontieres-et-visas/customs-cooperation?lang=de](http://www.consilium.europa.eu/policies/council-configurations/justice-et-affaires-interieures-(jai)/frontieres-et-visas/customs-cooperation?lang=de).

## b. Liaison officers

Additionally, the Member States have the option of exchanging liaison officers among each other in order to promote cooperation in mutual assistance matters (Article 6). The concrete conditions, the location and the terms of reference may be determined by means of bilateral or multilateral agreements. These liaison officers are not to have any powers of intervention in the host state.

## II. Regulation (EC) No 515/97

### 1. Introduction

Up until the creation of the Amsterdam Treaty of 2 October 1997, the treaties on the foundation of the European Community did not contain any explicit or comprehensive provisions on customs cooperation among the Member States. On 7 September 1967, the Naples I Convention was signed to fill this loophole. In order to create obligations for the Member States to provide information and cooperate with the European Commission and to allow for interpretation by the Court of Justice of the European Communities, Council Regulation (EEC) No 1468/81 of 19 May 1981 on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the European Commission to ensure the correct application of the law on customs or agricultural matters (hereafter “**Regulation (EEC) No 1468/81**”) was created and later substituted by Regulation (EC) No 515/97 dated 13 March 1997. Later on, Regulation (EC) No 515/97 was amended by Regulation (EC) No 766/2008 of the European Parliament and of the Council of 9 July 2008 (hereafter “**Regulation (EC) No 766/08**”). Among other matters, it intensified the obligations of the Member States towards the European Commission, and set up a customs files identification database (hereafter “**FIDE**”) at the Community level.

Regulation (EC) No 515/97 regulates mutual assistance and cooperation between the Member States in *administrative* matters. It came into force later than the Naples I Convention, but before the Naples II Convention. While the Naples II Convention forms part of the former third pillar (police and judicial cooperation – exclusive competence of the Member States), Regulation (EC) No 515/97 belongs in the realm of the former first pillar (e.g. customs union, single market, trade policy – competence of the European Communities). Given that the law enforcement does not fall within the competence of the European Union, Regulation (EC) No 515/97 constitutes a legal basis merely for cooperation of the Member States for *administrative* purposes with regards to an incorrect application of Community customs provisions. Thus, Regulation (EC) No 515/97 is not one of customs’ legal instruments for mutual assistance in criminal matters, but will be examined briefly here in order to make its relation to the Naples II Convention clear. Moreover, Regulation (EC) No 515/97 offers various cut-off points in relation to the Member States’ national laws of criminal procedure and their cooperation in criminal matters which shall also be described below.

## 2. *Scope of application*

### a. Overview

Regulation (EC) No 515/97 concerns cooperation among the competent administrative authorities of the Member States as well as between these and the European Commission in order to ensure compliance with the legislation on customs and agricultural matters (Article 1 paragraph 1).<sup>3</sup>

According to Article 2 paragraph 1 of Regulation (EC) No 515/97, “customs legislation” comprises all Community provisions governing the import, export, transit and presence of goods traded between Member States and third countries and – in the case of goods not having Community status – traded between Member States.

Regulation (EC) No 515/97 not only applies to fiscal Community provisions but also to Community provisions stipulating Community prohibitions and restrictions with respect to the cross-border movement of goods (e.g.: Council Regulation (EC) No 111/2005 of 22 December 2004 laying down rules for the monitoring of trade between the Community and third countries in drug precursors).

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<sup>3</sup> The following text only refers to customs legislation.

Moreover, Regulation (EC) No 515/97 is applicable to Community provisions on controls of cross-border cash movements (Article 6 paragraph 1, second sentence of Regulation (EC) No 1889/2005 of the European Parliament and of the Council of 26 October 2005 on controls of cash entering or leaving the Community). However, Regulation (EC) No 515/97 only governs mutual assistance in cases of incorrect or potentially incorrect cash declarations, but not cooperation in criminal matters with respect to money laundering.

Unlike the Naples II Convention, Regulation (EC) No 515/97 does not encompass cooperation concerning the incorrect application or infringements of national customs provisions.

The notion of compliance in Article 1 paragraph 1 refers to administrative measures with respect to the incorrect application of Community customs provisions, but not to law enforcement measures. Cooperation with respect to law enforcement measures as to a breach of Community customs provisions is therefore carried out on the basis of the Naples II Convention (see above under I. 2. a.).

Mutual assistance under Regulation (EC) No 515/97 is thus rendered for the *administrative* purposes of recovery or reimbursement only, not for purposes concerning criminal matters. This follows, among others, most clearly from the recital of Regulation (EC) No 515/97 which explicitly declares that the application of the Naples I Convention is to remain unaffected due to the allocation of competences to the Member States/ the Community (“Whereas the introduction of Community provisions on mutual assistance ... is without prejudice to the application of the 1967 Convention for mutual assistance between customs administrations which remain the sole province of the Member States; whereas these Community provisions are not such as to affect the application in the Member States of rules on judicial cooperation in criminal cases ...”).

The different forms of cooperation among the Member States according to Regulation (EC) No 515/97 correspond to those stipulated in the Naples II Convention, except for the special forms of cooperation.

Assistance may be requested in form of

(1) information

(Article 4 of Regulation (EC) No 515/97; please compare with Article 10 of the Naples II Convention),

(2) surveillance

(Article 7 of Regulation (EC) No 515/97; please compare with Article of the 11 Naples II Convention),

(3) enquiries

(Article 9 of Regulation (EC) No 515/97; please compare with Article 12 of the Naples II Convention),

(4) notification

(Article 6 of Regulation (EC) No 515/97; please compare with Article 13 of the Naples II Convention).

Spontaneous assistance may be rendered in the form of

- (1) arranging for or carrying out a special watch, and
- (2) furnishing information

(Articles 13 pp. of Regulation (EC) No 515/97; please compare with Articles 15 pp. of the Naples II Convention).

Regulation (EC) No 515/97 only touches the special forms of cooperation in Article 47 without having any practical relevance. There it says that the Member States may decide by common accord about further procedures to ease cooperation and in particular “in order to avoid any interruption of surveillance of persons or goods”. Hence, Regulation (EC) No 515/97 does not provide a legal basis for such surveillances itself, but if such a basis is applicable, the Member States concerned are allowed to agree on additional procedures to ensure the accomplishment of such surveillance.

Any papers and information exchanged either on request or spontaneously may be used as evidence for *administrative* purposes (Articles 12 and 16 of Regulation (EC) No 515/97).

Additionally, Article 45 paragraph 3 implicitly stipulates that the information obtained under Regulation (EC) No 515/97 may be used “in any legal action or proceedings subsequently initiated in respect of failure to comply with customs (...) legislation”. Given that Regulation (EC) No 515/97 governs cooperation for administrative purposes, Article 45 obviously applies to administrative actions and proceedings. Moreover, the information and documents exchanged on the basis of Regulation (EC) No 515/97 may also be used in criminal proceedings

- if and as far as they refer to the (potentially) incorrect application of customs provisions that also constitutes a criminal offence
- and
- provided that no criminal investigations had been conducted or were likely/ intended to be conducted against the action concerned at the time the request was sent on the basis of Regulation (EC) No 515/97, meaning that the Naples II Convention or provisions of mutual legal assistance were not applicable.

Finally, Regulation (EC) No 515/97 determines the relationship between the Member States and the European Commission on the one hand (Articles 17 pp.) and the forwarding of information to third countries on the other hand (Articles 19 pp.) with respect to administrative assistance matters in the case of Community customs provisions.

In order to facilitate the implementation of Regulation (EC) No 515/97, each Member State distributes to the other Member States and the European Commission a list of its authorities that are competent and appointed for assistance matters pursuant to Regulation (EC) No 515/97 (Article 2 paragraph 2).

**b. Customs information system (CIS/CIS EU)**

Regulation (EC) No 515/97 also provides for the establishment of an automated customs information system, a central database accessible in each Member State and at the European Commission which serves to assist in preventing, investigating and prosecuting operations breaching Community customs provisions (Article 23). By means of the CIS, the relevant information is to be made available more rapidly, thereby increasing the efficiency of cooperation. The data stored in the CIS may only be used for this objective and solely by designated national customs authorities and departments of the European Commission.

In addition to the CIS based on Regulation (EC) No 515/97 and concerning Community customs provisions (hereafter “**CIS EU**“), there is another customs information system on the basis of the CIS Decision which relates to the national customs provisions of the Member States (hereafter “**CIS MS**”; see below under III. 2. a.). These two information systems consist of separate sets of data and complement one another. This separation does not result from any technical considerations but from the allocation of competences between the European Union on the one hand and the Member States on the other hand.



The European Commission created the hardware architecture for the CIS and arranged for the software design. Regulation (EC) No 515/97 determines the modalities of the operation and use of the CIS EU database and regulates specific data security and protection aspects including the rights of the persons concerned. The inclusion and processing of the data is governed by the respective national law of the supplying or processing Member State (Article 31).

The use of CIS EU is only allowed for the following purposes (Article 27 paragraph 1):

- (1) (a) sighting,
  - (b) reporting,
  - (c) discreet surveillance,
  - (d) specific checks, and
- (2) operational analysis (as defined in Article 2 paragraph 1).

With respect to the first set of purposes, the Schengen Information System (SiS) was used as a role model for the CIS. Similarly, the CIS serves as an information platform by way of which the Member States insert information in order to “alert”<sup>4</sup> other Member States about goods, means of transport and persons involved (or suspected of being involved) in an incorrect administrative application or criminal infringement of Community customs provisions in case the respective goods, means of transport or persons may be encountered on the territory of one of the other Member States. Such an “alert” is helpful in all cases in which it is not known exactly where the respective goods, means of transport or persons will be encountered. Where there is a specific incident, the authorities may then search the CIS for particular goods, means of transport or persons in order to see if they receive a “hit”. The Member State inserting information may also indicate the suggested action (Article 25 paragraph 2 (j)) which is identical with purposes (1) (a), (c), (d) and (2) above (Article 27 paragraph 1).

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<sup>4</sup> Please compare to Articles 3 and 27 of Regulation (EC) No 1987/2006 of the European Parliament and of the Council of 20 December 2006 on the establishment, operation and use of the second generation Schengen Information System (SIS II).

If an authority exercises the suggested action, it has to do so by observing the respective national law, for instance, the national rules on jurisdiction (Article 31 paragraph 2). The data inserted into the CIS itself do not constitute the legal basis for the actions conducted upon receiving a hit. The authority acting upon such hit is to inform the inserting Member State (“CIS partner”) about the results of the action.

**c. Customs files identification database (FIDE/FIDE EU)**

By amending Regulation (EC) No 515/97 via Regulation (EC) No 766/08 the CIS was supplemented by a customs files identification database (Fichiers d’identification d’enquêtes douanières = FIDE) that pursues a further different objective by displaying investigation files which exist in the Member States (Article 41a). Regulation (EC) No 515/97 also governs how FIDE is to be operated and used.

The objective of inserting data into FIDE is to inform other Member States about the respective national authority leading or having led administrative or criminal investigations against certain natural or legal persons on the account of a breach of Community customs provisions. FIDE may contain certain personal data of the person concerned if the person is suspected of committing or having committed such a breach, if the person concerned has already been the subject of a respective finding or has been the subject of an administrative decision or judicial penalty for such an operation (Article 41b paragraph 1a, 2). FIDE provides information about the respective national file number (Article 41b paragraph 1c) and the investigation office. For any further information, a Member State or the European Commission has to address the Member State conducting the respective investigations via a formal request (Article 41a paragraph 4).

Thus, for the first time, FIDE enables the investigating authorities of the Member States to systematically coordinate their ongoing investigations (Article 41a paragraph 3). This avoids situations where the national authorities of different Member States conduct investigations against the same person for the same reasons without gaining any knowledge of the existence of the other investigations in the other Member States.

The investigations coordinated by FIDE according to Regulation (EC) No 515/97 are in the first instance administrative investigations. Regulation (EC) No 515/97 does not provide for the input, storage and use of data referring to criminal offences which do not at the same time constitute a breach of Community customs provisions. This already stems from the Regulations' general scope of application (Articles 1 and 2). However, if the infringement of the Community customs provisions in question furthermore constitutes a criminal offence according to the applicable national law and the Member State concerned therefore conducts criminal investigations, FIDE may also be used for such purpose (please refer to Article 41b paragraph 1a).

At the discretion of the Member States, the national judicial authorities may be granted— exclusively indirect – access to FIDE by sending information inquires to the customs administrations. In this case, the judicial authorities may use relevant information in FIDE for mutual legal assistance requests. However, pursuant to the applicable national rules of criminal procedure, the insertion of data into FIDE may be subject to the prior approval of the judicial authorities (Articles 51 and 3). This may also be applicable in the case of any information exchange between customs administrations of the Member States within the meaning of Article 3.

For more detailed information regarding the use of FIDE, also with respect to criminal investigations and the options for judicial authorities, please refer to the FIDE Handbook.<sup>5</sup>

In addition to the FIDE based on Regulation (EC) No 515/97 and concerning Community customs provisions (hereafter “**FIDE EU**”), there is another customs files identification database on the basis of the CIS Decision which relates to the national customs provisions of the Member States (hereafter “**FIDE MS**”; below under III. 2. b.). These two files identification databases consist of separate sets of data that complement one another. This separation does not result from any technical considerations but from the allocation of competences between the European Union on the one hand and the Member States on the other hand.

### *3. Relation to the Naples II Convention*

As already described above, the relationship between Regulation (EC) No 515/97 and the Naples II Convention is determined by two aspects –customs provisions, the compliance with which is to be ensured (national vs. Community customs provisions), and the purposes for which assistance is requested (administrative vs. criminal).

While Regulation (EC) No 515/97 aims to ensure compliance with Community customs provisions, the Naples II Convention strives to promote compliance with national customs provisions.

As to the purposes of the requested assistance, the Naples II Convention covers – as far as the compliance with national customs provisions is concerned – both administrative and law enforcement purposes. In contrast, Regulation (EC) No 515/97 only comprises measures for administrative purposes with respect to compliance with Community customs provisions. This difference derives from reasons concerning the allocation of competence between the European Union and the Member States prior to the creation of the Treaty of Lisbon. Both legal instruments belong to different former pillars of the European Union – Regulation (EC) No 515/97 to the first one (competence of the European Communities) and the Naples II Convention to the third one (exclusive competence of the Member States).

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<sup>5</sup> Council document 5047/3/12 REV 3 ENFOCUSTOM 1 ENFOPO 2 COPEN 1 EUROJUST 1.

Given that the law enforcement did not fall within the competence of the European Union, Regulation (EC) No 515/97 does not provide a legal basis with regard to customs cooperation in this field. This loophole was filled by the later Naples II Convention which does not therefore only govern customs cooperation with regard to administrative and criminal measures as to infringements of national customs provisions, but additionally encompasses cooperation in terms of the law enforcement as to the customs law of the European Union. This means that the Convention is also applicable to the implementation of the customs law deriving from the former first pillar as far as criminal matters are concerned.

At a glance, the relationship between Regulation (EC) No 515/97 and the Naples II Convention can be set out as follows.

	<b>National</b> customs provisions	<b>Community</b> customs provisions
Cooperation with respect to measures for <b>administrative</b> purposes	Naples II Convention	Regulation (EC) No 515/97
Cooperation with respect to measures for <b>law enforcement</b> purposes	Naples II Convention	Naples II Convention

This table will be complemented in the course of the analysis of the CIS EU/CIS MS and the FIDE EU/FIDE MS after shedding light on the CIS Decision. For further details, please refer to III. 2. c. below.

#### 4. *Relation to national laws of criminal procedure and cooperation in criminal matters*

Regulation (EC) No 515/97 offers several cut-off points in relation to the Member States' national laws of criminal procedure and their cooperation in criminal matters.

##### a. Article 51 of Regulation (EC) No 515/97

As a general principle, Article 51 of Regulation (EC) No 515/97 establishes the primacy of national law of criminal procedure and assistance. It stipulates that the application in the Member States of rules on criminal procedure and mutual assistance in criminal matters remain unaffected by Regulation (EC) No 515/97. This assumes there are overlaps between mutual administrative assistance on the one hand and national criminal procedures and mutual legal assistance in criminal matters on the other hand. This is true whenever the cooperation in administrative matters supports a case which may lead or has led to criminal investigations. In such cases, Article 51 resolves the conflict by stipulating the priority of the rules on criminal procedure and mutual assistance in criminal matters in relation to the provisions of Regulation (EC) No 515/97.

However, in Member States in which criminal proceedings are initiated at an early stage, Regulation (EC) No 515/97 would be undermined if Article 51 were interpreted extensively. This does not correspond to the predominant practical use of the preceding Regulation (EC) No 1468/81 nor does it correspond to the spirit of Regulation (EC) No 515/97. The latter itself presupposes for instance in Article 3 and Article 9 paragraph 2, subparagraph 3 that assistance according to Regulation (EC) No 515/97 may also be rendered in cases in which criminal proceedings are initiated. Therefore, Article 51 is to be interpreted restrictively so that national rules of criminal procedure and those of mutual assistance in criminal matters prevail only in proceedings led by the national judicial authorities or under their direction. Moreover, it has to be borne in mind that the reservation of Article 51 does not hinder the application of Article 18 paragraph 1 pursuant to which the European Commission is empowered to request information of a Member State and to pass the information down to another Member State in order to support that State's criminal proceedings.

**b. Article 3 of Regulation (EC) No 515/97**

In accordance with the general principle stipulated in Article 51, Article 3 clarifies on the one hand that the initiation of criminal proceedings does not release the Member States from their cooperation obligations according to Regulation (EC) No 515/97. On the other hand, in those cases in which the information requested on the terms of mutual administrative assistance under Regulation (EC) No 515/97 had been gathered in connection with criminal proceedings within the requested Member State, its customs authorities have to apply for the prior consent of the judicial authorities in order to pass this information down to the requesting Member State. Article 3 is also applicable to the use of the CIS.

However, the above-mentioned only applies to information gathered in criminal proceedings which are led by the judicial authorities or under their direction but not if the customs authorities are competent for the criminal investigations. Article 3 thus makes it clear that the judicial authorities and the administrative authorities conducting investigations under the direction of the judicial authorities are not obliged to provide any information or documents.

**c. Article 2 paragraph 1 of Regulation (EC) No 515/97**

In line with the above-mentioned Articles, Article 2 paragraph 1 of Regulation (EC) No 515/97 defines the term “administrative enquiry” – relevant for instance for requests of enquiry pursuant to Article 9 – as excluding any action taken at the request of or under a direct mandate from a judicial authority.

### III. CIS Decision

#### 1. Introduction

Council Decision 2009/917/JHA of 30 November 2009 on the use of information technology for customs purposes (hereafter “**CIS Decision**”) succeeds the Convention of 26 July 1995 on the use of information technology for customs purposes (hereafter “**CIS Convention**”).

The CIS Convention had set up for a customs information system (CIS) with the objective of assisting in preventing, investigating and prosecuting national law infringements. Moreover, the CIS Convention – as amended by a Protocol of 8 May 2003 – had stipulated the establishment of a FIDE within the area of national customs law infringements as a supplement to the FIDE within the area of Community customs law infringements set up by Regulation (EC) No 515/97.

The CIS Decision replaces the CIS Convention with certain amendments. For instance, it adds strategic analysis and operational analysis to the purposes for which the CIS may be used by the Member States.

The CIS Decision has to be seen in contrast to Regulation (EC) No 515/97 and in conjunction with the Naples II Convention.

#### 2. Scope of Application

##### a. Customs information system (CIS/CIS MS)

Contrary to the CIS based on Regulation (EC) No 515/97 and concerning Community customs provisions (CIS EU), the CIS governed by the CIS Decision only concerns the respective *national* customs provisions of the Member States (CIS MS). Due to the allocation of competences between the European Union on the one hand and the Member States on the other hand, the CIS MS it is not only founded on a different legal basis, but also contains a separate set of data.



In order to diminish potential disadvantages resulting from this separation, both systems are used inversely. Therefore, the provisions of the CIS Decision referring to the CIS MS are predominantly congruent with those of Regulation (EC) No 515/97 referring to the CIS EU (please refer to II. 2. b. above). Accordingly, the recitals of the CIS Decision emphasize that the parallel development of the provisions on mutual assistance and administrative cooperation is necessary because customs administrations have to implement both Community and national customs provisions in their daily work routine.

Article 1 of the CIS Decision constitutes the legal basis for the establishment of the CIS MS, serving the objective of assisting in preventing, investigating and prosecuting serious contraventions of *national* laws by making information available more rapidly and thereby increasing the effectiveness of the cooperation and control procedures.

The notion of national laws is defined in Article 2 as all laws and regulations of a Member State in the application of which the customs administration of the Member State has total or partial competence concerning (1) the movement of goods subject to prohibitions, restrictions or control, (2) measures to control intra-Community cash movements, and (3) money laundering concerning proceeds from contraventions in particular against national prohibitions and restrictions on the movement of goods, and against Community customs provisions.

The data– including personal data – which may be inserted are determined in Articles 3 and 4.

Under the presumption that, in a concrete case, there are real indications for serious contraventions of national laws, the use of CIS MS is allowed for the following purposes (Article 5):

- (1) (a) sighting,
  - (b) reporting,
  - (c) discreet surveillance,
  - (d) specific checks, and
- (2) (a) strategic analysis (as defined in Article 2 paragraph 4),
  - (b) operational analysis (as defined in Article 2 paragraph 5).

The data in the CIS MS are used in a similar manner to those in the CIS EU.<sup>6</sup> The use of data found in the CIS MS and the performance of any action suggested by the inserting Member State according to the purposes mentioned above under (1) is governed by national laws, regulations and procedures (Article 9 paragraph 2).

Any data found in CIS may be forwarded to authorities other than the customs authorities appointed pursuant to Article 10 paragraph 1 (e.g. judicial authorities) only with the prior approval of the inserting Member State (Article 8 paragraph 4).

If data are inserted for the first set of purposes, a search may result in a “hit” that leads to the detection of an infringement of national customs provisions, which means that cooperation on the basis of the Naples II Convention will usually follow. In contrast, a hit in the CIS EU will usually be followed by cooperation on the basis of Regulation (EC) No 515/97 with regard to the measures for administrative purposes. For law enforcement purposes, a hit in the CIS EU however must lead to cooperation pursuant to Naples II.

Only the Member States, that is those national authorities being appointed by them as competent authorities, have full access to CIS. The Council of the European Union may, by unanimous decision, also permit access by international or regional organizations (Article 7). Read access is moreover given to Europol and – the national members of – Eurojust within their respective mandates so they can fulfil their tasks and in accordance with the other prerequisites stipulated in Articles 11 and 12.

Where a search of Europol or Eurojust in CIS MS reveals a match with information processed by Europol or Eurojust by way of other means, they are to inform the inserting Member State. In the case of Europol, the respective Member State is to be informed through the channels defined in Council Decision 2009/371/JHA of 6 April 2009 establishing the European Police Office (hereafter “**Europol Decision**”), that is to say, via the national unit.

The inserting Member State may allow Europol to use the information gathered by Europol in the CIS MS. The handling thereof is governed by the Europol Decision (Article 11 paragraph 3, first sentence).

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<sup>6</sup> Remark: In contrast to FIDE MS the existence of criminal investigations is not a precondition for CIS MS.

Also Europol may use the data gathered from CIS to strengthen cooperation with the judicial authorities of the Member State concerned (Article 12 paragraph 2 first sentence).

Any information gathered by Europol and Eurojust may only be transferred to third countries or third bodies with the consent of the inserting Member State (Article 11 paragraph 3, second and third sentence; Article 12 paragraph 2, second sentence).

Europol may request further information from the Member State concerned, according to the Europol Decision (Article 11 paragraph 5, second sentence).

**b. Customs files identification database (FIDE/FIDE MS)**

Similar to the CIS, the FIDE ruled by the CIS Decision contrasts with the FIDE based on Regulation (EC) No 515/97 insofar as it only concerns the national customs provisions of the Member States (FIDE MS) instead of Community customs provisions (FIDE EU) due to the allocation of competences between the European Union and the Member States.

The provisions of the FIDE Decision referring to the FIDE MS are similar to those of Regulation (EC) No 515/97 referring to the FIDE EU (please refer to II. 2. c. above).

Like the FIDE EU, the objective of the FIDE MS is to enable the Member States to coordinate their investigations. Europol and Eurojust are moreover to be enabled to identify the competent authority of the other Member State (Article 15).

The data inserted in FIDE MS is only to refer to those serious contraventions against national laws listed by the respective Member State pursuant to Article 15 paragraph 3.

The Member States are obliged to insert relevant data into the FIDE MS. This follows from the recitals of the CIS Decision and *e contrario* from Article 17 according to which the Member States are released from this obligation only in certain limited cases (potential damage of essential interests, immediate and serious threat to public security etc.).

c. Relation to the Naples II Convention and Regulation (EC) No 515/97

In line with the statements above, the relation between the Naples II Convention and the CIS MS/ FIDE MS on the one hand and between Regulation (EC) No 515/97 and the CIS EU/ FIDE MS on the other hand may be set out as follows.

	<b>National</b> customs provisions	<b>Community</b> customs provisions
Cooperation with respect to measures for <b>administrative</b> purposes	<b>Naples II Convention</b>  <b>CIS MS</b>  <b>(CIS Decision)</b>	<b>Regulation (EC) No 515/97</b>  <b>CIS EU</b> <b>FIDE EU</b> <b>(Reg. (EC) No 515/97)</b>
Cooperation with respect to measures for <b>law enforcement</b> purposes	<b>Naples II Convention</b>  <b>CIS MS</b> <b>FIDE MS</b> <b>(CIS Decision)</b>	<b>Naples II Convention</b>  <b>CIS EU</b> <b>FIDE EU</b> <b>(Reg. (EC) No 515/97)</b>

Accordingly, the Naples II Convention is complemented:

1. by Regulation (EC) No 515/97

as shown in the table above,

2. by the CIS Decision and its CIS MS  
with respect to customs cooperation on administrative measures in the case of (the prevention of) breaches of *national* customs provisions, and
3. by the CIS Decision and its CIS MS and FIDE MS  
with respect to customs cooperation on law enforcement measures in the case of infringements of national customs provisions, and
4. by Regulation (EC) No 515/97 and its CIS EU and FIDE EU  
with respect to customs cooperation on law enforcement measures in the case of infringements of *Community* customs provisions.

**d. Relation to national criminal laws**

Only data referring to serious – that is extraditable contraventions against national laws listed by the respective Member State are to be entered into the FIDE MS (Article 15 paragraph 3). Thus, the storage of data also concerns the competences of the national judicial authorities.

The Member States are in principle obliged to insert data into FIDE, unless this would jeopardize current criminal investigations (cf. Article 17). In most cases, the judicial authorities will be the authorities deciding whether such an exception is applicable or not.

## IV. Swedish Framework Decision

### 1. Introduction

The 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 traces back to a Swedish initiative is therefore referred to as the “**Swedish Framework Decision**” hereafter. It pursues the objective of abolishing obstacles of the exchange of information and intelligence between the law enforcement authorities of the Member States introduced by formal procedures, administrative structures and national legislation in order to improve the safety of the Union’s citizens.

Thus, the Swedish Framework Decision is designed to establish rules enabling the Member States’ law enforcement authorities to exchange information and intelligence more effectively and more quickly for the purpose of conducting criminal investigations or criminal intelligence operations (Article 1 paragraph 1).

To this end, the Decision reflects two basic principles: the principle of availability and the principle of non-discrimination.

The principle of availability originates from “The Hague Program: strengthening freedom, security and justice in the European Union of 3 March 2005” (2005/C 53/01) and means that “throughout the Union, a law enforcement officer in one Member State who needs information in order to perform his duties can obtain this from another Member State and that the law enforcement agency in the other Member State which holds this information will make it available for the stated purpose, taking into account the requirement of ongoing investigations in that State”. The Swedish Framework Decision is the first Council act implementing this principle.

The second principle on which the Decision is based requires the law enforcement authorities of one Member State to make any available information accessible for the law enforcement authorities of all other Member States to the same extent to which they are accessible to its national law enforcement authorities (Article 3 paragraph 3).

The Swedish Framework Decision, as a development of the Schengen *acquis*, also applies to Iceland, Norway, Liechtenstein and Switzerland.

## 2. *Scope of application*

Under the Swedish Framework Decision, information and intelligence may be requested and provided by competent law enforcement authorities for the purpose of conducting criminal investigations or criminal intelligence operations (Article 1 paragraph 1).

The notion of a competent law enforcement authority also comprises national customs, police or other authorities vested with national powers to detect, prevent and investigate offences or criminal activities and to exercise authority and coercive measures in such a context (Article 2 (a)).

Moreover, information and intelligence shall be exchanged with Europol and Eurojust insofar as it refers to an offence or criminal activity within their mandate (Article 6 paragraph 2).

Criminal investigations and criminal intelligence operations are to be understood as two different investigation stages, depending on the intensity of the suspicion. In the case of criminal intelligence operations, it is to be established whether or not concrete criminal acts have been committed or may be committed in the future. In the case of criminal investigations, this initial suspicion already exists, and thus measures are taken to establish and identify facts, suspects and circumstances with respect to the respective criminal act (Article 2 (b), (c)). As a result, the Swedish Framework Decision covers not only preventive, but also repressive measures.

In accordance with Article 2 (d) of the Swedish Framework Decision information and/or intelligence means any type of information or data

- which is held by the law enforcement authorities or
- which is held by public authorities or private entities but is available to law enforcement authorities without using coercive measures.

Consequently, the Decision does not impose any obligation to gather and store information and intelligence for the purpose of providing it to the law enforcement authorities of other Member States (Article 1 paragraph 3). Moreover, Member States are not obliged to obtain any information and intelligence by means of coercive measures as defined in accordance with national law (Article 1 paragraph 5).

Pursuant to the above-mentioned principle of non-discrimination, the Member States are to provide other Member States with information and intelligence under conditions that are not stricter than those applicable at the national level (Article 3). In particular, the exchange is not to be subject to judicial authorisation if such an authorisation is not requested on the national level. However, if such an authorisation would also be necessary on the national level but is not given in the case at hand, the assistance is to be refused by the requested state (Article 10 paragraph 3).

Article 4 stipulates time limits for the provision of information and intelligence. In urgent cases, the requested Member State is to respond within 8 hours, or, if this would mean a disproportionate burden to it, within three days at the latest. In non-urgent cases, the requested state is to respond within 1 week if the held data are directly accessible by the respective law enforcement authority. In all other cases, the Swedish Framework Decision provides for a time limit of 14 days.

In its Annexes, the Swedish Framework Decision provides for a request form (B) as well as for a form to be used by the requested Member State in the case of a transmission, delay or refusal (A). Communication under this Decision may take place via existing channels for international law enforcement cooperation.

Finally, the Swedish Framework Decision sets out a spontaneous exchange of information and intelligence (Article 7). The Member States are to provide each other, without any prior request, with information and intelligence if there are factual reasons to believe that it could assist in the detection, prevention or investigation of certain offences. However, this only refers to offences listed in Article 2 paragraph 2 of the Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States. These are, among others,



- illicit trafficking in narcotic drugs and psychotropic substances, in weapons, munitions and explosives, in cultural goods, in hormonal substances and other growth promoters, and in nuclear or radioactive materials,
- illicit trade in human organs and tissue, and
- counterfeiting and piracy of products.

The spontaneous exchange is also governed by the principle of non-discrimination.

Pursuant to Article 10, the assistance may only be refused in exceptional cases, if it would

- (1) harm essential national security interests,
- (2) jeopardize the success of a current investigation or operation,
- (3) jeopardize the safety of individuals,
- (4) be clearly disproportionate or irrelevant,
- (5) concern an offence punishable by a term of maximum 1 year under the law of the requested state.

Any information and intelligence exchanged on the basis of this Decision may not be used as evidence before a judicial authority except where the requesting Member State has obtained the consent of the requested Member State. Such consent may be declared either upon request after providing the information or at the time of transmitting the information (Article 1 paragraph 4). It has to be applied for by means of a request based on the provisions for mutual legal assistance (provisions for cooperation between judicial authorities) if required by the respective national law of the requested Member State.

### 3. *Relation to the Naples II Convention*

Article 12 governs the relation of the Swedish Framework Decision to other instruments. With regard to bilateral and multilateral agreements already in force at the time when the Swedish Framework Decision was adopted, such as the Naples II Convention, paragraph 3 of this Article stipulates that they may still be applied by the Member States in so far as they “allow the objectives of this Framework Decision to be extended and help to simplify or facilitate further procedures for exchanging information and intelligence falling within the scope of this Framework Decision”. The same applies to future agreements (paragraph 4).

The scope of the Naples II Convention goes beyond those of this Framework Decision in various ways. While the Swedish Framework Decision requires the provision of existing information only (Article 2 d of the Swedish Framework Decision), the Naples II Convention obliges the requested Member State to “proceed as though it were acting on its own account or at the request of another authority in its own Member State” (Article 8 paragraph 1 of the Naples II Convention). This includes the conducting of investigations in order to gather information if necessary.

Moreover, both legal instruments provide different possibilities for using the information obtained as evidence. The Swedish Framework Decision does not impose any obligation to provide information to be used as evidence before a judicial authority and only provides for the possibility of obtaining the requested Member State’s consent hereto (Article 1 paragraph 4 of the Swedish Framework Decision). This consent has to be applied for by means of a request based on provisions of mutual legal assistance if required by the respective national law of the requesting Member State. On the contrary, any information obtained in accordance with the Naples II Convention may be used as evidence without any further preconditions or additional requests (for further information, please refer to I. 2. g. above). Besides the request on the basis of the Naples II Convention, any additional mutual assistance request of the judicial authorities intended to obtain information which may be used as evidence in court proceedings is therefore not necessary.

Another reason why the Naples II Convention exceeds the Swedish Framework Decision is that only the latter provides for special forms of cooperation.

The recitals of the Swedish Framework Decision therefore explicitly confirm that the Naples II Convention, as a legal instrument going beyond the Framework Decision, continues to be applicable.

## V. 1959 and 2000 EU MLA Conventions

### 1. Introduction

The 1959 European Convention on Mutual Assistance in Criminal Matters (hereafter “**1959 EU MLA Convention**”) is the widest European mutual legal assistance convention in terms of number of Parties. It provides for classical cooperation tools – through formal mutual assistance requests - for judicial authorities in criminal law procedures.

The European Union adopted in 1998 a Joint Action on good practice in mutual legal assistance in criminal matters.<sup>7</sup> This Joint Action paved the way for the 2000 Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union (hereafter “**2000 EU MLA Convention**”) which would amend considerably the 1959 EU MLA Convention.

The 2000 EU MLA Convention supplements,<sup>8</sup> extends, simplifies and modernizes the European legal frame on mutual legal assistance.<sup>9</sup> Its adoption was accelerated by the implementation of the Treaty of Amsterdam whose aim was to provide an area of freedom, security and justice to the EU citizens and, therefore, promote a more flexible and advanced cooperation between competent authorities of Member States.

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<sup>7</sup> Joint Action of 29 June 1998 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, on good practice in mutual legal assistance in criminal matters (98/427/JHA), OJ 1998, L.191/1.

<sup>8</sup> According to Article 1(a) of the 2000 EU MLA Convention, “*The purpose of this Convention is to supplement the provisions and facilitate the application between Member States of the European Union, of: (a) the European Convention on Mutual Assistance in Criminal Matters of 20 April 1959 (...)*”.

<sup>9</sup> For a general analysis of the different MLA Conventions, see in particular Eileen Denza “*The 2000 Convention on mutual assistance in criminal matters*”, Common Market Law Review 40: 1047-1074, 2003. Both Conventions are hereafter referred to as “**MLA Conventions**”.

## 2. *Scope of the application*

While the 1959 EU MLA Convention is ratified by all Member States of the European Union, the 2000 EU MLA Convention is still not ratified by three of them.

For the customs authorities of the Member States, only very rare cases exist in which the MLA Conventions may be applied for direct cooperation among some of them.

The customs authorities of the Member States may be involved in the application of these instruments

- a. if they are declared competent, according to Article 24 of the 1959 EU MLA Convention and Article 24 paragraph 1 of the 2000 EU MLA Convention, for the application of these instruments,
- b. in the case of requests for controlled deliveries, joint investigation teams or covert investigations made by a judicial authority or a central authority of one Member State pursuant to the Articles 12 to 14 of the 2000 EU MLA Convention, if the customs authorities of the requested Member State are competent for answering these requests according to the applicable national law.

In these cases, the requests may be directly send to the customs authorities of the requested Member State (Article 6 paragraph 5 of the 2000 EU MLA Convention).

Re. a.:

Pursuant to Article 24 of the 1959 EU MLA Convention and Article 24 paragraph 1 of the 2000 EU MLA Convention, the Member States may define what authorities will, for the application of the Convention, be deemed judicial and/or competent authorities.

Only two Member States have made a declaration according to which their customs authorities are competent under the 1959 EU MLA Convention (Cyrus and Finland; please refer to Appendix C).

Consequently, only the two of them may use this legal instrument for mutual assistance in criminal matters.<sup>10</sup>

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<sup>10</sup> Moreover, Estonia declared that the Estonian Tax and Customs Board is competent for the purposes of the application of Articles 18 and 19 and Article 20 paragraphs 1 to 5 of the 2000 EU MLA Convention.

Re. b.:

If a competent judicial or central authority of one Member State wishes to request for a controlled delivery, a joint investigation team or covert investigations and the authority of the requested Member State competent for these requests is a customs authority, then the requesting judicial authority may send its request directly to the customs authority of the requested Member State (Article 6 paragraph 5 of the 2000 EU MLA Convention).<sup>11</sup>

In these cases, the 2000 EU MLA Convention provides a direct channel from the judicial authority of one Member State to a customs authority of another Member State. This does not mean that customs authorities of different Member States may exchange requests and answer requests directly. As a consequence, this provision of the 2000 EU MLA Convention does not furnish the customs authorities of the Member States with any benefit.

Drawing on the statements above, the conclusion is that there are only very rare cases in which direct cooperation between the customs authorities of the Member States is possible for law enforcement purposes on the basis of the 1959 EU MLA Convention. These cases are not examined any further in this study.

### 3. *Relation to the Naples II Convention*

For offences in the customs area, the MLA Conventions and the Naples II Convention are in principle equally ranking legal instruments in terms of cooperation in criminal matters (please refer to Article 1 paragraph 2 of the Naples II Convention). In this regard, the judicial authorities may choose whether or not a request is to be based upon the MLA Conventions or the Naples II Convention.

If the judicial authorities decide to apply the Naples II Convention instead of the MLA Conventions because, in the individual case, offences in the customs area are concerned, this has various practical benefits for all parties involved.

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<sup>11</sup> In their declarations on the 2000 EU MLA Convention, two Member States explicitly stated which of their customs authorities are competent for the purposes of applying Article 6 paragraph 5 of the 2000 EU MLA Convention (Cyprus and Estonia; please refer to Appendix B).

In the case of MLA requests, the customs authorities inform the competent judicial authority of the requesting Member State which information or investigative measures are needed from the requested Member State. The judicial authority then drafts the request and sends it to the judicial authorities of the requested Member State. These hand it down to the customs authorities of the requested Member State for execution. The same method applies for sending the requested information to the requesting Member State.

In the case of a request on the basis of the Naples II Convention, the customs authorities of the requesting Member State – under the direction of the judicial authority competent pursuant to the respective national law – draft and send the request directly to the customs authority of the requested Member State for execution.

The latter procedure, if applied by the respective judicial authorities in cases concerning offences in the customs area, reduces the workload of the competent judicial authority and is less time consuming and cumbersome. 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.

In this context, it must be emphasised that the request procedure on the basis of the Naples II Convention does not imply any change in the allocation of competences according to the applicable national law. According to Article 2 first sentence of the Naples II Convention, the customs authorities are only allowed to apply this Convention “with the limits of the powers conferred upon them under national provisions”. As a consequence, they have to act under the direction of the judicial authorities if so stipulated by the respective national law. Even more clearly, Article 2, second sentence of the Naples II Convention explicitly rules that the Convention may not be interpreted in such a way that it affects the powers conferred upon the customs administrations through national provisions. However, the Naples II Convention unambiguously obliges the customs authorities to cooperate in criminal matters. The Member States who joined this Convention may not therefore refuse any requested cooperation on the grounds that there are presumably conflicting national rules of competence.<sup>12</sup>

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<sup>12</sup> Please refer to Article 27, first sentence of the Vienna Convention on the Law of Treaties dated 23 May 1969 which reads “A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”

The application of the Naples II procedure instead of the MLA procedure is of particular importance in such cases where the requested information is urgently needed for administrative purposes as well as for law enforcement purposes and may only be gathered by means of further criminal investigative measures on the part of the requested Member State. As a first step, and where the MLA procedure is chosen, the customs authorities of the requesting Member State usually send a request for administrative purposes on the basis of Regulation (EC) 515/97 and, in this request, inform the customs authority of the other Member State that an MLA request will follow with the aim of obtaining the same information for law enforcement purposes. In practice this means that the requested customs authority consequently and rightfully, for reasons of the applicable national law of criminal procedure, waits before undertaking the requested investigative measure until it receives the MLA request. This time delay may lead to a situation in which the investigation of the basis for collecting customs duties (traditional own resources, TOR) by the requesting Member State could be thwarted.

In order to protect the financial interests of the European Union, such a situation should be avoided wherever possible.

This serious issue can only be solved 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.

As already stated in the sixth recommendation in the Evaluation Report of 5 September 2008, and adopted by the CATS,<sup>13</sup> the judicial authorities should therefore be invited to take into consideration the application of the Naples II Convention.

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<sup>13</sup> Council document 8282/3/08 REV 3 ENFOCUSTOM 47 ENFOPOL 74 COPEN 71 UD 59.

## **B. SUMMARY**

### **I. Legal instruments for customs cooperation in criminal matters**

The core instrument for customs cooperation in criminal matters is the **Naples II Convention**. It allows all competent law enforcement authorities including the judicial authorities to cooperate in criminal matters, insofar as national and Community customs provisions are concerned.

The second legal instrument available for customs cooperation in criminal matters is the **Swedish Framework Decision**. Given that the Naples II Conventions goes beyond the Swedish Framework Decision, both are applicable in parallel. Therefore, the question arises as to which of these instruments may be used best in which given situation. In most cases, the use of the Naples II Convention is preferable (please refer to II. below).

It must be noted that the Naples II Convention not only constitutes a basis for customs cooperation in criminal matters, but also constitutes a legal basis for administrative mutual assistance in certain cases.<sup>14</sup>

As a legal basis for customs cooperation in criminal matters, the Naples II Convention is complemented by the CIS Decision.<sup>15</sup> 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 authorities of some Member States for law enforcement purposes is possible on the basis of the **1959 EU MLA Convention** (e.g. between Cyprus and Finland; please refer to V. 2. above). These cases are not examined any further in this study.

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<sup>14</sup> Please see below under Part III, B. II.

<sup>15</sup> Council Decision 2009/917/JHA of 30 November 2009 on the use of information technology for customs purposes.



However, the judicial authorities may decide to apply the Naples II Convention instead of the MLA Conventions if in the individual case offenses in the customs area are concerned. Application of the Naples II Convention offers various practical benefits for all parties involved (please refer to III. below). It is also more beneficial than the application of the Swedish Framework Decision by the judicial authorities in these cases (please refer to IV. below).

For an overview of all of the legal instruments examined, please refer to Appendix B.

## **II. Comparison: Naples II Convention vs. Swedish Framework Decision**

This section compares the two main legal instruments for customs cooperation in criminal matters.

The **advantages of the Swedish Framework Decision** may be that

- it provides time limits for the provision of information and intelligence: c.f. Article 4 (in urgent cases the limit is from eight hours up to three days at the latest; and in non-urgent cases the limit is from one week up to 14 days at the latest),
- it obliges the Member States to provide information and intelligence under conditions not stricter than those applicable at the national level: c.f. Article 3 (this may be relevant in particular with respect to any judicial authorisation)

The **advantages of the Naples II Convention** are that

- the requested Member State is to proceed as though it were acting on its own account and, in doing so, use all its legal powers (Article 8 paragraph 1);  
this means that the requested Member State may be obliged under the Naples II Convention (unlike under the Swedish Framework Decision (Article 2 d)) not only to provide existing information and documents, but also to undertake investigations in aid of the requesting Member State, possibly by using coercive measures;
- the information and documents provided to the requesting Member State under the Naples II Convention (unlike under the Swedish Framework Decision (Article 1 paragraph 4)) – may also be used as evidence in criminal proceedings without separately applying for prior consent from the judicial authorities by means of an MLA request (Articles 14, 18, 19 paragraph 7);

- it provides a legal basis for the special forms of cooperation – hot pursuit, cross-border surveillance, controlled delivery, covert investigations and joint special investigation teams (Articles 19 to 24) – if the Member State concerned has not exercised its opt-out;<sup>16</sup>
- it also provides a legal basis for requests for surveillance (Article 11), for enquiries (Article 11), and for a cooperation in terms of notification (Article 13).

In most of the cases, applying the Naples II Convention will be more beneficial for the requesting Member State than applying the Swedish Framework Decision.

### **III. Comparison: Naples II Convention vs. MLA Conventions**

For offences in the customs area, the judicial authorities may choose whether or not a request is to rest upon the MLA Conventions or the Naples II Convention. Choosing the latter 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.

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<sup>16</sup> Please refer to Appendix A.

- 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 purposes as well as for 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.<sup>17</sup>

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 (Article 2 of the Naples II Convention).

#### **IV. Comparison: MLA Conventions vs. Swedish Framework Decision**

The judicial authorities may also choose applying the MLA Conventions or applying the Swedish Framework Decision.

Compared with the Naples II Convention, the Swedish Framework Decision shows disadvantages if chosen by the judicial authorities instead of the MLA Conventions (c.f. above under VI. 2.). In particular, it permits the received information to be used as evidence in criminal proceedings without the prior consent of the judicial authorities and it permits the use of investigative measures (with or without coercion) in order to gather the requested information.

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<sup>17</sup> For further information please refer to A. V. 3. above.

## V. Relation of CIS/ FIDE towards mutual assistance in criminal matters

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

### 1. CIS EU/ CIS MS

Within the framework of its two purposes,<sup>18</sup> CIS provides two possible methods of communicating personal data for the purpose of mutual assistance in criminal matters.

Firstly, the Member States may insert information in order to “alert” other Member States about suspicious goods, means of transport and persons involved (or suspected of being involved) in an incorrect application of or infringement against customs provisions.

The inserting Member State requests a certain investigative measure which may also serve law enforcement purposes. The Member State acting upon a “hit” is to inform the inserting Member State about the results of the requested action.

Consequently, CIS provides the Member States with another method of sending requests to each other. Unlike the “usual” requests for assistance, the requests in CIS are not addressed to one particular Member States but to all of them. Therefore, the CIS is particularly helpful in all cases in which it is not known exactly where the respective goods, means of transport or persons will be encountered.

Secondly, the Member States may insert information which enables or may enable other Member States to use this information for operational analysis.

This means that CIS also provides the Member States with another method of sending spontaneous information without submitting a request to each other. Unlike the “usual” spontaneous information, the information is not addressed to one particular Member State but to all of them.

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<sup>18</sup> “Alert” (sighting, reporting, discreet surveillance, specific checks) and “operational analysis”; Article 27 of Regulation (EC) 515/97 and Article 5 of CIS Decision.

Unlike the CIS MS on the basis of the CIS Decision, the CIS EU on the basis of Regulation (EC) 515/97 is primarily used for administrative purposes and may only serve the purpose of law enforcement as an adjunct. However, both databases also serve to the benefit of the judicial authorities.

## 2. *FIDE EU/FIDE MS*

FIDE provides another method of communication for the purpose of cooperation in criminal matters.

FIDE enables the Member States to exchange information with each other about the national authorities leading administrative or criminal investigations against certain natural or legal persons on the account of an incorrect application of or an infringement against customs provisions. FIDE provides a database enabling coordination of ongoing or terminated investigations in different Member States. A “hit” may lead to requests for criminal purposes on the basis of the Naples II Convention or the MLA Conventions.

Thus, FIDE provides the Member States with a particular method of sending spontaneous information without submitting a request bilaterally, and contrary to the “usual” method of communication, not addressed to one Member State but to all of them.

With regard to the FIDE MS, data can only be inserted with reference to serious contraventions against national law listed by the respective Member State pursuant to Article 15 paragraph 3 of the CIS Decision. Contraventions are deemed to be serious if they are punishable by deprivation of liberty or detention order for a maximum period of not less than 12 months or by a fine of at least € 15,000.

FIDE is therefore a database also serving for the benefit of the judicial authorities. At the discretion of the Member States, the national judicial authorities may be granted indirect access to FIDE.

## **Part II: Case Study**

Taking the findings derived from the theoretical analysis (Part I, VI.) as the starting point, the following case study intends to go a step beyond the purely theoretical level by taking common practical issues into consideration. Against this backdrop, it aims to shed light on the question of what the common practical obstacles are in applying the existing legal instruments of customs cooperation in criminal matters – the Naples II Convention, the Swedish Framework Decision and the 2000 EU MLA Convention – and how they might be overcome.

For this purpose, the project group developed a Questionnaire to which 19 Member States replied. Their answers served as one source for establishing possible practical obstacles – without prejudice to the question of whether they are representative or not.

The answers to the Questionnaire primarily indicate that practical issues might occur if the respective national legislation of the requesting Member State and/or its legal assessment of the case differ from the legislation/assessment of the requested Member State in relevant aspects. Thus, the actions and procedures at the national level of the requesting Member State on the one hand and the requested Member State on the other hand may have an impact on the mutual assistance process.

### **A. DIFFERENT NATIONAL CLASSIFICATION – ADMINISTRATIVE VS. CRIMINAL INVESTIGATIONS**

The answers to the Questionnaire show that the event initiating the commencement of criminal investigations may vary according to the respective national law of the Member State concerned.

While most Member States presuppose the existence of some kind of initial suspicion as to the commitment of a customs offence which may vary in the degree of its intensity, for some Member States criminal investigations start at a much later point of time when the existence of a customs offence is already about to be established.

This means that, depending on their respective national law perspective, the requesting Member State and the requested Member State may arrive at a different assessment of the stage at which the procedure the respective case stands – that is to say, they may see it as still administrative or already criminal.

Two cases are theoretically possible:

- (1) The requesting Member State sends a request for the purposes of *criminal* investigations, but the requested Member State considers the requested information as belonging to the *administrative* procedure.
- (2) The requesting Member State sends a request for *administrative* purposes, but the requested Member State considers the requested information as belonging to the *criminal* procedure.

Against the backdrop of the project group’s objectives, only the first case will be considered here. In this case example, the requested customs authority may – under the Naples II Convention – be obliged to undertake investigations or measures in accordance with its national law of criminal procedure, although, from its national law perspective, the case would still stand at the administrative stage. The reason is that the Naples II Convention imposes the obligation on the requested Member State to proceed “as though it were acting on its own account or at the request of another authority in its own Member State” (Article 8 paragraph 1). Therefore, even if, on the basis of its national law perspective, the requested Member State has a different assessment of the case to that of the requesting Member State with respect to the purposes of the request, the requested Member State has to rely on the purposes indicated in the request by the requesting Member State. It has to conduct its investigations in compliance with its national law, in particular of criminal procedure, so that the information gained by means of this request may be validly used as evidence. On the other hand, the requesting Member State is to clearly indicate the requested measure and the reasons for the request (Article 9 paragraph 2 (b) and (c) of the Naples II Convention).

These matters do not arise if the request is based on the Swedish Framework Decision because this does not enable the gathering information which does not yet exist in the requested Member State.

## **B. NATIONAL INVESTIGATIONS PENDING IN PARALLEL BUT AT DIFFERENT STAGES**

It is furthermore imaginable that, in the concrete case, the respective request is one intended for *criminal* purposes and the requested Member State itself has already initiated or is about to initiate *administrative* investigations against the person(s) concerned in connection with the same case.

The answers to the Questionnaire show different approaches to this case. While most Member States answer the request without further preconditions and eventually verify whether they have to initiate criminal investigations themselves, a few Member States refuse to answer the request with reference to the secrecy of investigations.

The answers of the latter Member States reveal that a conflict arises if the gathering of information in accordance with the Naples II Convention would jeopardize the administrative investigations of the requested Member State, for instance, because the person concerned would be alerted. The conflict could be solved by applying the – narrow – provisions of Article 28 paragraph of the Naples II Convention which stipulate the exceptional cases in which assistance may be refused in whole or in part or made subject to compliance with certain conditions. According to this provision, this may be the case if the rendering of assistance would be likely to harm the public policy or other essential interests of the requested Member State or if the scope of the requested assistance is obviously disproportionate to the seriousness of the presumed infringements. The reasons must be displayed to the requesting Member State (Article 28 paragraph 2).

However, in such a case it appears more advisable for the customs administrations of the requested and the requesting Member State to communicate with each other so as coordinate their respective investigations. The overall objective should be to cooperate for the benefit of achieving 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.



The matter described above does not arise for requests under the Swedish Framework Decision because it does not allow requests for measures in order to gather the desired information.

### **C. DIFFERENT NATIONAL ALLOCATION OF COMPETENCES – CUSTOMS VS. JUDICIAL AUTHORITY**

The answers to the Questionnaire reveal another aspect under which the national legislation of the requesting Member State on the one hand and of the requested Member State on the other hand may vary – namely the allocation of the competences between the customs authorities and the judicial authorities.

While in some Member States the judicial authorities are in full charge of the criminal investigations from their beginning on or even at the stage before entering into the criminal investigations, in other Member States the customs authorities are in full charge themselves during all stages of investigation.

A third group of Member States has allocated certain competences to the judicial authorities. They may for instance assume the case and take full charge, or the customs authorities may hand the case over to them. Sometimes the judicial authorities are deemed competent only in cases in which one action constitutes a customs and a non-customs offence at the same time. Sometimes customs is only in charge of minor customs offences or of those actions that are committed negligently, or customs is exclusively competent for a preliminary stage of investigations until it reports to the judicial authorities, which then decide on the further procedure.

Consequently, in the respective case, the competent authority of the requesting state may differ from the authority in the requested state that is competent for answering the request.

Two cases are theoretically possible:

- (1) The competent authority of the requesting state is a *judicial* authority, but the competent authority of the requested state is a *customs* authority.
- (2) The Competent authority of the requesting state is a *customs* authority, but the competent authority of the requested state is a *judicial* authority.

In both cases, the Naples II Convention as well as the Swedish Framework Decision may be used as legal basis for the request. According to both legal instruments, requests are to be sent to a central coordinating unit. If this central coordinating unit is not itself competent for answering the request or undertaking necessary measures, it will forward the request to the competent authority. However, in both cases it may occur that the competent authority of the requested Member State refuses the request because it is sent, for instance, by a judicial authority and based on the Naples II Convention. Thus it is essential that both customs and judicial authorities know that the Naples II Convention and the Swedish Framework Decision may be applied likewise by customs authorities and judicial authorities. Moreover, it is crucial to stick to the channels provided by the respective legal instruments and to send requests exclusively to the central coordinating units in order to avoid confusion and a loss of time.

**D. DIFFERENT NATIONAL MODELS OF COMPETENCE ALLOCATION – CLEAR SEPARATION  
BETWEEN CUSTOMS AND JUDICIAL AUTHORITIES OR OVERLAPS**

Moreover, the answers to the Questionnaire show that there are different overarching models in terms of the allocation of competences between the customs and the judicial authorities in the Member States. In some Member States, the competences are clearly separated; in contrast, in other Member States there are plenty of overlaps in jurisdiction.

Consequently, a requesting Member State may seldom predict exactly which the competent authority on the part of the requested Member State will be. It should not simply presume that the customs authorities are always the authorities competent for answering the request. Therefore, the abovementioned statement is valid even in those cases in which the requesting Member State does not know with certainty that the competent authority of the requested Member State is one belonging to another section of the administration.

## **E. DIFFERENT NATIONAL ASSESSMENT OF APPLICABLE LEGAL BASIS**

The existence of different national legal systems means that the situation may moreover occur where the requesting Member State indicates a legal basis in its requests which the requested Member States does not deem to be applicable. The question therefore arises whether or not the requested Member State may answer the request by applying a different legal basis which it considers to be valid, instead of using the legal basis indicated by the requesting Member State.

This is not possible. The reason is that, by indicating the legal basis in its request, the requesting Member State implicitly declares

- the purpose for which it requires the requested information,
- the legal obligations it wishes to be bound to (e.g., provisions on data protection),
- the rights and obligations which the persons covered by the request have (e.g. the person obliged to provide information in administration procedures, witness or defendant).

If the requested Member State applies a legal basis to its investigations other than the one indicated in the request, it may be intervening in the national procedures of the requesting Member State and be sending information which may not legally be used for the purpose intended by the requesting Member State.

It is therefore recommendable that both Member States concerned 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. A possible time delay has to be accepted in such cases.

## **Part III: Recommendations**

The following recommendations are derived from Part I (theoretical analysis) and Part II (practical issues). They start with customs cooperation in criminal matters (I.) and then turn to the cut-off points between this and customs cooperation in administrative matters (II.) on the one hand and mutual legal assistance among judicial authorities (III.) on the other. Finally, the recommendations are completed by some general practical suggestions following on from the considerations in Part II (IV.).

The recommendations may be used as a basis for a best practice guide.

### **A. CUSTOMS COOPERATION IN CRIMINAL MATTERS**

#### **(INFRINGEMENTS OF NATIONAL AND COMMUNITY CUSTOMS PROVISIONS)**

With regards 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. It is necessary to draw a distinction between requests for information on the one hand (1.) and special forms of cooperation or requests on the other hand (2.). CIS EU/MS and FIDE EU/MS offer particular communication channels (3.).

The recommendations regarding customs cooperation in criminal matters are summarised in a checklist (Appendix C).

## I. 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,<sup>19</sup> or
  - Community customs provisions,<sup>20</sup>
- and
- 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.

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<sup>19</sup> 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.

<sup>20</sup> 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, it 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.

## II. Special forms of cooperation or requests

In the case mentioned above, the request **has to be based on the Naples II Convention**<sup>21</sup> 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)<sup>22</sup>
- or
- surveillance, enquiries or notification.<sup>23</sup>

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

## III. CIS and FIDE

Both CIS and FIDE constitute particular channels of communication 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.

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

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<sup>21</sup> If the request shall not be based on the MLA Conventions.

<sup>22</sup> Articles 19-25 of the Naples II Convention.

<sup>23</sup> Articles 11-13 of the Naples II Convention.

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 leading criminal investigations against certain natural or legal persons because of an incorrect application of or an infringement against customs provisions.

Member States should search in FIDE if they wish to find out whether or not (administrative or) criminal investigations are led against a specific natural or legal person on account of an 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.

## **B. 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).

## I. 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,<sup>24</sup>
- and
- the information requested for is intended to serve administrative purposes.<sup>25</sup>

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 on Regulation (EC) No 515/97 may not only be used as evidence for administrative proceedings but also in criminal proceedings, 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.

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<sup>24</sup> 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 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. 27).

<sup>25</sup> This comprises all measures for the administrative purposes of recovery or reimbursement.



## **II. Incorrect application of national customs provisions**

Any request for information, surveillance, enquiries, notification or joint special investigation teams<sup>26</sup> has to be based on the **Naples II Convention**, if

- the case at hand concerns the (potentially) incorrect application of national customs provisions,<sup>27</sup>
- and
- the requested information is intended to serve administrative purposes.<sup>28</sup>

The same applies to spontaneous assistance.

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

### **C. AS CUT-OFF POINT: MUTUAL LEGAL ASSISTANCE (COOPERATION BETWEEN JUDICIAL AUTHORITIES)**

In cases in which offenses 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.

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<sup>26</sup> Please see Article 24 paragraph 1, second tiret of the Naples II Convention (“to prevent and detect particular types of infringement”).

<sup>27</sup> Please refer to explanation in Fn. 19

<sup>28</sup> Please refer to explanation in Fn. 25.

- **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.

- **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 to collect 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 purposes as well as for 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 finally 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.<sup>29</sup>

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.

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<sup>29</sup> For further information please refer to Part I, A. V. 3.

## **D. GENERAL PRACTICAL RECOMMENDATIONS**

Based on 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 of OLAF (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 belonging under the *administrative* procedure, it has to conduct its investigations in compliance with its national law (especially, of criminal procedure), so that the information gained by means of this request may be validly used as evidence.<sup>30</sup> 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 information gathering 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 so 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.

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<sup>30</sup> 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.

## Bibliography

I. Legal Instruments		
1.	<p>Convention of 18 December 1997 drawn up on the basis of Article K.3 of the Treaty on European Union on mutual assistance and cooperation between customs administrations</p> <p><b>(Naples II Convention)</b></p>	OJ C 24, 23.1.1998, p.1
2.	<p>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 customs and agricultural matters as amended by Regulation (EC) No 766/2008 of the European Parliament and of the Council of 9 July 2008</p> <p><b>(Regulation (EC) No 515/97)</b></p>	OJ L 82, 22.3.1997, p.1 OJ L 218, 13.8.2008, p. 48
3.	<p>Council Decision 2009/917/JHA of 30 November 2009 on the use of information technology for customs purposes</p> <p><b>(CIS Decision)</b></p>	OJ L 323, 10.12.2009, p.20 OJ C 56, 5.3.2005, p. 46 (Cor)

4.	<p>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</p> <p><b>(Swedish Framework Decision or Initiative)</b></p>	<p>OJ L 386, 29.12.2006, p. 89</p>
5.	<p>European Convention of 20 April 1959 on Mutual Assistance in Criminal Matters</p> <p><b>(1959 EU MLA Convention)</b></p>	<p>Council of Europe Treaty Series (CETS) No 30</p> <p><a href="http://www.conventions.coe.int/">http://www.conventions.coe.int/</a>  <i>(Note: Council of Europe, not European Union / European Community)</i></p>
6.	<p>Additional Protocol of 17 March 1978 to the European Convention of 20 April 1959 on Mutual Assistance in Criminal Matters</p>	<p>Council of Europe Treaty Series (CETS) No 99</p> <p><a href="http://www.conventions.coe.int/">http://www.conventions.coe.int/</a>  <i>(Note: Council of Europe, not European Union / European Community)</i></p>
7.	<p>Second additional Protocol of 8 November 2001 to the European Convention of 20 April 1959 on Mutual Assistance in Criminal Matters</p>	<p>Council of Europe Treaty Series (CETS) No 99</p> <p><a href="http://www.conventions.coe.int/">http://www.conventions.coe.int/</a>  <i>(Note: Council of Europe, not European Union / European Community)</i></p>

8.	<p>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</p> <p><b>(2000 EU MLA Convention)</b></p>	<p>OJ C 197, 12.7.2000, p.1</p> <p>See also homepage of the Council</p> <p><a href="http://www.consilium.europa.eu">http://www.consilium.europa.eu</a></p> <p>policies &gt; Justice and home affairs &gt; Judicial cooperation and</p>
9.	<p>Protocol of 16 October 2001 to the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union</p>	<p>OJ C 326, 21.11.2001, p.1</p>

<b>II. Further sources</b>		
10.	<p>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</p> <p>Text approved by the Council on 28 May 1998</p>	OJ C 189, 17.6.1998, p. 1
11.	<p>Evaluation of Member States' implementation of Customs Cooperation (Naples II Convention, including ratification status (2007))</p>	<p>Council of the European Union, Document 8282/3/08 REV 3</p> <p>ENFOCUMSTOM 47,</p> <p>ENFOPOL 74, COPEN 71,</p> <p>CRIMORG 62, UD 59</p>
12.	<p>Naples II – Handbook</p> <p>Guidelines to all Member States on the application of Naples II, adopted by the Customs Cooperation Working Party (CCWP), a Council-Working Group in charge with customs cooperation according to Art 87 Treaty of the Functioning of the European Union.</p> <p>These guidelines includes information by the Member States on their application of Naples II</p> <p>National fact sheets</p>	<p>See homepage of the Council</p> <p><a href="http://www.consilium.europa.eu">http://www.consilium.europa.eu</a></p> <p>policies &gt; Justice and home affairs &gt; Borders and Visas &gt; Customs Cooperation</p>



13.	<p>FIDE – Handbook</p> <ul style="list-style-type: none"> <li>• Guideline to all member states on the use of FIDE, CIS Decision, adopted by the CCWP (for matters of shared competence according to Art 4 (2) j), 87 of the Treaty of the Functioning of the European Union <u>and</u></li> <li>• Guideline to all Member States on the use of FIDE, Regulation (EC) No 515/97 adopted by the Committee according to Art 43 of Regulation (EC) No 515/97 (for matters of exclusive competence according to Art 3 (1) a), 33 of the Treaty of the Functioning of the European Union</li> </ul>	<p>Council of the European Union, Document 5047/3/12 REV 3 ENFOCUSTOM 1 ENFOPOL 2 COPEN 1 EUROJUST 1</p>
14.	<p>Guidelines on the implementation of 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</p>	<p>Council of the European Union, Document 9512/1/10 REV 1, 2, 3 DAPIX 59 CRIMORG 90 ENFOPOL 125 ENFOCUSTOM 36 COMIX 346</p>
15.	<p>Explanatory Report on Mutual Assistance in Criminal Matters between the Member States of the European Union</p>	<p>OJ C 379, 29.12.2000, p.7</p>
16.	<p>Explanatory report to the Protocol to the 2000 Convention on mutual assistance in criminal matters between the Member States of the European Union  Text approved by the Council on 14 October 2002</p>	<p>OJ C 257, 24.10.2002, p.1</p>

## **Declarations according to Art. 20 para. 8 and 6, Art. 21 para. 5, Art. 23 para. 5 of the Naples II Convention**

The following information had been gathered from the homepage of the Council of European Union on 9 August 2012 and has not been up-dated since then.

For more current information please refer to:

[http://www.consilium.europa.eu/policies/council-configurations/justice-et-affaires-interieures-\(jai\)/frontieres-et-visas/customs-cooperation/national-fact-sheets](http://www.consilium.europa.eu/policies/council-configurations/justice-et-affaires-interieures-(jai)/frontieres-et-visas/customs-cooperation/national-fact-sheets)

(FN) = please refer to text or footnote below

? = no information

	Article 20 paragraphs 6, 8 (Hot pursuit)			Article 21 paragraph 5 (Cross-border surveillance)			Article 23 paragraph 5 (Covert investigations)		
	complete opting-out	partial opting-out	→ Art. 20 applicable?	complete opting-out	partial opting-out	→ Art. 21 applicable?	complete opting-out	partial opting-out	→ Art. 23 applicable?
Austria	-	-	yes	-	-	yes	-	-	yes
Belgium	-	-	yes	-	-	yes	-	-	yes
Bulgaria	x	-	no	x	-	no	x	-	no
Cyprus	x	-	no	x	-	no	x	-	no
Czech Republic	-	(FN)	yes	-	(FN)	yes	-	-	yes
Denmark	-	-	yes	-	(FN)	yes	x	-	yes
Estonia	-	(FN)	yes	-	-	yes	x	-	no
Finland	-	-	yes	-	-	yes	-	-	yes
France	-	(FN)	yes	-	-	yes	-	-	yes
Germany	-	(FN)	yes	-	-	yes	-	-	yes
Greece	x	-	no	?	?	?	?	?	?
Hungary	(FN)	-	yes	-	-	yes	-	(FN)	yes
Luxembourg	-	-	yes	-	-	yes	?	?	?
Ireland	?	?	?	?	?	?	?	?	?
Italy	?	?	?	?	?	?	?	?	?

Latvia	x	-	no	x	-	no	x	-	no
Lithuania	?	?	?	-	-	yes	-	-	yes
Malta	?	?	?	?	?	?	?	?	?
Netherlands	-	-	yes	-	-	yes	-	-	yes
Poland	x	-	no	-	(FN)	yes	-	(FN)	yes
Portugal	-	-	yes	-	-	yes	-	-	yes
Romania	?	?	?	?	?	?	?	?	?
Slovenia	x	-	no	x	-	no	x	-	no
Slovakia	-	(FN)	yes	-	(FN)	yes	-	-	yes
Spain	-	-	yes	-	-	yes	-	-	yes
Sweden	-	-	yes	-	-	yes	x	-	no
United Kingdom	x	-	no	-	-	yes (FN)	?	?	?

Article 20 paragraph 1

"The Czech Republic states that authorisation to proceed according to this Article in the Czech Republic will lie with the officials of the bodies of the Customs Administration of the Czech Republic, who have the position of police authorities pursuant to the national legislation, and the Police of the Czech Republic."

Article 20 paragraph 6

"The Czech Republic declares that, in the territory of the Czech Republic the relevant officials of the Member States will carry out cross-border hot pursuit without spatial or time limitations (Article 20(3)(b)) and with the right to arrest persons (Article 20(2)(b)). This authorisation shall not apply to officials of the Member States that have fully excluded implementation of this Article pursuant to paragraph 8."

Article 21 paragraph 1

"The Czech Republic informs that authorisation to proceed according to this Article in the Czech Republic will lie with the officials of the bodies of the Customs Administration of the Czech Republic, who have the position of police authorities pursuant to the internal legal regulations, and the Police of the Czech Republic."

Article 21 paragraph 5

"The Czech Republic declares that it accepts the provisions of Article 21 under the following conditions:

Cross-border surveillance may be carried out pursuant to Article 21(1), (2) and (3) only if there is justified suspicion that the persons pursued are participating in one of the offences set forth in Article 19(2), if the upper limit of the criminal sentence in the requesting state for these offences is at least one year of imprisonment, and only for the purpose of evidence in criminal proceedings."

## Denmark

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### Article 20 paragraph 8

"Denmark declares that it accepts the provisions of Article 20, subject to the following conditions: in case of a hot pursuit exercised by the customs authorities of another Member State at sea or through the air, such pursuit may be extended to Danish territory, including Danish territorial waters and the airspace above Danish territory and territorial waters, only if the competent Danish authorities have received prior notice thereof."

### Article 21 paragraph 5

"Denmark declares that it accepts the provisions of Article 21, subject to the following conditions: Cross-border surveillance without prior authorisation may be carried out only in accordance with Article 21(2) and (3) if there are serious grounds for believing that the persons under observation are involved in one of the infringements referred to in Article 19(2) which may give grounds for extradition."

## Estonia

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### Article 20

The pursuing officers of other Member States have no right to apprehend persons on the territory of the Republic of Estonia.

## France

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### Article 20

No right to apprehend for foreign officers on French territory.

## Germany

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MSs which have totally excluded the application of Article 20 may not exercise the right of pursuit on German territory.

– Officers from MSs which have accepted the application of this Article may exercise the right of pursuit without any restrictions in terms of space or time.

## Hungary

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### Article 20

Hot Pursuit is only applicable in compliance with Articles 31-33 of the Hungarian Act LIV of 2002 on the International Cooperation of Enforcement Bodies, which creates the domestic legal framework for international cooperation between enforcement authorities. Furthermore, pursuant to the “Hungarian” Act LXXXIX of 2006 (ratifying the Naples II Convention), with reference to Hungary’s declaration regarding the application of hot pursuit: during this form of cooperation the member of the foreign customs (enforcement) authority - specified in Section 1 of Article 20 - is only entitled to apprehend (intercept) the person concerned on the territory of Hungary according to Section 2 Point (b) of Article 20 of the Naples II Convention. Any other action (taking into custody) is strictly forbidden.

Regarding Section 3 of Article 20, there are no restrictions neither in space nor in time on the territory of Hungary but the principle of reciprocity must be respected. Regarding Section 4 of Article 20, the detailed provisions of this special form of cooperation (hot pursuit) with other Member States of the European Union should be regulated in bilateral agreements on preventing and tackling cross-border criminality. Regarding 8 of Article 20, Hungary’s declarations that have been announced on the grounds of Section 6 of Article 20 shall apply to Member States fully or partially not excluding the application of Article 20 of this Convention.

### Article 23

Pursuant to the “Hungarian” Act LXXXIX of 2006 (ratifying the Naples II Convention), with reference to Hungary’s declaration related to the application of covert investigations, regarding Section 5 of Article 23 of the Naples II Convention: in respect of executing a covert investigation, besides the regulations of the Naples II Convention, the detailed provisions of (existing and future) bilateral agreements on preventing and tackling cross-border criminality, as well as occasional agreements related to a specific case, which are to be applied.

The following information should be included in the Occasional Agreement on covert investigation:

- the time period in which the secret gathering of information is possible;
- criteria of application;
- the rights and responsibilities of the covert investigator;
- measures to be taken when the identity of the covert investigator is revealed;
- information on the provisions applicable when damage is caused by the covert investigator during his/her operation.

## Poland

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### Article 21

The Republic of Poland declares that Article 21 of this Convention may be applied by the competent authorities of other Member States in relation to the Republic of Poland on the basis of the principle of reciprocity. The Republic of Poland also declares that officers of the competent authorities of the Member States may carry their service weapons into the territory of the Republic of Poland, but are entitled to use them only in the case of legitimate self-defense as laid down in Article 25 of the Law of 6 June 1997 – Penal Code (O. J. of Law of 1997, No 88, item 553, as amended). The Republic of Poland declares that Article 21(3)(d) of this Convention may be applied by the competent authorities of other Member States in relation to the Republic of Poland on the basis of the principle of reciprocity.

### Article 23

The Republic of Poland declares that Article 23 of this Convention may be applied by the competent authorities of other Member States in relation to the Republic of Poland on the basis of the principle of reciprocity.

## Slovakia

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### Article 20 paragraph 1

„The Slovak Republic states that authorization to proceed according this Article in the Slovak Republic will lie with officials of the Customs Administration.”

### Article 20 paragraph 6

“The Slovak Republic announces that, as there has not been carried out consultations yet with relevant member states with aim to agree on reciprocity measures in these states, it has not been possible to carry out such declaration according to the Article 20 (6) related to the procedures for performance of Hot pursuit at its territory.

The Slovak Republic will make such declaration after performance of consultations with relevant member states.”



Article 20 paragraph 8

“The Slovak Republic states that it accept provisions of Article 20 subject to the following conditions: in case of hot pursuit exercised by the customs authorities of another Member State across the border or in the airspace, such pursuit may be extended to the Slovak territory, only if the competent Slovak authorities have received prior notice thereof and relevant Member States apply measures of reciprocity against customs authorities of the Slovak Republic.”

Article 21 paragraph 1

Officials, to who relates this provision, are in the Slovak Republic officials of the Police Special Corp or officials of the Customs Administration of the Slovak Republic.

The competent authority to grant authorization is , according to this Convention, Customs Directorate of the Slovak Republic, Customs Criminal Office – Central Coordinating Unit.

Article 21 paragraph 5)

“The Slovak Republic declares that it accepts the provisions of Article 21 under the following conditions:

Cross-border surveillance without prior authorisation may be carried out only in accordance with Article 21 (2) and (3) if there are serious grounds for believing that the persons under observation are involved in one of the infringements referred to in Article 19(2) which could give reason to extradition and also relevant Member States apply the measures of reciprocity against customs authorities of the Slovak Republic.”

United Kingdom

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Requests for crossborder surveillance are dealt with by the Sirene Bureau at the National Criminal Intelligence Service – please refer to the Schengen Handbook. Note. Naples II is still a working agreement and cross border surveillance may still be carried out under this on a customs to customs basis and not necessarily under Article 40 of Schengen.

**Declarations**  
**according to Article 24 of the 1959 EU MLA Convention and Article 24**  
**paragraph 1 of the 2000 EU MLA Convention**

The following information had been gathered from the homepage of the Council of European Union on 7 December 2012 and has not been up-dated since then.

For more current information please refer to:

1959 Convention:

<http://www.conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?NT=030&CM=8&DF=26/09/2012&CL=ENG&VL=1>

2000 Convention: <http://consilium.europa.eu/policies/agreements/search-the-agreements-database?lang=en&command=details&id=297&lang=en&aid=2000023&doclang=en>

The customs authorities are highlighted in bold letters in the table below (please refer to Cyprus, Estonia, Finland).

(FN) = please refer to text or footnote below

? = no information

	1959 EU MLA Convention	2000 EU MLA Convention
<b>Austria</b>	For the purposes of the Convention, Austria will regard as judicial authorities the Criminal Courts, the Department of Public Prosecution and the Federal Ministry of Justice.	-
<b>Belgium</b>	-	In accordance with Article 24 of the Convention, the Kingdom of Belgium states that the competent authorities for the application of the Convention are the judicial authorities and, where the intervention of a central authority is required, the Directorate-General of Legislation, Fundamental Freedoms and Rights at the Federal Department of Justice (Service public fédéral Justice, Direction générale de la Législation et des Libertés et Droits fondamentaux, Autorité centrale d'entraide pénale, Boulevard de Waterloo 115, 1000 Bruxelles). As stated in the Declaration made in connection with the 1959 Convention on Mutual Assistance, the Kingdom of Belgium defines "judicial authorities" as "members of the judicial authority responsible for delivering rulings, examining magistrates and members of the Public Prosecutor's Office". The Kingdom of Belgium does not designate any non-judicial authority for the application of the Convention.

<p><b>Bulgaria</b></p>	<p>The Republic of Bulgaria declares that for the purposes of the Convention it deems to be judicial authorities the courts, the Public Prosecutor Office and the Ministry of Justice.</p>	<p>Declaration concerning Article 24(1): "The Republic of Bulgaria declares that the authorities competent for the application of this Convention and for the application of the provisions on mutual assistance in criminal matters contained in Article 1(1) are: 1. For requests for legal assistance in pre-trial proceedings - the Supreme Prosecutor's Office of Cassation of the Republic of Bulgaria 2. For requests for legal assistance in judicial proceedings: (a) the district courts at the place where the person is held in custody - for the application of Article 9; (b) an equivalent court in the person's place of residence - for the application of Article 11; (c) the court of appeal in the person's place of residence - for the application of Article 10; (d) the regional or district courts - for all other cases, in accordance with their competence under national law". 3 Declaration concerning Article 24(1)(b): "The Republic of Bulgaria declares that the central authorities for the purposes of applying Article 6 are: 1. The Supreme Prosecutor's Office of Cassation - for requests for legal assistance in pre trial proceedings; 2. The Ministry of Justice - for requests for legal assistance in judicial proceedings. The competent authority pursuant to Article 6(8) is the Supreme Prosecutor's Office of Cassation. The temporary transfer of persons held in custody for the purposes of investigation under</p>
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		<p>Article 6(8) shall be permitted by the competent district court". 4. Declaration concerning Article 24(1)(e): "The Republic of Bulgaria declares that the competent authority for the application of Articles 18, 19 and 20 is the Supreme Prosecutor's Office of Cassation".</p>
<p><b>Cyprus</b></p>	<p>For the purposes of the Convention, the Government of the Republic of Cyprus deems the following to be "judicial authorities":</p> <ul style="list-style-type: none"> <li>- all courts of the Republic exercising criminal jurisdiction;</li> <li>- all attorneys of the Law Office of the Republic (Office of the Attorney General);</li> <li>- the Ministry of Justice and Public Order;</li> <li>- the authorities or persons empowered by national law to investigate into criminal cases including the Police, <b>the Department of Customs and Excise</b> and the Department of Inland Revenue.</li> </ul>	<p>In accordance with Article 24, of the Convention on Mutual Assistance in Criminal Matters, the Republic of Cyprus declares that the designated authorities for the application of the provisions of the aforesaid Convention between the Member States are as follows: a) the Ministry of Justice and Public Order, for the application of Article 3 paragraph 1 of the Convention, b) the Ministry of Justice and Public Order and the Chief of the Cyprus Police, for the application of Article 6 and Article 6 paragraph 8 of the Convention, c) the Chief of the Cyprus Police, <b>the Director of Customs</b> and Commissioner for VAT, the Unit for Combating Money Laundering, the Director of the Inland Revenue Department and the Central Bank of Cyprus, for the application of Article 6 paragraph 5 of the Convention, d) The Ministry of Justice and Public Order and the Law Office of the Republic, for the application of Article 6 paragraph 6 of the Convention, e) the Department of Electronic Communications of the Ministry of Communications and Works, the Commissioner</p>

		<p>of Electronic Communication and Postal Regulation and the Commissioner for the Protection of Personal Data, for the application of Articles 18, 19 and 20 paragraphs 1 to 5, of the Convention.</p>
<p><b>Czech Republic</b></p>	<p>In compliance with Article 24 of the European Convention on Mutual Assistance in Criminal Matters and Article 8 of its Additional Protocol, I declare that, for the purposes of the Convention and its Additional Protocol, the following authorities shall be considered as judicial authorities: the Office of the Supreme Prosecutor of the Czech Republic, the Regional and District Offices of the Prosecutors, the Town Prosecutor's Office in Prague, the Ministry of Justice of the Czech Republic, the Regional and District Courts and the Town Court in Prague.</p>	<p>In accordance with Article 24(1)(b) of the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union (Brussels, 29 May 2000), the Czech Republic declares that the judicial authority competent to deal with requests for controlled under Article 12 of the Convention is the Regional Prosecutor's Office in Prague, Husova 11, 110 01 Prague 1, tel.: +420 222 111 700, fax: +420 222 220 075. In accordance with Article 24(1)(b) of the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union (Brussels, 29 May 2000), the Czech Republic declares that the judicial authority competent to deal with requests to set up joint investigation teams under Article 13 of the Convention is the Supreme Prosecutor's Office of the Czech Republic, International Department, Jezuitská 4, 660 55 Brno, tel.: +420 542 512 416, fax: +420 542 512 414. In accordance with Article 24(1)(b) of the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union (Brussels, 29 May 2000),</p>

the Czech Republic declares that the judicial authority competent to deal with requests for covert investigations under Article 14 of the Convention is the Chief Prosecutor's Office in Prague, náměstí Hrdinu 1300, 140 65 Prague 4, tel.: +420 261 196 111, fax: +420 241 401 400. In accordance with Article 24(1)(b) of the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union (Brussels, 29 May 2000), the Czech Republic declares that the central authority referred to in Article 6(8) of the Convention is the Ministry of Justice of the Czech Republic. In accordance with Article 24(1)(e) of the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union (Brussels, 29 May 2000), the Czech Republic declares that the contact point referred to in Article 20(4)(d) of the Convention is the Police Headquarters of the Czech Republic, International Police Cooperation Division, Interpol Bureau, Strojnická 27, 170 89 Prague 7, tel.: +420 974 834 380, fax: +420 974 834 716.

<b>Denmark</b>	<p>The term "judicial authorities" in Denmark means the Courts of Law and the Department of Public Prosecutions which itself, according to the Danish judicature and procedural code, includes the Ministry of Justice, the Attorney-General, the prosecutors, the Copenhagen Prefect of Police and the Police Commissioners.</p>	<p>In connection with its accession to the Convention, Denmark declares as follows: 1. In relation to Article 24 Denmark states that: (a) The "judicial authorities" in Denmark include the courts and prosecution authorities, which under the Danish Administration of Justice Act include the Ministry of Justice, the Director of Public Prosecutions, the District Public Prosecutors, the Commissioner of the Copenhagen Police and the chief constables.</p>
<b>Estonia</b>	<p>Pursuant to Article 24 of the Convention, the Republic of Estonia declares that for the purposes of this Convention, the judicial authorities for Estonia shall be the courts, the State Prosecutor's Office, the Ministry of Justice and the Ministry of Internal Affairs.</p>	<p>Pursuant to Article 24 paragraph 1 of the Convention, the Republic of Estonia declares that: (1) the central authority for mutual assistance in criminal matters referred to in Article 6 paragraph 8 of this Convention is the Ministry of Justice; (2) for the purposes of the application of Article 6 paragraph 5, Articles 18 and 19 and Article 20 paragraphs 1-5 of the Convention, the competent authorities are the National Police Board, police prefectures, Security Police Board, Central Criminal Police, <b>Estonian Tax and Customs Board</b> and Estonian Board of Border Guard; (3) the contact point on duty twenty-four hours a day referred to in Article 20 paragraph 4 subparagraph d of the Convention is the Central Criminal Police.</p>



<b>Finland</b>	<p>Finland declares that for the purposes of the Convention the following are deemed to be judicial authorities in Finland:</p> <ul style="list-style-type: none"> <li>- The Ministry of Justice,</li> <li>- The Courts of First Instance (käräjäoikeus/tingsrätt), the Courts of Appeal (hovioikeus/hovrätt) and the Supreme Court (korkein oikeus/högsta domstolen),</li> <li>- the public prosecutors,</li> <li>- the police authorities, <b>the customs authorities</b> as well as the frontier guard officers in their capacity of preliminary criminal investigations authorities in criminal proceedings under the Preliminary Criminal Investigations Act of 30 April 1987 (449/87).</li> </ul>	
<b>France</b>	<p>The French Government declares that the authorities to be considered for the purposes of this Convention as French judicial authorities are the following:</p> <ul style="list-style-type: none"> <li>- first presidents, presidents, counsellors and judges (conseillers) of criminal courts;</li> <li>- examining magistrates (juges d'instruction) of these courts;</li> <li>- members of the Department of Public Prosecution (Ministère public) acting in those courts, namely:</li> </ul>	<p>Article 24(1): France declares that, in addition to those judicial authorities which the French Government previously indicated when it signed the European Mutual Assistance Convention, its competent authorities are as follows: - for the application of Article 6(2) and (8)(a): the Ministry of Justice, Directorate for Criminal Matters and Pardons, - for the application of Article 6(8)(b): the Ministry of Justice, Directorate for Criminal Matters and Pardons, National Criminal Records Department, - for the application of Articles 18 and 19: the examining magistrate</p>

	<ul style="list-style-type: none"> <li>* Directors of Public Prosecution;</li> <li>* Deputy Directors of Public Prosecution;</li> <li>* Assistant Public Prosecutors;</li> <li>* Head of the Prosecution Department in courts of first instance and their assistants;</li> <li>* Representatives of the Department of Public Prosecution in Police courts;</li> <li>* Judge-advocates in courts martia</li> </ul>	<p>having territorial competence, - for the application of Article 20(1) to (5): the Ministry of Justice, Directorate for Criminal Matters and Pardons. France declares that, for the purposes of the European Convention on Mutual Assistance in Criminal Matters, enforcement judges and regional parole courts must also be considered to be French judicial authorities.</p>
<p><b>Germany</b></p>	<p>Judicial authorities for the purposes of this Convention are:</p> <ul style="list-style-type: none"> <li>- the Federal Minister of Justice;</li> <li>- the Federal Court of Justice;</li> <li>- the Federal Prosecutor-General at the Federal Court of Justice;</li> <li>- the Ministry of Justice of Baden-Württemberg;</li> <li>- the Bavarian State Ministry of Justice;</li> <li>- the Senator of Justice;</li> <li>- the Senator for Judicial and Penal Affairs;</li> <li>- the Judicial Authority of the Free and Hanseatic City of Hamburg;</li> <li>- the Hessian Minister of Justice;</li> <li>- the Minister of Justice of Lower Saxony;</li> </ul>	

	<ul style="list-style-type: none"> <li>- the Minister of Justice of Land Northrhine/Westphalia;</li> <li>- the Ministry of Justice of Land Rhineland-Palatinate;</li> <li>- the Minister for Judicial Affairs of the Saarland;</li> <li>- the Minister of Justice of Land Schleswig-Holstein;</li> <li>- the Bavarian Supreme Court;</li> <li>- the Higher Regional Courts;</li> <li>- the Regional Courts;</li> <li>- the Local Courts;</li> <li>- the Directorate of Prosecutions at the Bavarian Supreme Court;</li> <li>- the Directorates of Prosecutions at the Higher Regional Courts;</li> <li>- the Directorates of Prosecutions at the Regional Courts;</li> <li>- the Central Office of the Land Judicial Administrations for the Investigation of National Socialist Crimes.</li> </ul>	
<b>Greece</b>	-	[not ratified]
<b>Hungary</b>	For the purpose of the Convention the following shall be deemed judicial authorities in Hungary: courts, public prosecutor's offices, the Ministry of Justice and the Chief Public Prosecutor's Office.	

<b>Luxembourg</b>	The Government of the Grand Duchy of Luxembourg declares that, as regards the Grand Duchy of Luxembourg, judicial authorities for the purposes of the Convention are to be understood as meaning members of the judiciary responsible for administering the law, examining magistrates and members of the Department of Public Prosecution.	In accordance with the statement made in Article 24 of the European Convention on Mutual Assistance in Criminal Matters of 20 April 1959, the Government of the Grand Duchy of Luxembourg understands the "judicial authority" to be "members of the judiciary responsible for administering the law, examining magistrates and members of the Department of Public Prosecution."
<b>Ireland</b>	In accordance with Article 24, for the purposes of the Convention, the Government of Ireland deems the following to be judicial authorities: <ul style="list-style-type: none"> <li>- the District Court;</li> <li>- the Circuit Court;</li> <li>- the High Court;</li> <li>- a Special Criminal Court;</li> <li>- the Court of Criminal Appeal;</li> <li>- the Supreme Court;</li> <li>- the Attorney General of Ireland;</li> <li>- the Director of Public Prosecutions;</li> <li>- the Chief State Solicitor.</li> </ul>	[not ratified]

<b>Italy</b>	<p>In accordance with Article 24 and for the purposes of the Convention the following authorities are to be considered Italian judicial authorities:</p> <ul style="list-style-type: none"> <li>- Directors of Public Prosecution,</li> <li>- Assistant Public Prosecutors,</li> <li>- Ordinary Courts of Justice,</li> <li>- Military Courts,</li> <li>- Offices of the Public Prosecutor attached to the Military Courts,</li> <li>- Examining Magistrates,</li> <li>- Superior Magistrates,</li> <li>- Praetors.</li> </ul>	[not ratified]
<b>Latvia</b>	<p>In pursuance of Article 24 of the Convention, the Republic of Latvia defines that, for the purposes of the Convention, the courts, the Public Prosecutor's Office and the police are deemed judicial authorities.</p>	

<b>Lithuania</b>	In relation to Article 24 of the Convention, the Republic of Lithuania declares that for the purposes of the Convention the following authorities shall be considered as judicial authorities: the Ministry of Justice of the Republic of Lithuania, the Prosecutor General's Office of the Republic of Lithuania, the Courts of Lithuania except the Constitutional Court.	
<b>Malta</b>	In accordance with Article 24 for the purposes of the Convention, the Government of Malta deems the following to be "judicial authorities": - Magistrates Courts, the Juvenile Court, the Criminal Court and the Court of Criminal Appeal; - the Attorney General, Deputy Attorney General, Heads of Unit and Lawyers within the Attorney General's Office; - Magistrates.	
<b>Netherlands</b>	The Netherlands Government declares that, as regards the Netherlands, judicial authorities for the purposes of the Convention are to be understood as meaning members of the judiciary responsible for administering the law, examining magistrates and members of the Department of Public Prosecution.	

<b>Poland</b>	For the purposes of the Convention, the public prosecutor's offices shall be also deemed to be “judicial authorities”.	
<b>Portugal</b>	Under the terms of Article 24, Portugal declares that, for the purpose of the Convention, the Public Prosecutor must be considered as judicial authority.	
<b>Romania</b>	For the purpose of the Convention, Romanian judicial authorities are deemed to be the judicial authorities, the prosecuting authorities at them, the Ministry of Justice and the Public Prosecutor's Department at the Supreme Court of Justice and, for the requests for mutual assistance to which reference is made in Article 15, paragraph 3, the Ministry of Home Affairs.	
<b>Slovenia</b>	In accordance with Article 24, the Republic of Slovenia will, for the purposes of the Convention, deem to be judicial authorities the courts and the State prosecutor's offices.	

<b>Slovakia</b>	<p>For the purposes of this Convention, the following are deemed to be judicial authorities in the Slovak Republic: the Ministry of Justice of the Slovak Republic, the General Prosecutor's Office of the Slovak Republic, all courts and prosecutor's offices irrespective of their denomination.</p>	
<b>Spain</b>	<p>Spain modifies its declaration to Article 24 of the Convention contained in the instrument of ratification. This modification applies also to the Additional Protocol to the Convention, and reads as follows:</p> <p>"In accordance with Article 24 of the Convention, Spain declares that for the purposes of the Convention, the following shall be deemed judicial authorities:</p> <ul style="list-style-type: none"> <li>a) ordinary judges and courts;</li> <li>b) registrars;</li> <li>c) public prosecutors;</li> <li>d) military judges and courts;</li> <li>e) reporting registrars of the military courts.</li> </ul> <p>This declaration applies also to the Additional Protocol to the Convention, done in Strasbourg on 17 March 1978."</p>	



<b>Sweden</b>	For the purposes of the Convention Sweden deems courts and prosecutors to be judicial authorities.	
<b>United Kingdom</b>	-	<p>In accordance with Article 24 of the Convention (as inserted by Article 6 of the Second Additional Protocol), the Government of the United Kingdom declares the following to be judicial authorities:</p> <ul style="list-style-type: none"> <li>- Magistrates' Courts, the Crown Courts and the High Court;</li> <li>- the Attorney General for England and Wales;</li> <li>- the Director of Public Prosecutions and any Crown Prosecutor;</li> <li>- the Director and any designated member of the Serious Fraud Office;</li> <li>- the Environment Agency;</li> <li>- Secretary of State for Business, Innovation &amp; Skills in respect of his function of investigating and prosecuting offences;</li> <li>- Secretary of State for Health;</li> <li>- Secretary of State for Transport;</li> <li>- Secretary of State for Work and Pensions;</li> <li>- District Courts and Sheriff Courts and the High Court of Justiciary;</li> <li>- the Lord Advocate of Scotland;</li> <li>- any Procurator Fiscal;</li> </ul>

- |  |  |   |
|--|--|---|
|  |  | <ul style="list-style-type: none"><li>- the Attorney General for Northern Ireland;</li><li>- the Director of Public Prosecutions in Northern Ireland;</li><li>- the Financial Services Authority.</li></ul> |
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## Checklist

The following checklist is intended to give a rough overview only. However, it does not exempt from thoroughly examining the legal preconditions of the applicable legal basis in the respective case at hand.

<b>1. Customs cooperation in CRIMINAL matters</b>	
<b>a.</b>	<b>Requests for information (or spontaneous information)</b>
	(potential) infringement of <input type="checkbox"/> national customs provisions, or <input type="checkbox"/> Community customs provisions, and
	<input type="checkbox"/> the information is intended to serve the purpose of <u>law enforcement</u> , and
	<input type="checkbox"/> request for information (or spontaneous information), and
*	<input type="checkbox"/> you do not know exactly whether or not the requested information is already available in the requested Member State without further investigative measures, or <input type="checkbox"/> you wish 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
	→ Application of the <b>Naples II Convention</b> recommended * If you deny both of these questions, you may also apply the Swedish Framework Decision.

	<b>b.</b>	<b>Special forms of cooperation or requests</b>
		(potential) infringement of <input type="checkbox"/> national customs provisions, or <input type="checkbox"/> Community customs provisions, and
		<input type="checkbox"/> the information is intended to serve the purpose of <u>law enforcement</u> , and
		Request for <input type="checkbox"/> surveillance, or <input type="checkbox"/> enquiries, or <input type="checkbox"/> notification, or <input type="checkbox"/> hot pursuit, or <input type="checkbox"/> cross-border surveillance, or <input type="checkbox"/> controlled delivery, or <input type="checkbox"/> covert investigations, or <input type="checkbox"/> joint special investigation teams
		→ Application of the <b>Naples II Convention</b> mandatory (if request shall not be based on MLA Conventions instead)

	<b>c.</b>	<b>Requests/ spontaneous information to all Member States</b>
		<input type="checkbox"/> (potential) infringement of national customs provisions and
		<input type="checkbox"/> the information is intended to serve the purpose of <u>law enforcement</u> , and
	= Request	<input type="checkbox"/> you wish to “alert” other Member States about suspicious goods, means of transport or persons of which you do not know exactly where they will be encountered, and  <input type="checkbox"/> you wish to do so with the aim to request for a particular control measure for <u>criminal</u> (or administrative) purposes (that is, specific checks, discreet surveillance, sighting, reporting), and  <input type="checkbox"/> with the aim to obtain a feedback on the control measure, or
	= Spontaneous information	<input type="checkbox"/> you wish to “alert” other Member States about suspicious goods, means of transport or persons of which you do not know exactly where they will be encountered, and  <input type="checkbox"/> you wish to do so with the aim to request for a particular control measure for <u>criminal</u> (or administrative) purposes (that is, specific checks, discreet surveillance, sighting, reporting), or  <input type="checkbox"/> you wish to provide other Member States with personal data on detained, seized or confiscated good or cash, and  <input type="checkbox"/> you wish to do so for the purpose of “operational analysis” without requesting a particular measure
	→ Insert data in CIS MS ( <b>CIS Decision</b> )	

	<b>d.</b>	<b>Coordination of investigations with other Member States</b>
		<input type="checkbox"/> (potential) infringement of national customs provisions and
		<input type="checkbox"/> you wish to establish - whether or not and/or - by which authority and/or - under which reference number <u>criminal</u> investigations are being led against a specific natural or legal person on account of an infringement against customs provisions in another Member State, and
		for the purpose of <input type="checkbox"/> exchanging available information or <input type="checkbox"/> coordination ongoing investigations
		→ Search FIDE MS ( <b>CIS Decision</b> )

<b>2. Customs cooperation in ADMINISTRATIVE matters</b>	
<b>a.</b>	<b>Requests the case of (potentially) incorrect application of Community customs provisions (or spontaneous information)</b>
	<input type="checkbox"/> (potentially) incorrect application of <u>Community</u> customs provisions, and
	<input type="checkbox"/> the information is intended to serve the <u>administrative</u> purposes, and
	request for <input type="checkbox"/> information, or <input type="checkbox"/> surveillance, <input type="checkbox"/> enquiries, or <input type="checkbox"/> notification and
	→ Application of <b>Regulation (EC) No 515/97</b> mandatory

	<b>b.</b>	<b>Requests in the case of (potentially) incorrect application of national customs provisions (or spontaneous information)</b>
		<input type="checkbox"/> (potentially) incorrect application of <u>national</u> customs provisions, and
		<input type="checkbox"/> the information is intended to serve the <u>administrative</u> purposes, and
		request for <input type="checkbox"/> information, or <input type="checkbox"/> surveillance, <input type="checkbox"/> enquiries, or <input type="checkbox"/> notification, or <input type="checkbox"/> joint special investigation teams, and
		→ Application of the <b>Naples II Convention</b> mandatory



<b>c. Requests/ spontaneous information to all Member States</b>	
	<input type="checkbox"/> (potential) infringement of Community customs provisions, and
	<input type="checkbox"/> the information is intended to serve <u>administrative</u> (or criminal) purposes, and
=	<input type="checkbox"/> you wish to “alert” other Member States about suspicious goods, means of transport or persons of which you do not know exactly where they will be encountered, and  <input type="checkbox"/> you wish to do so with the aim to request for a particular investigative measure for <u>administrative</u> purposes, and  <input type="checkbox"/> with the aim to obtain a feedback on the control measure, or
=	<input type="checkbox"/> you wish to “alert” other Member States about suspicious goods, means of transport or persons of which you do not know exactly where they will be encountered, and  <input type="checkbox"/> you wish to do so with the aim to request for a particular investigative measure for <u>administrative</u> purposes,  or  <input type="checkbox"/> you wish to provide other Member States with personal data on detained, seized or confiscated good or cash, and  <input type="checkbox"/> you wish to do so for the purpose of “operational analysis” without requesting a particular measure
<input type="checkbox"/> you wish to provide other Member States with personal data on detained, seized or confiscated good or cash, and  <input type="checkbox"/> you wish to do so for the purpose of “operational analysis” without requesting a particular measure	
	→ Insert data in CIS EU ( <b>Regulation (EC) No 515/97</b> )

	<b>d.</b>	<b>Coordination of investigations with other Member States</b>
		<input type="checkbox"/> you wish to establish - whether or not and/or - by which authority and/or - under which reference number <u>administrative</u> (or criminal) investigations are being led or have been led against a specific natural or legal person on account of an incorrect application of Community customs provisions in another Member State
		for the purpose of <input type="checkbox"/> exchanging available information or <input type="checkbox"/> coordination ongoing investigations
	→ Search FIDE EU ( <b>Regulation (EC) No 515/97</b> )	

**Roadmap for progression recommendations suggested for inclusion in the monitoring file**

ACTION Number: 5.10		Action Title:		
Group Leader	GERMANY	"To find and recommend best practice for customs cooperation in criminal matters"		
No	Recommendation	Plan for ensuring delivery of recommendation		
		By whom?	How?	By when?
1	<p><b>Application of Naples II</b> (instead of Swedish Framework Decision) recommended if</p> <ul style="list-style-type: none"> <li>• case concerns (potential) infringement of                             <ul style="list-style-type: none"> <li>○ <u>national</u> customs provisions,</li> <li>or</li> <li>○ <u>Community</u> customs provisions,</li> </ul>                             and                         </li> <li>• information is intended to serve <u>purpose of law enforcement</u>, and</li> <li>• requesting MS does not know exactly whether or not the requested information is already available in requested MS without further investigative measures, or</li> </ul> <p>requesting MS want to use the information as evidence in criminal proceedings without additional MLA request</p>	Competent national customs authority		When appropriate

2	<p><b>Application of Naples II</b> if</p> <ul style="list-style-type: none"> <li>• case concerns (potential) infringement of <ul style="list-style-type: none"> <li>○ <u>national</u> customs provisions,</li> <li>or</li> <li>○ <u>Community</u> customs provisions,</li> </ul> </li> <li>and</li> <li>• information is intended to serve <u>purpose of law enforcement</u>, and</li> <li>• MS intends to send request for special forms of cooperation (hot pursuit, cross-border surveillance, controlled delivery, covert investigations or joint special investigation teams) or</li> </ul> <p>For surveillance, enquiries or notification.</p>	Competent national customs authority		When appropriate
3	<p><b>Use of CIS</b> recommended in the following manner:</p> <ul style="list-style-type: none"> <li>• inserting personal data in CIS in order to “alert” other MS 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.</li> <li>• inserting personal data on detained, seized or confiscated goods or cash in CIS without requesting a particular measure so that it can be used for “operational analysis”</li> </ul> <p>searching CIS for information if an incident gives reason to do so.</p>	Competent national customs authority		When appropriate

4	<p><b>Use of FIDE</b> recommended in the following manner:</p> <ul style="list-style-type: none"> <li>• inserting 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.</li> <li>• searching FIDE if MS wishes 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 MS and by which authority (objective: to coordinate investigations with investigative authorities in other MS).</li> <li>• In the event of a “hit”: examine whether or not a request for criminal purposes or possibly also for administrative purposes, is to be addressed MS leading the investigations.</li> </ul>	Competent national customs authority	-	When appropriate
5	<p><b>Application of Reg. (EC) No 515/97</b> in the case of requests for information, surveillance, enquiries or notification if</p> <ul style="list-style-type: none"> <li>• case at hand concerns the (potentially) incorrect application of <u>Community</u> customs provisions, and</li> <li>• the information requested is intended to serve <u>administrative purposes</u>.</li> </ul> <p>Reg. (EC) No 515/97 does <i>not</i> constitute legal basis for requests in criminal matters for law enforcement purposes.</p>	Competent national customs authority	-	When appropriate

6	<p><b>Application of Naples II</b> in the case of requests for information, surveillance, enquiries, notification or joint special investigation teams if</p> <ul style="list-style-type: none"> <li>• case at hand concerns the (potentially) incorrect application of <u>national</u> customs provisions, and</li> <li>• requested information is intended to serve <u>administrative purposes</u>.</li> </ul>	Competent national customs authority	-	When appropriate
7	<p><b>Consider applying Naples II instead of MLA</b> for offenses in the customs area due to the following benefits:</p> <ul style="list-style-type: none"> <li>• Less work for judicial authorities</li> <li>• Less time-consuming and cumbersome</li> <li>• Direction of the request to the competent authority</li> <li>• Protection of financial interests of the European Union: No time delay in identifying the basis for collecting customs duties</li> </ul>	Judicial authorities, supported by competent national customs authority	-	When appropriate
8	<p><b>Suggestion to examine</b></p> <ul style="list-style-type: none"> <li>• the scope within which the Naples II Convention may be applied by the judicial authorities,</li> <li>• how FIDE may be effectively used by the judicial authorities.</li> </ul>	COPEN	-	-
9	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.	Competent national customs authority	-	When appropriate

10	<p>A request should clearly indicate</p> <ul style="list-style-type: none"> <li>- the legal basis of the request,</li> <li>- the purpose for which the requested information is intended,</li> <li>- the fact that it traces back to instructions given by a judicial authority and the reference number of the judicial authority (if applicable),</li> <li>- 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,</li> <li>- the number of the MA communication (Mutual assistance communication) from OLAF (Office européen de lutte antifraude; European Anti-Fraude Office) (if applicable).</li> </ul>	Competent national customs authority	-	When appropriate
11	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.	Competent national customs authority	-	When appropriate
12	The requested Member State should rely on the purposes indicated in the request by the requesting Member State.	Competent national customs authority	-	When appropriate