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ENFOCUSTOM 22

OUTCOME OF PROCEEDINGS

of : Customs Cooperation Working Party

on : 26 June 2002

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Subject : Convention on the use of information technology for customs purposes
(CIS Convention)
– Draft Protocol to the CIS Convention for the creation of a customs files
identification database

Delegations will find attached the text of the above Draft Protocol as it stands following discussions in the Customs Cooperation Working Party on 26. June 2002. Amendments agreed in this meeting are underlined.

PROTOCOL

established on the basis of Article 34 of the Treaty on European Union, amending the Convention on the use of information technology for customs purposes as regards the creation of a customs files identification database

THE HIGH CONTRACTING PARTIES to this Protocol, Member States of the European Union,
REFERRING to the Act of the Council of the European Union of ...,
HAVING REGARD to the Treaty on European Union, and in particular Article 34 thereof,
CONSIDERING:

- (1) the Convention on the use of information technology for customs purposes, hereinafter referred to as "the Convention",
- (2) ¹

HAVE AGREED ON THE FOLLOWING PROVISIONS:

¹ Further recitals will be added when there is consensus on the enacting terms.

Article 1

In the Convention after Chapter V, the following three Chapters shall be inserted:

"CHAPTER V A:

CREATION OF A CUSTOMS FILES IDENTIFICATION DATABASE

Article 12 A

- (1) The Customs Information System shall contain data in accordance with this Chapter, in addition to data in accordance with Article 3 in a special database (customs files identification database).² Without prejudice to the provisions of this Chapter and of Chapters V B and V C, all the provisions of this Convention shall also apply to the customs files identification database.
- (2) The aim of the customs files identification database shall be to enable the national authorities responsible for carrying out customs investigations designated pursuant to Article 7³, when opening a file on or investigating one or more natural or legal persons, to identify competent authorities of the other Member States which are investigating or have investigated those natural or legal persons, in order, through information on the existence of investigation files, to achieve the aims referred to in Article 2(2).⁴

² This provision makes it clear that the data of the customs files identification database and the data pursuant to Article 3 CIS Convention are stored separated and are to be processed separately.

³ Clarification that **only** authorities designated by the Member States in accordance with Article 7 have access to the customs files identification database. According to the laws, regulations and procedures of the Member States, authorities other than customs authorities may also be allowed access (2nd sentence of Article 7(1)). Pursuant to Article 7(2) of the CIS Convention the Member States must forward a list of competent authorities designated pursuant to Article 7(1) to have direct access to the Customs Information System, stating, for each authority which data it may access and for what purposes. This enables each individual Member State to determine which authority is responsible for conducting customs investigations. Logically, these should be the same authorities as the Member States authorise to apply Naples II, see Annex I.

⁴ Information on the **existence** of investigation files" is the **new** purpose of the Protocol, supplementing the Customs Information System pursuant to Article 3 in conjunction with Article 5(1) of the CIS Convention. The FIDE system is not designed to incorporate material from investigation files.

- (3) For the purposes of the customs files identification database, the Member States shall communicate to the other Member States and to the committee mentioned in Article 16 a list of the serious offences against their national laws.
Data according to Art 12 B, referring to these serious contraventions that are entered in the customs files identification database, may relate only to contraventions that are punishable
- by deprivation of liberty or a detention order for a maximum period of at least 12 months or⁵
 - by a administrative fine of at least € 15.000.⁶
- (4) If the Member State retrieving data from the customs files identification database requires further information on the stored investigation file on natural or legal persons, it shall request the assistance of the supplying Member State on the basis of the existing instruments in force relating to mutual assistance.⁷

⁵ The first indent has been taken from Article 2 of the European Extradition Convention of 27 September 1996 (Official Journal C 313 of 23.10.1996, see: Annex 2). The 12-month sentence has been chosen to make it easier to apply for administrative assistance.

⁶ Result of consultations on 26.June 2002: Each Member State shall determine the "serious offences" which can be entered in the customs files identification database. However, these offences must be serious enough to meet the criteria mentioned in the following indents. The result: no storage of contraventions which the Member States supplying the data considers to be minor and no definition of "serious offences" according to Article 2 paragraph 2 CIS-Convention.

⁷ Question of IRL: Wording makes clear, that not only mutual assistance according to Naples II, but also mutual assistance according to bilateral agreements will still be possible.

CHAPTER V B:

OPERATION AND USE OF THE CUSTOMS FILES IDENTIFICATION DATABASE

Article 12 B

- (1) The competent authorities shall enter data from investigation files in the customs files identification database for the purposes set out in Article 12A(2). The data may cover only the following categories: ⁸
- (i) natural and legal persons who are or have been⁹-the subject of an investigation file opened by the competent authority of a Member State, and who:
 - are suspected of committing or having committed, or participating or having participated in the commission of, a serious contravention of national laws ¹⁰¹¹or
 - have been the subject of a report relating to such a contravention, or
 - have been the subject of an administrative or legal sanction for such a contravention;
 - (ii) the field covered by the investigation file;¹²
 - (iii) the name, nationality and contact information of the Member State authority handling the case and the file number.

⁸ S proposal designed 1) to clarify the purpose of the data input and 2) to clarify that only (exhaustive list) data in the following three categories can be stored. The concept "category" is taken from Article 3 of the CIS Convention.

⁹ The customs files identification database contains the file numbers both of current and completed investigations. Reference to Article 3 paragraph 4 of the Protocol (no retrospective entry of data).

¹⁰ Wording of Article 1(1) of the CIS Convention.

¹¹ Inclusion of non-harmonised excise taxes was deleted at suggestion of S.

¹² D note: Description in headnotes, f.e. smuggling of drugs or smuggling of arms.

Data according to (i) to (iii) shall be entered separately for each natural or legal person. Links are not permitted.

- (2) The personal data referred to in paragraph 1(i) may only consist of the following¹³
- (i) for natural persons: name, maiden name, forenames and aliases, date and place of birth, nationality and sex;
 - (ii) for legal persons: business name, name traded under¹⁴, registered office and VAT identifier.
- (3) Data shall be entered for a limited period in accordance with Article 12 E.

Article 12 C

A Member State shall not be obliged to make entries pursuant to Article 12 B in any particular case if and for such time as this would harm the public policy (ordre public) or other essential interests, in particular with regard to data protection, of the Member State concerned.¹⁵

¹³ Wording of Article 4 (1) of the CIS Convention.

¹⁴ NL pointed out that firms may trade under names other than those entered in the commercial register. These names should be able to be entered in the customs file identification system.

¹⁵ The customs file identification database is designed to optimise especially Naples II. The texts concerning "ordre public" should therefore cover the same ground. Divergences between individual language versions (ordre public – public policy) have still to be checked; see also Article 28 of Naples II and Article 48(1) of Reg. (EC) No 515/97 (Regulation on EC mutual assistance on customs) in Annex 3.

Article 12 D

- (1) Entry of data in the customs files identification database and consultation thereof shall be reserved for the authorities referred to in Article 12 A(2).
- (2) A query of the customs files identification database shall contain the following personal data:¹⁶
 - i) For individuals: forename and/or name and/or maiden name and/or aliases and/or date of birth,¹⁷
 - ii) for legal entities: business name and/or name traded under and/or VAT identifier.

¹⁶ Provision ensures that consultations are not "fishing expeditions" but always relate to a specific case involving an individual or a company. Important for data protection, to avoid abuses.

¹⁷ GR-proposal to add forename and date of birth.

CHAPTER V C:

PERIOD OF RETENTION OF DATA IN THE CUSTOMS FILES IDENTIFICATION
DATABASE

Article 12 E

- (1) The period of retention shall be determined by the laws, regulations and procedures of the supplying Member State. The following periods, calculated from the date the data is recorded in the investigation file, must not be exceeded¹⁸:
- (i) data relating to current investigation files may not be retained beyond a period of three years if it has not been established that a contravention has taken place within that time; the data shall be deleted before then if one year has passed since the last investigative act;
 - (ii) data relating to investigation files which have established that a contravention has taken place but which have not yet led to a conviction or to imposition of a fine may not be retained beyond a period of six years;
 - (iii) data relating to investigation files which have led to a conviction or a fine may not be retained beyond a period of ten years.
- (2) At all stages of an investigation as referred to in paragraph 1(i), (ii) and (iii), as soon as a natural or legal person within the meaning of Article 12 B is eliminated from an investigation under the laws and administrative regulations of the supplying Member State, all data relating to the corresponding natural or legal person must be deleted immediately.

¹⁸ In response to a query from IRL: the right to delete data is regulated in Article 11 of the CIS Convention.

- (3) Data shall automatically be deleted from the customs files identification database if the maximum data retention periods laid down in paragraph 1 sentence 1 or sentence 2 are exceeded¹⁹.

Article 2

In Article 20 of the Convention, the words "~~Article 10(1)~~" shall be replaced by "Articles 10(1) and 12 H(1)", and the words ²⁰"Article 12(1) and (2)" shall be replaced by "Articles 12(1) and (2) and 12 E".

Article 3

1. This Protocol shall be subject to adoption by the Member States in accordance with their respective constitutional requirements.
 2. Member States shall notify the depositary of the completion of their constitutional procedures for the adoption of this Protocol.
 3. This Protocol shall enter into force ninety days after the notification referred to in paragraph 2 by the State, a member of the European Union at the time of signing, which is the last to complete that formality.
- (4) The Customs files identification database shall contain only data which were recorded in the investigation file after the Protocol entered into force (Article 12 E paragraph 1 sentence 2 first half-sentence).²¹

¹⁹ Suggestion at the instigation of the Irish delegation. Automatic deletion would mean less work for users and ensure that the deadlines for deletion were met.

The reference not only to paragraph 1, but specifically to sentence 1 or 2 in paragraph 1 makes it clear that the customs files identification database automatically deletes the data when either the national storage limits or the (longer) limits pursuant to i) to iii) have been exceeded.

²⁰ Deleted because article 12 H dropped from the draft.

²¹ Prohibits involving "old" investigation files retroactively.

Article 4

1. This Protocol shall be open to accession by any State which becomes a member of the European Union and which accedes to the Convention.
2. The text of this Protocol in the language of the acceding State, drawn up by the Council of the European Union, shall be authentic.
3. The instruments of accession shall be deposited with the depositary.
4. This Protocol shall enter into force with respect to any State that accedes to it ninety days after the date of deposit of its instrument of accession or on the date of entry into force of this Protocol if it has not already entered into force at the time of expiry of the said period of ninety days, provided the Convention is in force for it.

Article 5

Any State that becomes a member of the European Union and accedes to the Convention in accordance with Article 25 thereof after the entry into force of this Protocol shall be deemed to acceded to the Convention as amended by this Protocol.

Article 6

The Secretary-General of the Council of the European Union shall act as depositary of this Protocol.

The depositary shall publish in the Official Journal of the European Communities information on the progress of adoptions and accessions, declarations and also any other notification concerning this Protocol.

Done at [], on ..., in a single original in the Danish, Dutch, English, Finnish, French, German, Greek, Irish, Italian, Portuguese, Spanish and Swedish languages, each text being equally authentic, the original being deposited in the archives of the General Secretariat of the Council of the European Union.

For the Government

For the Government

Extract from the Mutual assistance and cooperation handbook
(Naples II Convention)

MSs' customs auth. as well as other auth. with jurisdiction for implementing the Naples II Convention

Article 4(7): "Customs administrations": MSs' customs authorities as well as other authorities with jurisdiction for implementing the provisions of this Convention.

Customs administrations are defined in such a manner that the term includes MSs' customs authorities as well as other authorities with jurisdiction to apply the provisions of the Convention. The customs authorities' sphere of jurisdiction varies considerably as between MSs, and under that definition other criminal bodies (the police for example) may apply the provisions of the Convention if they are competent to intervene in connection with infringements of customs provisions as defined in Art. 4(1) and (2) of the Convention.

AU	Finance Department
BE	<i>no information given up to now</i>
DK	Customs authority, tax authority, police auth., Navy Operational Command, Air Force Tactical Command
FI	Customs authority, police authority, coastguard
FR	Customs authority (Dir. Générale des Douanes et Droits Indirects, DGDDI)
GE	Customs authority, border control service, coastguard, mobile control units, audit units, Border Guard, Länder police
GR	General Directorate of Customs and Excise, Financial and Economic Crimes Office (FECO), Police Force, Port Police Force
IRL	Revenue Commissioners, Department of Justice and Equality and Law Reform
IT	<i>no information given up to now</i>
LUX	The customs authority has jurisdiction, except for infringements under Article 4.3(4) of the Convention concerning money laundering
NL	The customs authorities, the FIOD-ECD (Fiscal Information and Investigation Service and Economic Investigation Service), the AID (General Inspectorate for Agriculture), the tax authority, the police and the Royal Military Police
PT	Dir.-Gen. of Customs and Excise (DGAIEC), Nat. Republican Guard (GNR), Criminal Police
SP	<i>no information given up to now</i>
SW	Police authority, Coastguard, Public Prosecutor's Office, Nat. Tax Board, Board of Agriculture
UK	HM Customs and Excise

Extradition Convention of 27 September 1996 (Official Journal C 313
of 23.10.1996, p. 12) (extract)

Article 2

Extraditable offences

- (1) Extradition shall be granted in respect of offences which are punishable under the law of the requesting Member State by deprivation of liberty or a detention order for a maximum period of at least 12 months and under the law of the requested Member State by deprivation of liberty or a detention order for a maximum period of at least six months.
- (2)

- a) Convention of 18.12.1997 on mutual assistance and cooperation between customs administrations (Naples II Convention, OJ C 24, 23.1.1998, p. 1)

Article 28 Exemptions from the obligation to provide assistance

- (1) This Convention shall not oblige the authorities of Member States to provide mutual assistance where such assistance would be likely to harm the **public policy** or other essential interests of the State concerned, particularly in the field of data protection, or where the scope of the action requested, in particular in the context of the special forms of cooperation provided for in Title IV, is obviously disproportionate to the seriousness of the presumed infringement. In such cases, assistance may be refused in whole or in part or made subject to compliance with certain conditions.
- (2) Reasons must be given for any refusal to provide assistance.

- b) Council Regulation No 515/97 of 13.3.1997 on mutual assistance (OJ L 82, 22.3.1997, p. 1)

Article 48

- (1) This Regulation shall not bind Member States' administrative authorities to grant each other assistance where that would be likely to be injurious to **public policy** (ordre public) or other fundamental interests, in particular with regard to data protection, of the Member State in which they are based.
- (2) Reasons shall be stated for any refusal to grant assistance.
The Commission shall be informed as early as possible of any refusal to grant assistance and the reasons given for refusal.