



session documents

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REPORT

on the Council Act of 26 July 1995 drawing up the Convention on the use of information technology for customs purposes, the Convention drawn up on the basis of Article K.3 of the Treaty on European Union on the use of information technology for customs purposes and the Agreement on provisional application between certain Member States of the European Union of the Convention drawn up on the basis of Article K.3 of the Treaty on European Union on the use of information technology for customs purposes (C4-0248/95 + C4-0520/95)

Committee on Civil Liberties and Internal Affairs

Rapporteur: Martin Schulz

- \* Consultation procedure  
simple majority
- \*\*I Cooperation procedure (first reading)  
simple majority
- \*\*II Cooperation procedure (second reading)  
simple majority to approve the common position  
majority of Parliament's component Members to reject or amend the common position
- \*\*III Assent procedure  
majority of Parliament's component Members to give assent  
but simple majority of component Members of the EC

- \*\*\*I Codecision procedure (first reading)  
simple majority
- \*\*\*II Codecision procedure (second reading)  
simple majority to approve the common position  
majority of Parliament's component Members to adopt a declaration of intended  
rejection of the common position, and amend the common position or confirm its rejection
- \*\*\*III Codecision procedure (third reading)  
simple majority to approve the joint text  
majority of Parliament's component Members to reject the

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By letter of 14 June 1995 the Presidency of the European Union forwarded to Parliament the draft Convention on the use of information technology for customs purposes (9909/1/93/REV.1) in one official language of the Union.

On 10 July 1995 (OJ C 249, 25 September 1995) the President of Parliament announced that the draft Convention (9909/1/93/REV. 1 - C4-0248/95) had been referred to the Committee on Civil Liberties and Internal Affairs as the committee responsible and to the Committee on Legal Affairs and Citizens' Rights, the Committee on Economic and Monetary Affairs and Industrial Policy and the Committee on Budgetary Control for their opinions.

By letter of 8 November 1995 the Council forwarded to Parliament the Council Act of 26 July 1995 drawing up the Convention on the use of information technology for customs purposes (95/C 316/02), the Convention drawn up on the basis of Article K.3 of the Treaty on European Union on the use of information technology for customs purposes (95/C 316/02/ANN.) and the Agreement on provisional application between certain Member States of the European Union of the Convention drawn up on the basis of Article K.3 of the Treaty on European Union on the use of information technology for customs purposes (95/C 316/04) (C4-0520/95).

On 28 November 1995 (OJ C 339, 18 December 1995) the President of Parliament announced that the draft Convention (LET 8406/95 - C4-0520/95) had been referred to the Committee on Civil Liberties and Internal Affairs as the committee responsible and to the Committee on Legal Affairs and Citizens' Rights, the Committee on Economic and Monetary Affairs and Industrial Policy and the Committee on Budgetary Control for their opinions.

At its meeting of 29 September 1995 the Committee on Civil Liberties and Internal Affairs had appointed Mr Schulz rapporteur.

At its meeting of 23 October 1995 it decided to consider Petition No 461/95 in the context of this report.

It considered the draft report at its meetings of 19 March, 29 May, 8 July and 16 December 1996 and 21 January and 24 February 1997.

At the last meeting it adopted the motion for a resolution unanimously.

The following took part in the vote: d'Ancona, chairman; Reding, vice-chairman; Vinci, vice-chairman; Schulz, rapporteur; Andrews, Bontempi, Cederschiöld, Chanterie, De Esteban Martin, Deprez, Elliott, Goerens, Gomolka, Lambraki, Lambrias, Lindeperg, Lucas Pires, Mohamed Ali, Nassauer, Oostlander, Pradier, Schaffner, Schmid, Stewart-Clark, Tamino (for Roth pursuant to Rule 138(2)), Van Lancker and Wemheuer.

The opinions of the Committee on Legal Affairs and Citizens' Rights, the Committee on Economic and Monetary Affairs and Industrial Policy and the Committee on Budgetary Control are attached to this report.

The report was tabled on 26 February 1997.

The deadline for tabling amendments will be indicated in the draft agenda for the relevant part-session.

**A**  
**MOTION FOR A RESOLUTION**

**Resolution on the Council Act of 26 July 1995 drawing up the Convention on the use of information technology for customs purposes, the Convention drawn up on the basis of Article K.3 of the Treaty on European Union on the use of information technology for customs purposes and the Agreement on provisional application between certain Member States of the European Union of the Convention drawn up on the basis of Article K.3 of the Treaty on European Union on the use of information technology for customs purposes (C4-0520/95 )**

The European Parliament,

- having regard to the text of the Act agreed by the Council of 26 July 1995 drawing up the Convention on the use of information technology for customs purposes <sup>(1)</sup>, the Convention drawn up on the basis of Article K.3 of the Treaty on European Union on the use of information technology for customs purposes<sup>(2)</sup> and the Agreement on provisional application between certain Member States of the European Union of the Convention drawn up on the basis of Article K.3 of the Treaty on European Union on the use of information technology for customs purposes<sup>(3)</sup> (C4-0248/95 + C4-0520/95),
  - having regard to the Council Act of 23 July 1996 drawing up, on the basis of Article K.3 of the Treaty on European Union, the Protocol on the interpretation, by way of preliminary rulings, by the Court of Justice of the European Communities of the Convention on the establishment of a European Police Office, and the Declarations attached to that Protocol<sup>(4)</sup>,
  - having regard to Articles K.1, K.3 and K.6 of the Treaty on European Union,
  - having regard to the report of the Committee on Civil Liberties and Internal Affairs and the opinions of the Committee on Legal Affairs and Citizens' Rights, the Committee on Economic and Monetary Affairs and Industrial Policy and the Committee on Budgetary Control (A4-0060/96),
- A. whereas in addition to the Customs Information System (hereinafter referred to as the CIS) the following computerized systems are in existence, are being developed or have been proposed in the area of activity referred to in Title VI of the EU Treaty:
- the Schengen Information System
  - Europol
  - EURODAC
- and whereas under the first pillar the REITOX System is already in place in respect of drugs,
- B. whereas it is not desirable for CIREA and CIREFI to be expanded into computerized systems because this would increase the risk of duplication,

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<sup>(1)</sup> OJ C 316, 27.11.1995, p. 33.

<sup>(2)</sup> OJ C 316, 27.11.1995, p. 34.

<sup>(3)</sup> OJ C 316, 27.11.1995, p. 58.

<sup>(4)</sup> OJ C 299, 9.10.1996, p. 14.

- C. whereas there is a great need for computerized systems which make it possible for officials who have the task of overseeing the movement of goods, persons, services and capital across the internal and external frontiers to obtain a better picture, within their powers and responsibilities, of such movements,
- D. whereas there is a great need for computerized systems which facilitate the exchange of relevant data and enable officials responsible for preventing and investigating serious infringements and offences or fighting crime in general to do their job more effectively within the limits of their powers and responsibilities,
- E. whereas computerized systems should generally fulfil the following requirements:
- protection against access by unauthorized persons,
  - protection of the privacy of individuals,
  - rapidity,
  - unless otherwise provided, the most restricted possible access to the systems and arrangements for monitoring them,
  - effectiveness,
- F. whereas the Council 'agreed to prepare a specific information note for Parliament . . . outlining the main aspects, and that it would hold a discussion on them'<sup>(1)</sup>, and this was not done;
- G. whereas, pursuant to Article K.6, second paragraph, the Presidency should have consulted the European Parliament on the Convention referred to above, and whereas it did not wait for the opinion of the European Parliament since the Convention was signed already on 26 July 1995 although it was not forwarded to the European Parliament, and in only one official language of the Union, until 14 June 1995, and the abovementioned act and Agreement were not received either before the signing,

as regards procedure

1. Notes that the Presidency failed to consult the European Parliament on the Convention in accordance with Article K.6, second paragraph, of the TEU and that the views of the European Parliament have not been duly taken into consideration;
2. Notes that the Council Presidency, by failing to carry out the consultation provided for by Article K.6, second paragraph, of the TEU, has infringed that provision;
3. Notes that the Convention has thus not been established in accordance with the Treaty;
4. Takes the view that, in addition to the Presidency and the Commission, the Member States, before taking a decision on conventions which may be described as 'principal aspects of activities' within the meaning of Article K.6, second paragraph, of the TEU, should make arrangements for the views of the European Parliament to be taken into consideration ;

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<sup>(1)</sup> Council Press Release 7760/94 of 20 June 1994

as regards legal protection

5. Points out that the central data bank of the CIS contains data not only about goods, means of transport, businesses, fraud trends and the availability of expert knowledge, but also data of a personal nature; feels, therefore, that any person should be able to bring an action or a complaint before the national courts concerning personal data relating to himself in the CIS;
6. Demands that those concerned by personal data stored in the CIS must enjoy, in particular, a right to information and moreover, without prejudice to national data protection rights, the rights laid down in Recommendation R(87)15 of the Committee of Ministers of the Council of Europe of 17 September 1987;
7. Believes, moreover, that it must be possible to refer disputes which have a bearing on the rules and the multilateral nature of the Convention to the Court of First Instance or the Court of Justice of the European Communities;
8. Considers the compromise regarding the preliminary interpretation in respect of Europol inadequate and therefore undesirable for the CIS, since it still refers to the possibility of optional full or limited accession to the protocol, and that it is therefore probable that one or more Member States will not join and that others will avail themselves of provisos;
9. Draws attention to the legal protection for Member States and takes the view that the lack of legal protection for the non-specified institutions of the Union, in particular the European Parliament, must be made good;

other matters

10. Takes the view that there is overlapping between the systems, particularly between Europol and the EIS;
11. Emphasizes that data processing systems geared to different objectives in customs, police and general administration are preferable to a uniform European data processing system having regard to the specificity rule under data protection law and in the interests of the effectiveness of area-specific data protection regulations;
12. Calls on the Council to issue, in the interests of clarity, a statement to specify what is meant by the use of data 'for other purposes' (Article 8(1) of the Convention);
13. Calls on the European Union to guarantee as soon as possible a right to self-determination regarding personal data in order to protect individuals and the private sphere in the field of justice and home affairs;
14. Takes the view that the Commission should go beyond technical management of this system and play a greater role in the implementation and coordination of all the systems;
15. Calls on the Commission to determine whether the system could be regulated under the EC Treaty by means of a directive or a regulation;

16. Calls on the Commission, should the abovementioned investigation prove positive, to consider drawing up a proposal on the basis of the provisions of the EC Treaty with a view to replacing the relevant part of the Convention by a regulation or a directive;
17. Advises the national parliaments to refrain from ratifying the Convention and the Agreement unless the Court of First Instance and the European Court of Justice secure a position which is comparable to the one they enjoy under the EC Treaty;
18. Urges that, where necessary, the national parliaments should ensure, upon ratification, that measures are taken with a view to bringing about a very high level of data protection (preventing unauthorized access to the systems, registration of input and registration of consultation, restricting the number of users), that the guarantees in respect of the protection of individuals and their privacy are set at a very high level and that the data protection measures envisaged in the Convention itself are fully complied with;
19. Calls for the annual report of the Committee referred to in Article 16 of the Convention on the use of information technology for customs purposes to be transmitted also to the European Parliament and national parliaments;
20. Instructs its President to forward this resolution to the Council, the Commission and the governments and parliaments of the Member States and the applicant countries.

## **B**

### **EXPLANATORY STATEMENT**

#### **I. Consultation of the European Parliament**

By letter of 14 June 1995 from the French Minister of Foreign Affairs a draft convention on the CIS was forwarded to the European Parliament on the basis of Article K.6 of the EU Treaty. However, this only concerned the French-language version. The document did not become available in the other languages until 8 November 1995 and 27 November 1995, although the texts had already been finalized on 26 July 1995 and the opinions of the European Parliament, which the Council, through the Presidency, must take into consideration according to Article K.6 of the Union Treaty, are therefore now unnecessary for the Council. The European Parliament's opinion can therefore now only be used by the Member States and the national parliaments in ratifying and incorporating the Convention in national legislation.

The publication of decisions in the area of justice and home affairs (hereinafter referred to as JHA) by the Council in the Official Journal<sup>(1)</sup> is a step in the right direction. Publication should however take place before the decision is taken so the European Parliament can express its views. The European Parliament must now, retrospectively, express its views on three texts:

1. The Council Act of 26 July 1995 drawing up the Convention on the use of information technology for customs purposes (hereinafter referred to as the Act),
2. The Convention drawn up on the basis of Article K.3 of the Treaty on European Union on the use of information technology for customs purposes (hereinafter referred to as the Convention),
3. The Agreement on provisional application between certain Member States of the European Union of the Convention drawn up on the basis of Article K.3 of the Treaty on European Union on the use of information technology for customs purposes (hereinafter referred to as the Agreement).

#### **II. Not one but two customs information systems**

Although only Article 22(2) makes reference to it there is not in fact one customs information system but two:

- the system referred to in this Convention
- the customs information system for the purpose of applying the customs and agricultural rules of the Community<sup>(2)</sup>

The two systems will be linked (though this is not stated anywhere in the Convention) so ultimately only one system will result for customs officials.

#### **III. Comments relating to the Act**

The Act names the legal basis, a matter of common interest in the area of JHA and Article K.3(2)(c). It then recommends its adoption by the Member States in accordance with their respective constitutional requirements. It might also be pointed out that the Convention applying the Schengen

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<sup>(1)</sup> OJ C 316, 27.11.1995, p. 33 ff.

OJ C 316, 27.11.1995, p. 58 ff.

<sup>(2)</sup> OJ C 72, 15.3.1993, pp. 147 ff.

Agreement (CSA) does not provide for a specific customs information system but that Article 125 of the CSA does provide for the mutual placement of liaison officials.

#### IV. Comments on the Convention

In the opinion of the rapporteur the Convention is based on Articles K, K.1 and K.3 of the EU Treaty. The question whether the CIS does not fall within EC competence (which of course rules out application of Articles K to K.9<sup>(1)</sup>) needs to be answered first of all. For that purpose, according to the constant case law of the Court of Justice of the European Communities<sup>(2)</sup>, it is necessary to consider the purpose and content of the measure.

The Convention relates to an area which concerns measures to combat infringements of national laws, in particular with regard to the movement of goods which are subject to prohibitions, restrictions or controls as defined in Articles 36 and 223 of the EC Treaty. There is no list of such goods in the Convention, but Article 36 of the EC Treaty states: *'The provisions of Articles 30 to 34 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States'*.

It can thus be assumed that the abovementioned goods concern, in particular, such items as drugs, weapons, pornography, racist literature, protected plant and animal species, counterfeit products etc. The aim of the customs system, after it comes into operation, will be, according to Article 2, *'to assist in preventing, investigating and prosecuting serious contraventions of national laws by increasing, through the rapid dissemination of information, the effectiveness of the cooperation and control procedures of the customs administrations of the Member States'* to comprise data relating to (i) commodities, (ii) means of transport, (iii) businesses, (iv) persons, (v) fraud trends, (vi) availability of expertise<sup>(3)</sup>; the information in respect of persons will comprise (i) name, maiden name, forenames and aliases, (ii) date and place of birth, (iii) nationality, (iv) sex, (v) any particular objective and permanent physical characteristics (vi) reasons for inclusion of data in the customs information system, (vii) suggested action, (viii) a warning code indicating any history of being armed, violent or escaping<sup>(4)</sup>

There is no obvious case for Community competence in the above area but given that the internal market has been in force since 1 January 1993, questions must be raised about the exceptions laid down in Articles 36 and 223 of the EC Treaty. Without dwelling on this matter at excessive length it must be concluded, on the basis of the attached opinions of the relevant committees, that there might at least be a case for restricted Community competence (for example with regard to the use of means of transport, fraud, which of course often has implications for the Community's finances, the prevention of money laundering etc.). The Commission, as guardian of the Treaties, must therefore be instructed to draw up a study on the matter.

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<sup>(1)</sup> See Article K.

<sup>(2)</sup> See, for example, the judgment of 28 June 1994 - C 187/93 - ECR 1994, p. I-2857.

<sup>(3)</sup> See Article 3.

<sup>(4)</sup> See Article 4.

The customs information system consists of a central data bank and is accessible through terminals in every Member State. The terms 'sighting', 'discreet surveillance' and 'specific checks' are of major importance though they are not defined<sup>(1)</sup>.

How data are inputted is not very clearly defined: Article 9(1) provides merely that the inclusion of data is governed by the laws, regulations and procedures of the supplying Member State unless this Convention lays down more stringent provisions.

A comparable provision applies also to the use of data<sup>(2)</sup>, though Article 8 specifies that the data may be used for administrative or other purposes with the authorization of and subject to any conditions imposed by the Member States which included it in the system.

Amendments may be made only by the Member State which included the data in the system.

Article 7 provides that *'the national authorities designated by each Member State ... shall be customs administrations, but may also include other authorities competent, according to the laws, regulations and procedures of the Member State in question, to act in order to achieve the aim stated in Article 2(2)'*. The definitions are too vague.

Not all of the Member States have legislation and implementation of the legislation which guarantees protection of personal data at the same level. The rules must therefore be precisely defined.

The structure of protection in respect of the CIS is as follows:

- protection in the strict sense of the term: the Strasbourg Convention of 1981<sup>(3)</sup> and the Recommendation<sup>(4)</sup>, or the structural rules of the CIS Convention,
- 'supervision': national supervisory authority<sup>(5)</sup> and a Joint Supervisory Authority<sup>(6)</sup>
- access by persons included in the system<sup>(7)</sup>
- correction facility for persons included in the system<sup>(6)</sup>.

The various provisions contained in the Union's provisions on the CIS, Europol and the EIS may have negative consequences for citizens. However, it should not be assumed that data about ordinary citizens will be included in the CIS. In most cases the data will concern persons under suspicion or actual offenders. Given the very broad definitions, however, the possibility cannot be ruled out that persons against whom there is no concrete evidence will be included. There is therefore a clear need to make certain changes and clarifications in this respect.

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<sup>(1)</sup> See Articles 5 and 6.

<sup>(2)</sup> Article 9(2).

<sup>(3)</sup> Council of Europe Convention on the Protection of Individuals with regard to Automatic Processing of Personal Data, signed in Strasbourg on 28 January 1981 (also known as the '1981 Strasbourg Convention').

<sup>(4)</sup> Recommendation R(87)15 of 17.09.1987 of the Committee of Ministers of the Council of Europe (hereinafter referred to as the 'Recommendation').

<sup>(5)</sup> See Article 17.

<sup>(6)</sup> See Article 18.

<sup>(7)</sup> See Article 15.

One has the distinct impression that things that were not possible under Europol and are subject to a large number of guarantees are not dealt with so carefully under the CIS and in principle the input and retrieval of data are regulated much less carefully. There is therefore every reason to draw the attention of national parliaments to this point. To achieve efficient, legally secure systems the following approach is necessary:

- a small number of specifically identified persons should be allowed to input data and inputting should be registered;
- input must be subject to a formal, stringent definition;
- input must be supervised 'internally';
- the system must operate very fast;
- it must be possible to consult the system at any location where it is useful to do so;
- there must be rules governing consultation;
- the smallest possible number of persons, who should be specifically identified, should be authorized to retrieve data and reasons must be given for every operation, which must be duly registered;
- it must be possible to carry out analyses of the data inputted;
- it must be possible to carry out analyses of input (policy) and retrieval (policy);
- there must be a facility for making corrections;
- it must be possible to deny access to unauthorized persons;
- there must be no possibility of using the system for unauthorized purposes;
- persons who are interested in taking cognizance of data which concern them must in principle be allowed a right of access, though that right may be restricted if criminal proceedings are in progress against them;
- persons who have an interest must be allowed to lodge a complaint against what they consider to be the incorrect inclusion of data or refusals to supply data and if that complaint is rejected they must be allowed to appeal to an independent court.

Under the CIS Convention the following non-national bodies (in addition to the abovementioned supervisory authorities) are involved in implementation and management:

- (a) the Commission, for the management of the infrastructure<sup>(1)</sup>
- (b) a Committee of Representatives of the Member States<sup>(2)</sup>
- (c) a Joint Supervisory Authority<sup>(3)</sup>.

The Committee is responsible for the implementation and correct application of the Convention and the proper functioning of the Customs Information System with regard to technical and operational aspects.

The Committee takes its decisions unanimously on matters relating to implementation and correct application. It would seem that the Member States, on the one hand, are willing to commit a great deal of data, including personal data, to the CIS but that, on the other hand, there is not a great deal of confidence that the implementation and correct application can be entrusted with the Commission or a majority in the Committee.

#### V. Comments on the agreement

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<sup>(1)</sup> See Article 3.

<sup>(2)</sup> See Article 16.

<sup>(3)</sup> See Article 18, without direct powers.

The Agreement<sup>(1)</sup> was not communicated to the European Parliament until 27 November 1995. The Agreement enters into force on the first day of the third month following the deposit of the instrument of approval, acceptance or ratification by the eight High Contracting Parties to do so<sup>(2)</sup>.

The Convention applies provisionally between the High Contracting Parties to this Agreement as of the first day of the third month following the deposit of the instrument of approval, acceptance or ratification of this Agreement by the eighth High Contracting Party to do so<sup>(3)</sup>.

This seems to mean that if eight Member States have ratified the Agreement and the Convention (and the eight, under the procedure selected, do not need to be the same), the Convention will then be implemented by fifteen Member States. If this text is really applied in this way, the Convention must then be implemented even if certain Member State parliaments do not approve the Convention and thus withhold ratification. The constitutional provisions of certain Member States may be violated by the method applied. The position of the national parliaments will then also be undermined.

The Agreement also provides that Article 7(3) (cooperation with non-Member States) and Article 16 (the Committee) will not be applied during the transitional period (how long that can be we know from the Dublin Convention, possibly 8 years or more). But the question whether the protection of personal data can already be applied remains unanswered.

#### VI. Comments on the Court of Justice of the European Communities

In the event of the same rules applying to the CIS as in the case of Europol, it is worth looking at the situation with regard to the Court of Justice of the European Communities in respect of the Europol Convention.

On 23 July 1996 the Council Act drawing up, on the basis of Article K.3 of the Treaty on European Union, the Protocol on the interpretation, by way of preliminary rulings, by the Court of Justice of the European Communities of the Convention on the establishment of a European Police Office was signed in Brussels<sup>(4)</sup>.

The Protocol regulates the position with regard to preliminary rulings. In a declaration attached to the Protocol the governments of Belgium, the Netherlands, Luxembourg and Italy draw attention to the need to apply the solution provided for in the Protocol on the Europol Convention to be applied to the CIS and to the Convention on the protection of the Community's financial interests.

The solution used for Europol includes the following points:

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<sup>(1)</sup> OJ C 316, 27.11.1995, p. 59 ff.

<sup>(2)</sup> See Article 4 of the Agreement.

<sup>(3)</sup> See Article 2 of the Agreement.

<sup>(4)</sup> OJ C 299, 9.10.1996, p. 1.

- (a) in case of disputes between Member States:  
These are to be discussed in the Council; if no solution is found within 6 months the Member States concerned shall give an undertaking concerning the way in the which the dispute is to be settled<sup>(1)</sup>; (different rules apply in the case of the CIS, see Article 27(1));
- (b) in case of disputes between the institutions of the Union or between Member States and the Institutions: not regulated; (in the case of the CIS a dispute in which the Commission is involved is referred to, see Article 27(2));
- (c) contractual disputes:  
according to the law applicable to the contract concerned<sup>(2)</sup>; (not regulated in the case of the CIS);
- (d) non-contractual liability:  
in principle national law, taking into account the provisions of the Brussels Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters, as later amended by Accession Agreements, with some adjustments<sup>(3)</sup>; (idem in the case of the CIS, see Article 21(2));
- (e) matters subject to preliminary rulings:
  - any judicial authority in the Member State against whose decisions there is no judicial remedy under national law may request the Court of Justice of the European Communities to give a preliminary ruling on a question raised in a case pending before it and concerning the interpretation of the Europol Convention if that court or tribunal considers that a decision on the question is necessary to enable it to give judgment;
  - or any court or tribunal of that Member State may request the Court of Justice of the European Communities to give a preliminary ruling on a question raised in a case pending before it and concerning the interpretation of the Europol Convention if that court or tribunal considers that a decision on the question is necessary to enable it to give judgment;
  - or the Court of Justice of the European Communities is not competent.

The French Republic and Ireland opted for the first category, the Kingdom of Belgium, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Republic of Austria, the Portuguese Republic and the Republic of Finland opted for the second category.

Spain, Sweden and Denmark have announced that they will be making a declaration. It is assumed that the United Kingdom will not be accepting any jurisdiction by the Court of Justice of the European Communities. These different provisions, which moreover do not cover all disputes, will make it very difficult for ordinary people to understand the decision-making process at European level<sup>(4)</sup>.

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<sup>(1)</sup> Article 40 of the Europol Convention, OJ C 316, 27.11.1996, p. 20.

<sup>(2)</sup> Article 39(1) of the Europol Convention.

<sup>(3)</sup> See Articles 38 and 39 of the Europol Convention.

<sup>(4)</sup> The Council has meanwhile adopted a protocol concerning the Court's jurisdiction over the CIS (not yet published). As the text of this explanatory statement was completed on 21 November 1996, it was impossible to consider the protocol.

## Comments on costs

*'The costs in connection with the operation and use of the Customs Information System by the Member States on their territories shall be borne by each of them.'*<sup>(1)</sup> .

*'Other expenditure incurred in the implementation of this Convention, except for that which cannot be kept separate from the operation of the Customs Information System for the purpose of applying the customs and agricultural rules of the Community, shall be borne by the Member States.'*<sup>(2)</sup>

The costs of the central computer should really be distributed between the Community information system and the CIS. However, Article 22(2) leaves open the possibility of the costs of the CIS being charged to the Community budget, in such a way that they cannot be identified. That would not be right if it is to be assumed that the CIS clearly comes under the third pillar of the EU Treaty.

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<sup>(1)</sup> Article 22(1).

<sup>(2)</sup> Article 22(2), first sentence.

# EUROPEAN PARLIAMENT

28 November 1996

## OPINION

(Rule 147)

for the Committee on Civil Liberties and Internal Affairs

on the Convention, drawn up on the basis of Article K.3 of the Treaty on European Union, on the use of information technology for customs purposes (C4-0520/95)

Committee on Legal Affairs and Citizens' Rights

Draftsman: Mr Wolfgang Ullmann

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## PROCEDURE

At its meeting of 26 July 1995 the Committee on Legal Affairs and Citizens' Rights appointed Mr Wolfgang Ullmann draftsman.

It considered the draft opinion at its meetings of 23 September and 26 November 1996 and at the latter meeting it adopted the conclusions as a whole unanimously.

The following were present for the vote: Rothley, acting chairman; Palacio Vallelersundi, vice-chairman; Ullmann, rapporteur; Berger, Candal, Fabre-Aubrespy, Falconer, Florio, Fontaine, Gebhardt, D. Martin and Mosiek-Urbahn.

### I. THE CONVENTION

The Convention on the use of information technology for customs purposes was signed by the 15 Member States of the European Union on 26 July 1995 in Brussels.

A separate agreement of the same date laid down that the Convention would be implemented provisionally, i.e. until it entered into force, by those Member States which had ratified the separate agreement, subject to ratification by a minimum of eight Member States.

The following special arrangements are in force during the provisional implementation of the Convention: the functions of the committee to be set up pursuant to Article 16 of the Convention and comprising representatives of the customs authorities of the Member States will be carried out jointly by the signatory States and the Commission. Furthermore, Article 7(3), concerning access to the information system for international or regional organizations, may not be used during this period.

As far as termination of the provisional implementation of the Convention is concerned, the agreement simply states that this will end when the Convention enters into force (Article 6). The agreement on the provisional implementation of the Convention will thus expire when all the Member

States have ratified the Convention and it therefore enters into force in accordance with Article 24(3) thereof. The 'provisional implementation' of the Convention may therefore extend for a considerable period. There are no legal reservations about this, as the 'agreement on provisional implementation' itself requires ratification. By substance and procedure it is therefore a fully-fledged international treaty which, through the accession of signatory States, will transform itself into another, virtually identical treaty.

## **II. THE DIVISION OF RESPONSIBILITIES**

The question of cooperation in the customs sphere raises the problem of the legal delimitation of the first and third pillars of the 'three pillars' of the European Union:

The Customs Union and the Common Agricultural Policy are viewed as key areas of the European Community and are based on the legislative competence provided for in Articles 9 to 29 and 38 to 47 of the EC Treaty.

In order to enhance measures to combat fraud in the Customs Union and the Common Agricultural Policy it is intended completely to replace Regulation (EEC) 1468/81<sup>(1)</sup>.

A draft regulation 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 or agricultural matters has now been submitted to the European Parliament for its opinion on the changed legal basis, following the Council's decision to replace Articles 43 and 100a which the Commission had proposed as the legal basis by Articles 43 and 235 of the EC Treaty.

The Regulation provides for the establishment of an automated information system (Customs Information System - CIS) and entrusts the Commission with the operation of this system.

Owing to the theoretical delimitation of competences between the first and third pillars, the field of application of the Regulation is to be limited to official assistance between the administrative authorities of the Member States and cooperation between these authorities and the Commission in the sphere of Community law. The Customs Information System set up by this Regulation will therefore contain data on cases of fraud and offences in the customs and agricultural sphere.

The European Community has no competence in respect of violations of national laws, in particular laws enacted in accordance with Articles 36 (non-harmonized plans and restrictions) and 223 (specific reservations concerning competence) of the EEC Treaty.

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<sup>(1)</sup> Regulation (EEC) No 1468/81 of the Council of 19 May 1981 on mutual assistance systems 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 or agricultural matters (OJ No L 144 of 2.6.1981, p. 1, amended by Regulation (EEC) No 945/87, OJ No L 90, 2.4.1987, p. 3).

These legal distinctions mean that the exchange of information in the customs sphere will take place on the basis of the two legal bases, although in practice there will be only one central system operated by the Commission.

### **III. INDIVIDUAL QUESTIONS**

#### **A. Democratic controls**

It must be pointed out that the European Parliament's participation in implementing cooperation in the spheres of justice and home affairs is very limited.

Despite the inter-state nature of this cooperation, the European Parliament has powers of control, on the basis of Article K.6 of the Treaty on European Union: Article 1 provides that the Presidency and the Commission shall regularly inform the European Parliament of discussions in the areas covered by this Title.

The second paragraph provides that 'the Presidency shall consult the European Parliament on the principal aspects of activities in the areas referred to' in Title VI and 'shall ensure that the views of the European Parliament are duly taken into consideration'. Furthermore, paragraph 3 provides that the European Parliament may ask questions of the Council or make recommendations to it.

#### **B. Judicial controls**

Article K.3.2(c) provides that Member States may transfer to the European Court of Justice jurisdiction to interpret the provisions of conventions and to rule on any disputes regarding their application.

The contracting parties have decided to dispense with an arbitration clause of the kind provided for in the provisions on judicial controls set out in the draft convention<sup>(1)</sup>.

The procedure for settling disputes consists of an interstate mechanism with a subsidiary judicial component:

- disputes between Member States on interpretation or application shall first be discussed in the Council. Should it prove impossible to settle the dispute within a six month period, one of the parties in the dispute may refer the matter to the European Court of Justice;
- disputes between one or more Member States and the Commission concerning application may be referred to the European Court of Justice if they cannot be settled by negotiations.

#### **C. Protection of personal data**

Article 2.2 of the Convention states that the aim of the Customs Information System is to combat serious contraventions of national laws. However, by way of derogation from this provision, Member States may use data 'for administrative or other purposes' (Article 8(1)).

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<sup>(1)</sup> Doc. C4-0248/95 (Article 26)

Where a central data bank is employed to gain access to personal data, fundamental freedoms must be adequately protected. As a primary source of law, the convention provides for a legal framework for the gathering and processing of personal data. There are special rules regarding access to data and the retention of data.

EC Directive 95/46/EC on the protection of natural persons in the processing of personal data specifically excludes the activities set out in Titles VI and VII from the sphere of activities of Community law. However, the Council and Commission have issued a declaration proposing that the principles set out in the EC directive on data processing should be applied by the institutions and bodies of the Union. This would ensure coherence and uniformity in the rules on protection in the Union.

Data protection is primarily a matter for national legislation. However, the Member States are required to comply with minimum standards under international law. The convention provides that the national legal and administrative provisions should ensure a level of protection which is at least equal to that resulting from the principles set out in the Council of Europe's convention of 28 January 1981 on the Protection of Individuals with regard to Automatic Processing of Personal Data.

Personal data protection supervision takes place in two stages:

In accordance with national legal provisions, the supervision of data protection in each Member State is transferred to the independent data protection authority.

In accordance with the provisions of the convention and the convention of the Council of Europe, and taking into account Recommendation R(87)15 of the Committee of Ministers of the Council of Europe, a Joint Supervisory Authority is to be set up consisting of representatives of the national data protection authority, to supervise operation of the Customs Information System.

Furthermore, the Convention regulates the access of international or regional organizations to the information system and requires of third organizations merely that they should ensure an adequate level of protection. It is regrettable that Member States have dropped the condition that data can only be transferred to third parties if an equal level of protection is provided.

#### **IV. CONCLUSIONS**

1. The question of judicial control by the Court of Justice - including preliminary rulings - in the various areas included in Title VI should be clarified as soon as possible. An agreement must be found on this matter within the framework of the IGC.
2. In connection with the ratification procedures, the introduction of an arbitration clause in accordance with Article K.3.2(c) should be considered, taking into account Article K.1.8.
3. The European Union should guarantee as soon as possible a right to self-determination regarding personal data in order to protect individuals and the private sphere in the field of justice and home affairs.
4. In the interests of clarity, the Council should issue a statement to specify what is meant by the use of data 'for other purposes' (Article 8(1) of the Convention).

5. The inadequate democratic and judicial controls on compliance with the obligation to respect human rights and fundamental freedoms provided for in Article K.2.1 must be enhanced by appropriate mechanisms at national and EU levels.
6. The Member States should make use of the IGC framework to establish decision-making and agreement procedures, with the participation of the Community institutions, which are sufficiently effective to obviate the need to apply the provisions of Article K.9.

# EUROPEAN PARLIAMENT

## OPINION

### of the Committee on Economic and Monetary Affairs and Industrial Policy

Letter from the chairman of the committee to Mr MARINHO, chairman of the Committee on Civil Liberties and Internal Affairs

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Brussels, 9 July 1996

**Subject:** **Convention on computerization in the field of customs**  
(COS0274 - 8406/95 - C4-0248/95 - 9909/1/93 - C4-0520/95)

Dear Mr Chairman,

The Committee on Economic and Monetary Affairs and Industrial Policy considered the draft Convention on computerization in the field of customs at its meetings of 26 September 1995, 26 June 1996 and 9 July 1996.

A proposal for a regulation<sup>(1)</sup> currently being considered by the Committee on Budgetary Control covers the aspects of interest to the Community.

The draft convention seeks to complement this proposal in respect of 'third- pillar' tasks so that the national customs authorities of the Member States of the Union may cooperate and a single system may be introduced for the Community and extra-Community aspects of customs activities.

The Committee on Economic and Monetary Affairs and Industrial Policy not only considers that dual use goods fall within the Community's terms of reference but that the Union's institutions (Parliament, the Commission and especially the Court of Justice) must be able to play their part since the implementation of this convention calls for a contribution from the Community budget.

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<sup>(1)</sup> Proposal for a Council Regulation (EEC) replacing Regulation (EEC) No 1468/81 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 or agricultural matters (COM(92) 0544, OJ C 72, 15.3.1993, p. 147)

If the operation of the uniform system is to be monitored effectively, we therefore consider it imperative to ensure this involvement of the Community's institutions.

Yours sincerely,

(sgd) Karl von WOGAU  
Chairman

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The following took part in the vote: von Wogau, chairman; Théonas, vice-chairman; Metten, vice-chairman and draftsman; Areito Toledo, Beres (for Billingham), de Brémond d'Ars, Carlsson, Caudron, Cox (for Larive), De Melo (for Lindqvist), Filippi (for Cassidy), Friedrich, García-Margallo, Garosci, Gasoliba i Böhm, Harrison, Haug (pour Glante), Hautala, Herman, Hoppenstedt, Imaz San Miguel, Krehl (for Murphy), Langen, Lulling, Mezzaroma, Miller, Pérez Royo, Pomes Ruiz (for Peijs), Randzio-Plath, Rapkay, de Rose, Schreiner, Secchi, Thyssen, Torres Marques, Watson and Wibe (for Read).

22 March 1996

## **OPINION**

(Rule 147)

for the Committee on Civil Liberties and Internal Affairs

on the Council Act drawing up the Convention on the use of information technology for customs purposes (OJ C 316, 27.11.1995)

Committee on Budgetary Control

Draftsman: Mr Otto Bardong

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## **PROCEDURE**

At its meeting of 19 July 1995 the Committee on Budgetary Control appointed Mr Bardong, draftsman:

At its meeting of 23 January 1996 it considered the draft opinion.

At its meeting of 19 March 1996 it adopted the conclusions as a whole unanimously.

The following were present for the vote: Theato, chairman; McCartin vice-chairman; Bardong, rapporteur; Dankert, Ewing, Kellett-Bowman, König, Tappin, Tomlinson, Wemheuer and Truscott (Rule 151(4)).

### **I. SIGNING OF THE CONVENTION ON THE USE OF INFORMATION TECHNOLOGY FOR CUSTOMS PURPOSES: THE ENACTING TERMS**

On 26 July 1995, the representatives of the Member States of the European Union signed a Convention on the use of information technology for customs purposes, which the Council forwarded to Member States for ratification pursuant to Article K.3 of the Treaty on European Union.<sup>(1)</sup> The enacting terms of this Convention, the purpose of which is to establish, amongst the Member States, a common data file for customs fraud falling within the scope of the third pillar, are in theory to supplement the future Customs Information System (CIS), which is to be established on the basis of a future Community Regulation repealing Regulation EEC No 1468/81 on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission<sup>(2)</sup>.

To summarize, the future CIS will have two legal bases:

- the Convention on fraud deemed to fall within the scope of the third pillar;
- the future regulation on conventional customs fraud.

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<sup>(1)</sup> Cf. OJ C 316, 27.11.1995, p. 33 et seq. (Notice No: 95/C 316/02)

<sup>(2)</sup> Cf. COM(93)0350 - SYN 450, 1.9.1993 and COM(94)... - COD 0450, 17.2.1994.

1. A misleading title and an objective which does little to foster integration

Firstly, it must be stressed that the Convention's title (Convention on the use of information technology for customs purposes) bears absolutely no relation to its substance.

The sole aim of the Convention is to establish a computerized file to aid the fight against customs fraud relating to goods not covered by the Treaty on European Union, such as narcotics and arms. Its aim is thus narrower in scope than the title given to it by the Council.

Secondly, it should be noted that this Convention does not establish any links with Community databases such as SCENT/CIS and IRENE (action to combat fraud), with indirect taxation (exchanges of data on VAT and products subject to excise duties) or with the proposal currently being drawn up concerning transit.

Likewise, no link is established with the Commission proposal to establish trans-European telematic networks for the interchange of data between administrations (IDA) with a view to facilitating the smooth functioning of the single market, which is of the greatest interest to the Union's customs services.

2. An objective which does not specifically take the protection of the Community's financial interests into account

The Council bases the Convention on the fact that customs administrations are responsible, together with other competent authorities, at the external frontiers of the Community and within the territorial limit thereof, for the prevention, investigation and suppression of offences against not only Community rules but also against national laws, in particular those laws covered by Articles 36 and 223 of the Treaty establishing the European Community.

The aim of the CIS, in accordance with the provisions of the Convention, is 'to assist in preventing, investigating and prosecuting serious contraventions of national laws by increasing, through the rapid dissemination of information, the effectiveness of the cooperation and control procedures of the customs administrations of the Member States' (cf. Article 2(1) and (2) of the Convention).

This wording appears not to go as far as the wording of the recitals in the Convention, which specifically refers to offences against Community rules.

3. A matter on which Parliament should have been consulted

The aim of the Convention setting up the CIS is to improve the effectiveness of measures taken by and cooperation between the customs services responsible for combating customs fraud, drug trafficking and other serious forms of international crime covered by the Convention (e.g. trafficking in arms and nuclear material).

It is likely that the scale of conventional customs fraud (first pillar) is much larger than that of fraud relating to the third pillar (e.g. drugs and the theft of works of art).

The Commission has a very limited role confined to technical management of the infrastructure of the Customs Information System in accordance with the rules provided for by the implementing measures adopted within the Council. The Commission is to report on the management to the committee

established by the Convention and to communicate to that committee the practical arrangements adopted for the technical management.

Because of the subject of the Convention and the nature of the data entered in the databases the matter ought to have been referred to Parliament.

Reference to Parliament was all the more necessary because the CIS Convention is one of the 'principal aspects of [the] activities' of the Union within the meaning of the second paragraph of Article K.6 of the EU Treaty.

On that basis, the Council should have consulted Parliament before taking a decision on the subject of the consultation procedure and the French Presidency's failure to comply with this important procedural requirement was an infringement of the Treaty.

4. The dubious inclusion in the Community budget of a Convention falling within the scope of the third pillar which disregards activities of the same type relating to the first pillar

When the CIS Convention was drawn up, the Member States issued a joint statement noting that certain expenditure included in a list were indispensable for the functioning of the CIS both as regards matters relating to Title VI of the TEU and those relating to the powers of the Community.

Consequently, they wished to include in the Community budget a number of items of expenditure relating to investment and the functioning of the system.

Other expenditure (referred to in Article 22(2) of the Convention) is to be borne by the Member States. Such expenditure covers the future development of the CIS, including the provision of screens and the introduction of technical functions which come under Title VI of the TEU.

## **II. IT IS UNACCEPTABLE THAT THE CIS, WHICH IS DESIGNED TO COMBAT FRAUD, HAS A DUAL LEGAL BASE**

It should be pointed out, first of all, that the CIS will be used mainly for investigating customs offences at the Union's external borders, which requires a single instrument specifically for that purpose.

Moreover, the CIS Convention poses a legal problem relating in particular to the relationship between the first and third pillars of the Treaty on European Union.

In its resolution of 16 December 1993<sup>(3)</sup>, Parliament made a clear distinction between two categories of fraud, namely international fraud, i.e. all deliberate acts of fraud on an international scale and Community fraud, being those acts of fraud which adversely affect the Community's interests.

Point 5 of Article K.1 concerns the combating of fraud on an international scale and does not specify clearly the precise scope of the term 'international fraud'.

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<sup>(3)</sup> OJ C 20, 24.1.1994, p.165.

Indeed, the first paragraph of Article K.1 of the Treaty on European Union lays down that cooperation in the fields of justice and home affairs is to take place '... without prejudice to the powers of the European Community ...', which means that, as regards the interchange of customs data, the provisions of the Treaty, which are of a more binding nature generally, take precedence over the provisions of intergovernmental cooperation laid down in Title VI of the Treaty on European Union.

This being the case, one can only conclude that the subject-matter covered by the CIS as a whole forms an integral part of the Community's competences.

The CIS Convention signed by the Member States on 26 July 1995 contains elements of both criminal and administrative law without it being possible, however, to draw a clear distinction as regards its content or legal nature which would justify its inclusion in two different institutional frameworks (EC Treaty and Title VI of the Treaty on European Union).

The CIS Convention should therefore have been presented in a more suitable framework, and this can only be the EC Treaty.

It is therefore regrettable that the Council acceded to the wishes of certain Member States to have the CIS Convention placed within the inter-governmental domain. The subject matter covered by the CIS should be accommodated within the framework of the EC Treaty, and it is emphasized that the artificial separation between the intergovernmental and the Community frameworks can do nothing but diminish the effectiveness of efforts to combat fraud in general and in particular to protect the Community's financial interests. This confused situation in fact signifies a retreat from the process of integrating customs activities within the Community domain.

### **III. IT IS WRONG THAT THERE SHOULD BE NO MECHANISMS FACILITATING COOPERATION BETWEEN THE COMMUNITY AND THE CIS AS REGARDS ACTION TO COMBAT FRAUD**

Even though the Commission is to ensure the technical management of the infrastructure of the system, the Convention does not provide for any institutional form of cooperation, notably as regards the frauds wrongly dealt with under the third pillar, between the Commission and the Member States, since the CIS only provides links between national units, and, in this connection, it should be pointed out that the right of access to the information system is reserved solely to customs officers of the Member States that are signatories to the Convention.

Moreover, it is not laid down that Parliament should have a right to be kept informed about the activities of the CIS, even though the CIS budget consists of national and Community contributions (Article 22 and joint statement by the Member States approved by the Commission).

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On the basis of the foregoing, the Committee on Budgetary Control calls on the Committee on Civil Liberties and Internal Affairs to incorporate the following paragraphs in the resolution on the CIS Convention:

- A. Notes that the CIS will principally hold data relating to customs fraud, particularly at the Union's external frontiers;

- B. Stresses that the data on fraud to be held by the CIS must be investigated within a Community framework of a regulatory and operational nature;
- C. Takes the view that the CIS must, as a matter of priority, be included within such a framework and regrets that the CIS has a dual legal basis which will cause legal complications leading to an absurd situation, in so far as the data file on customs fraud should have a single legal basis;
- D. Regrets that the CIS Convention (third pillar) has been published before the Community Regulation (first pillar), which has been under consideration for over three years.
- E. Takes the view that the system of financing the CIS budget would have to be amended, providing for an appropriate contribution from the Community budget which takes account of amendments made to the Convention and for checks to be made by the Community authorities responsible for monitoring the implementation of the budget;
- F. Calls for an annual report detailing the results obtained by the CIS to be forwarded to Parliament;
- G. Considers that the subject-matter of the CIS Convention is one of the 'principal aspects of [the] activities' of the Union within the meaning of the second paragraph of Article K.6 of the Treaty on European Union, that on the basis of Article K.6 the Council should have consulted Parliament before adopting the draft Convention and that the Council infringed the Treaty by not consulting the European Parliament beforehand.