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EUROPEAN COMMUNITIES
THE COUNCIL

Brussels, 20 December 1993

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RESTREINT

ENFOCUSTOM 2

NOTE

from : the Presidency

to : the Steering group II (Police and customs cooperation)

Subject: Draft convention between the Member States of the European Economic Community concerning the use of information technology for customs purposes

THE GOVERNMENTS OF THE MEMBER STATES OF THE EUROPEAN ECONOMIC COMMUNITY,

RECALLING the commitments contained in the Convention on the provision of Mutual Assistance by Customs Administrations, done at Rome on 7 September 1967,

RECALLING the Single European Act and the Declarations annexed thereto by the Governments of the Member States,

CONSIDERING 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 regulations, but also against national laws, in particular those laws covered by Articles 36 and 223 of the Treaty establishing the European Economic Community done at Rome on 25 March 1957,

CONSIDERING that a serious threat to public health, morality and security is constituted by the developing trend towards illicit trafficking of all kinds,

CONVINCED that it is necessary to reinforce co-operation between customs administrations, by laying down procedures under which customs administrations may act jointly and exchange personal and other data concerned with illicit trafficking activities, using new technology for the management and transmission of such information, subject to the provisions of the Council of Europe Convention on the Protection of Individuals with Regard to Automatic Processing of Personal Data done at Strasbourg on 28 January 1981,

BEARING IN MIND that the customs administrations in their day to day work have to implement both Community and non-Community provisions, and that there is consequently an obvious need to ensure that the provisions on mutual assistance and administrative co-operation in both sectors evolve as far as possible in parallel,

HAVE AGREED AS FOLLOWS:

CHAPTER I

DEFINITIONS

Article 1

For the purposes of this Convention,

1. The term "national laws" means laws or regulations of a Contracting State, in the application of which the customs administration of that Contracting State has total or partial competence, concerning:

- the movement of goods subject to measures of prohibition, restriction or control, in particular those measures covered by Articles 36 and 223 of the Treaty establishing the European Economic Community,

- the transfer, conversion, concealment, or disguise of property or proceeds derived from, obtained directly or indirectly through, or used in, illicit international drug trafficking;

2. The term "personal data" means any information relating to an identified or identifiable individual.

3. The term "supplying Contracting State" means a State which includes an item of data in the Customs Information System.

CHAPTER II

ESTABLISHMENT OF A CUSTOMS INFORMATION SYSTEM

Article 2

1. The customs administrations of the Contracting States shall set-up and maintain a joint automated information system for customs purposes, hereinafter referred to as the "Customs Information System".

2. The aim of the Customs Information System, according to the provisions of this Convention, shall be to assist in preventing, investigating and prosecuting serious contraventions of national laws by increasing, through the rapid dissemination of information, the effectiveness of the co-operation and control procedures of the customs administrations of the Contracting States.

CHAPTER III

OPERATION AND USE OF THE CUSTOMS INFORMATION SYSTEM

Article 3

The Customs Information System shall consist of a central data base facility and it shall be accessible via terminals in each contracting State. It shall comprise exclusively data necessary to fulfil its aim as stated in Article 2(2), including personal data, in the following categories:

(i) commodities;

(ii) means of transport;

(iii) businesses;

(iv) persons;

(v) fraud trends;

(vi) availability of expertise.

Article 4

The Contracting States shall determine the items to be included in the Customs Information System relating to each of the categories (i) to (vi) in Article 3 to the extent that this is necessary to fulfil the aim of the system. No items of personal data shall be included within categories (v) and (vi) of Article 3. The items of information included in respect of persons shall comprise no more than:

(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) reason for inclusion of data;

(vii) suggested action;

(viii) a warning code indicating any history of being armed, violent or escaping.

In any case personal data listed in Article 6 first sentence of the Council of Europe Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data done at Strasbourg on 28 January 1981, hereinafter referred to as the "1981 Strasbourg Convention," shall not be included.

Article 5

1. Data in categories (i) - (iv) of Article 3 shall be included in the Customs Information System only for the purpose of sighting and reporting, discreet surveillance or specific checks.

2. For the purpose of the suggested actions referred to in paragraph 1, personal data within any of the categories (i) - (iv) of Article 3 may be included in the Customs Information System only if, especially on the basis of prior illegal activities, there are real indications to suggest that the person concerned has committed, is in the act of committing, or will commit serious contraventions of national laws.

Article 6

1. If the suggested actions referred to in Article 5(1) are carried out, the following information may in whole, or in part, be collected and transmitted to the supplying Contracting State:

(i) the fact that the commodity, means of transport, business or person reported has been found;

(ii) the place, time or reason for the check;

(iii) the route and destination of the journey;

(iv) persons accompanying the person concerned or occupants of the means of transport;

(v) the means of transport used;

(vi) objects carried;

(vii) the circumstances under which the commodity, means of transport, business or person was found.

When such information is collected in the course of discreet surveillance steps must be taken to ensure that the discreet nature of the surveillance is not jeopardized.

2. In the context of a specific check referred to in Article 5(1) persons, means of transport and objects may be searched to the extent permissible and in accordance with the laws, regulations and procedures of the Contracting State in which the search takes place. If the specific check is not permitted by the law of a Contracting State, it shall automatically be converted by that Contracting State into sighting and reporting.

Article 7

1. Direct access to data included in the Customs Information System shall be reserved exclusively for the national authorities designated by each Contracting State. These national authorities shall be customs administrations, but may include other authorities also competent, according to the laws, regulations and procedures of the Contracting State in question, to act in order to achieve the aim stated in Article 2(2).

2. Each Contracting State shall send the other Contracting States and the [Executive Committee] referred to in Article 15 a list of its competent authorities which have been designated in accordance with paragraph 1 to have direct access to the Customs Information System stating, for each authority, which data it may have access to and for what purposes.

3. Notwithstanding the provisions of paragraphs 1 and 2, Contracting States may, by unanimous agreement, permit access to the Customs Information System by international or regional organizations. Such agreement shall take the form of a protocol to this Convention. In reaching their decision the Contracting States shall take account of any reciprocal arrangements and any opinion of the Joint Supervisory Authority mentioned in Article 18 on the adequacy of data protection measures.

Article 8

1. The Contracting States may only use data obtained from the Customs Information System in order to achieve the aim stated in Article 2(2), except that they may use it for administrative or other purposes with the prior authorization of and subject to any conditions imposed by, the Contracting State which included it in the system. Such other use shall be in accordance with the laws, regulations and procedures of the Contracting State which seeks to use it and should take into account Principle 5.5. of the Recommendation R(87)15 of 17 September 1987 of the Committee of Ministers of the Council of Europe.

2. Without prejudice to paragraphs 1 and 4 of this Article and Article 7(3), data obtained from the Customs Information System shall only be used by national authorities in each Contracting State designated by the Contracting State in question, which are competent, in accordance with the laws, regulations and procedures of that Contracting State, to act in order to achieve the aim stated in Article 2(2).

3. Each Contracting State shall send the other Contracting States and the [Executive Committee] a list of the competent authorities it has designated in accordance with paragraph 2.

4. Data obtained from the Customs Information System may, with the prior authorization of, and subject to any conditions imposed by, the Contracting State which included it in the System, be communicated for use by national authorities other than those designated under paragraph 2, non-Contracting States, and international or regional organizations. Each Contracting State shall take special measures to ensure the security of such data when it is being transmitted or supplied to services located outside its territory. Details of such measures must be communicated to the Joint Supervisory Authority referred to in Article 18.

Article 9

1. The inclusion of data in the Customs Information System shall be governed by the laws, regulations and procedures of the supplying Contracting State unless this Convention lays down more stringent provisions.

2. The use of data obtained from the Customs Information System, including performance of any action under Article 5 suggested by the supplying Contracting State, shall be governed by the laws, regulations and procedures of the Contracting State using such data, unless this Convention lays down more stringent provisions.

Article 9a

1. Each of the Contracting States shall designate a competent customs administration which shall have national responsibility for the Customs Information System.

2. This administration shall be responsible for the correct operation of the Customs Information System within the Contracting State and shall take the measures necessary to ensure compliance with the provisions of this Convention.

3. The Contracting States shall inform one another of the competent administration referred to in paragraph 1.

CHAPTER IV

AMENDMENT OF DATA

Article 10

1. Only the supplying Contracting State shall have the right to amend, supplement, correct, or delete data which it has included in the Customs Information System.

2. Should a supplying Contracting State note, or have drawn to its attention, that the data it included are factually inaccurate or were included, or are stored contrary to this Convention, it shall amend, supplement, correct or delete the data, as appropriate, and shall advise the other Contracting States accordingly.

3. If one of the Contracting States has evidence to suggest that an item of data is factually inaccurate, or was included or is stored on the Customs Information System, contrary to this Convention, it shall advise the supplying Contracting State as soon as possible. The latter shall check the data concerned and, if necessary, correct or delete the item without delay. The supplying Contracting State shall advise the other Contracting States of any correction or deletion effected.

4. If, when including data in the Customs Information System, a Contracting State notes that its report conflicts with a previous report as to content or suggested action, it shall immediately advise the Contracting State which made the previous report. The two Contracting States shall then attempt to resolve the matter. In the event of disagreement, the first report shall stand, but those parts of the new report which do not conflict shall be included in the system.

5. Subject to the provisions of this Convention, where in any Contracting State a court, or other competent authority within that Contracting State, makes a final decision as to amendment, supplementation, correction, or deletion, of data in the Customs Information System, the Contracting States shall undertake amongst themselves to execute such a decision. In the event of conflict between such decisions of courts or other competent authorities in different Contracting States, including those referred to in Article 14(4) concerning correction or deletion, the Contracting State which included the data in question shall delete it from the System.

CHAPTER V

RETENTION OF DATA

Article 11

1. Data included in the Customs Information System shall be kept only for the time necessary to achieve the purpose for which it was included. The need for its retention shall be reviewed at least annually by the supplying Contracting State.

2. The supplying Contracting State may, within the review period, decide to retain data until the next review if its retention is necessary for the purposes for which it was included. Without prejudice to Article 14, if there is no decision to retain data it shall automatically be transferred to that part of the Customs Information System to which access shall be limited in accordance with paragraph 4.

3. The Customs Information System shall automatically inform the supplying Contracting State of a scheduled transfer of data from the Customs Information System under paragraph 2, giving one month's notice.

4. Data transferred under paragraph 2 shall continue to be retained for one year within the Customs Information System, but, without prejudice to Article 14, shall be accessible only to a representative of the Management Committee referred to in Article 16 or to the supervisory authorities referred to in Articles 17(1) and 18(1). During that period they may consult the data only for the purposes of checking its accuracy and lawfulness, after which it must be deleted.

CHAPTER VI

PERSONAL DATA PROTECTION

Article 12

1. Each Contracting State intending to receive personal data from, or include it in, the Customs Information System shall, no later than the time of entry into force of this Convention, adopt the national legislation sufficient to achieve a level of protection of personal data at least equal to that resulting from the principles of the 1981 Strasbourg Convention.

2. A Contracting State shall only receive personal data from, or include it in, the Customs Information System where the arrangements for the protection of such data provided for in paragraph 1 have entered into force in the territory of that Contracting State. The Contracting State shall also have previously designated a national supervisory authority or authorities in accordance with Article 17.

3. In order to ensure the proper application of the data protection provisions in this Convention, the Customs Information System shall be regarded in every Contracting State as a national data file subject to the national provisions referred to in paragraph 1 and any more stringent provisions contained in this Convention.

Article 13

1. Subject to Article 8(1), each Contracting State shall ensure that it shall be unlawful under its laws, regulations and procedures for personal data from the Customs Information System to be used other than for the purpose of the aim stated in Article 2(2).

2. Data may be duplicated only for technical purposes, provided that such duplication is necessary for direct searching by the authorities referred to in Article 7. Subject to Article 8(1), personal data included by other Contracting States may not be copied from the Customs Information System in other national data files.

Article 14

1. The rights of persons with regard to personal data in the Customs Information System, in particular their right of access, shall be put into effect in accordance with the laws, regulations and procedures of the Contracting State in which such rights are invoked. If laid down in the laws, regulations and procedures of the Contracting State concerned, the national supervisory authority provided for in Article 17 shall decide whether information is to be communicated and the procedures for doing so. A Contracting State which has not supplied the data concerned may only communicate data if it has first given the supplying Contracting State an opportunity to take its position.

2. A Contracting State, to which an application for access to personal data is made, shall refuse access if access may undermine the performance of the legal task specified in the report pursuant to Article 5(1), or in order to protect the rights and freedoms of others. Access shall be refused in any event during the period of discreet surveillance or sighting and reporting.

3. In each Contracting State, a person may, according to the laws, regulations and procedures of the Contracting State concerned, have personal data relating to himself corrected or deleted if that data is factually inaccurate, or was included or is stored in the Customs Information System contrary to the aim stated in Article 2(2) of this Convention or to the provisions of Article 5 of the 1981 Strasbourg Convention.

4. In the territory of each Contracting State, any person may, in accordance with the laws, regulations and procedures of the Contracting State in question, bring an action or, if appropriate, a complaint before the courts or the authority competent under the laws, regulations and procedures of that Contracting State concerning personal data relating to himself on the Customs Information System, in order to:

(i) correct or delete factually inaccurate personal data;

(ii) correct or delete personal data included or stored in the Customs Information System contrary to this Convention;

(iii) obtain access to personal data;

(iv) obtain compensation pursuant to Article 21(2).

The Contracting States concerned shall undertake amongst themselves to execute final decisions taken by a court, or other competent authority, pursuant to (i), (ii) and (iii), of this paragraph.

5. The references in this Article and in Article 10(5) to a "final decision" do not imply any obligation on the part of any Contracting State to appeal against a decision taken by a court or other competent authority.

CHAPTER VII

INSTITUTIONAL FRAMEWORK

[Article 15

1. An Executive Committee consisting of representatives from the Customs Administrations of the Contracting States shall be set up. The Executive Committee shall take its decisions unanimously and shall draw up its own rules of procedure.

2. The Executive Committee shall be responsible for the correct application of the provisions of this Convention, without prejudice to the powers of the supervisory authorities referred in Articles 17(1) and 18(1).]

Article 16

1. A Customs Information System Management Committee, hereafter referred to as the "Management Committee", consisting of representatives from the customs administrations of the Contracting States shall be set up. The Management Committee shall determine its rules of procedure. These shall be referred to the [Executive Committee] for approval.

2. The Management Committee shall be responsible for the proper functioning of the Customs Information System with regard to technical and operational aspects. The Management Committee shall take all necessary steps to ensure that the measures set out in Articles 11 and 15 are properly implemented with regard to the Customs Information System. For the purposes of this paragraph only, the Management Committee may have direct access to, and use of, data from the Customs Information System.

3. The Management Committee shall report regularly to the [Executive Committee] regarding the efficiency and effectiveness of the Customs Information System, making recommendations as necessary.

CHAPTER VIII

PERSONAL DATA PROTECTION SUPERVISION

Article 17

1. Each Contracting State shall designate a national supervisory authority or authorities responsible for personal data protection to carry out independent supervision of such data included in the Customs Information System. The supervisory authorities, in conformity with their respective national legislations, are independently to supervise and carry out checks, to ensure that the processing and use of data held in the Customs Information System do not violate the rights of the person concerned. For this purpose the supervisory authorities shall have access to the Customs Information System.

2. Any person may ask any national supervisory authority to check personal data relating to himself on the Customs Information System and the use which has been or is being made of that data. That right shall be governed by the laws, regulations and procedures of the Contracting State in which the request is made. If the data have been included by another Contracting State, the check shall be carried out in close co-ordination with that Contracting State's national supervisory authority.

Article 18

1. A Joint Supervisory Authority shall be set up, consisting of two representatives from each Contracting State drawn from the respective independent national supervisory authority or authorities.

2. The Joint Supervisory Authority shall perform its task in accordance with the provisions of this Convention and of the 1981 Strasbourg Convention taking into account Recommendation R(87) 15 of 17 September 1987 of the Committee of Ministers of the Council of Europe.

3. The Joint Supervisory Authority shall be competent to supervise operation of the Customs Information System, to examine any difficulties of application or interpretation which may arise during its operation, to study problems which may arise with regard to the exercise of independent supervision by the national supervisory authorities of the Contracting States, or in the exercise of rights of access by individuals to the System, and to draw up proposals for the purpose of finding joint solutions to problems.

4. For the purpose of fulfilling its responsibilities, the Joint Supervisory Authority shall have access to the Customs Information System.

5. Reports drawn up by the Joint Supervisory Authority shall be forwarded to the authorities to which the national supervisory authorities submit their reports.

CHAPTER IX

SECURITY OF THE CUSTOMS INFORMATION SYSTEM

Article 19

1. All necessary administrative measures to maintain security shall be taken:

(i) by the competent authorities of the Contracting States in respect of the terminals of the Customs Information System in their respective States;

(ii) by the Management Committee in respect of the Customs Information System and the terminals located on the same premises as the system and used for technical purposes and the checks required by paragraph 3;

2. In particular the competent authorities and the Management Committee shall take measures:

(i) to prevent any unauthorized person from having access to installations used for the processing of data;

(ii) to prevent data and data media from being read, copied, modified or removed by unauthorized persons;

(iii) to prevent the unauthorized entry of data and any unauthorized consultation, modification, or deletion of data;

(iv) to prevent data in the Customs Information System from being accessed by unauthorized persons by means of data transmission equipment;

(v) to guarantee that, with respect to the use of the Customs Information System, authorized persons have right of access only to data for which they have competence;

(vi) to guarantee that it is possible to check and establish to which authorities data may be transmitted by data transmission equipment;

(vii) to guarantee that it is possible to check and establish a posteriori what data has been introduced into the Customs Information System, when and by whom, and to monitor interrogation;

(viii) to prevent the unauthorized reading, copying, modification or deletion of data during the transmission of data and the transport of data media.

3. The Management Committee shall monitor interrogation of the Customs Information System for the purpose of checking that searches made were admissible and were made by authorized users. At least 1% of all searches made shall be checked. A record of such searches and checks shall be maintained in the System, shall be used only for the said purpose by the Management Committee and the supervisory authorities referred to in Articles 17 and 18, and shall be deleted after six months.

Article 20

The competent customs administration referred to in Article 9a (1) of this Convention shall be responsible for the security measures set out in Article 19, in relation to the terminals located in its territory, the review functions set out in Article 11(1) and (2), and otherwise for the proper implementation of this Convention so far as is necessary under its laws, regulations and procedures.

CHAPTER X

RESPONSIBILITIES AND LIABILITIES

Article 21

1. Each Contracting State shall be responsible for the accuracy, currency and lawfulness of data it has included in the Customs Information System. Each Contracting State shall also be responsible for complying with the provisions of Article 5 of the 1981 Strasbourg Convention.

2. Each Contracting State shall be liable, in accordance with its own laws, regulations and procedures for injury caused to a person through the use of the Customs Information System in the Contracting State concerned. This shall also be the case where the injury was caused by the supplying Contracting State entering inaccurate data or entering data contrary to this Convention.

3. If the Contracting State against which an action in respect of inaccurate data is brought is not the Contracting State which supplied it, the Contracting States concerned shall seek agreement as to what proportion, if any, of the sums paid out in compensation shall be reimbursed by the supplying Contracting State to the other Contracting State. Any such sums agreed shall be reimbursed on request.

Article 22

1. Insofar as not borne by third parties each Contracting State shall bear the costs incurred in connection with the operation and use of Customs Information System terminals situated on its territory and their interconnection to that system.

2. The costs of:

(i) installation, maintenance and insurance of the Customs Information System, including any terminals located on the same premises as the System, and the employment of staff needed to ensure its proper functioning;

(ii) action taken by the Management Committee, additional to any covered by (i), pursuant to Articles 11(4), 16, or 19;

(iii) meetings of the [Executive Committee],

insofar as not borne by third parties, shall be defrayed jointly by the Contracting States. Each Contracting State's share shall be determined according to the proportion of its gross national product to the sum total of the gross national products of the Contracting States for the year preceding the year in which the costs are incurred. For the purposes of this subparagraph the expression "gross national product" means the gross national product determined in accordance with Council Directive 89/130/EEC, EURATOM of 13 February 1989 on the harmonization of the compilation of gross national product at market prices or any amending or replacing Community instrument.

CHAPTER XI

IMPLEMENTATION AND FINAL PROVISIONS

Article 23

The information provided for under this Convention shall be exchanged directly between the authorities of the Contracting States.

Article 24

1. This Convention shall be ratified or approved and the instruments of ratification or approval shall be deposited with the General Secretariat of the Council of the European Communities which shall advise all Signatory States of that deposit.

2. For Contracting States which have deposited the instruments of ratification or approval, this Convention shall enter into force on the first day of the third month following the deposit of the [second] instrument of ratification or approval.

3. For any State which subsequently ratifies or approves this Convention, it shall enter into force on the first day of the third month following the deposit of its instrument of ratification or approval.

Article 25

1. This Convention is concluded for an unlimited period.

2. Any Contracting State may denounce this Convention at any time after three years from its entry into force for that State by notifying the General Secretariat of the Council of the European Communities which shall notify such denunciation to the other Contracting States.

3. Any denunciation shall take effect six months from the day on which its notification is received by the General Secretariat of the Council of the European Communities.

4. Any Contracting State denouncing this Convention shall ensure that all information supplied by it to the Customs Information System is deleted from the System before the effective date of the denunciation.

Article 25

This Convention, drawn up in a single original in the Danish, Dutch, English, French, German, Greek, Irish, Italian, Portuguese and Spanish languages, each text being equally authentic, shall be deposited in the archives of the General Secretariat of the Council of the European Communities which shall transmit a certified copy to each of the Signatory States.

In witness whereof the undersigned, being duly authorized, have signed this Convention.

Done at Brussels on

[Declaration of Ireland relating to Article 14(2)

"The Contracting States declare that Article 14(2) does not impose on any Contracting State any obligation to refuse access to any personal data on the ground of protecting the rights and freedoms of others other than in accordance with a law of that State providing for such refusal on that ground which complies with Article 9 of the 1981 Strasbourg Convention or to enact any such law".]

[Declaration by the Federal Republic of Germany regarding Article 6(2)

"If any of the measures referred to in sentence 2 are not permitted under the law of the Federal Republic of Germany, the Federal Republic of Germany will take another measure which is permissible under this law, within the meaning of Article 5(1)."]

Declaration relating to the Naples Convention

"The Contracting States, recalling the declaration made by the Heads of Customs Administrations of the Member States of the European Community in Harrogate in May 1992, agree that a review of the Convention on the Provision of Mutual Assistance by Customs Authorities of 7 September 1967 (known as the Naples Convention), including its provisions on data protection is necessary. Endeavours must be made to achieve at least the same rules for conventional data protection, as have been agreed in the replacement EEC regulation for 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 and agricultural matters."

Article 14 (2)

Un Etat contractant, auquel est soumise une demande d'accès, refuse cet accès si la communication de l'information à la personnne concernée peut nuire à la mise en oeuvre de l'action suggérée conformément à l'article 5(1), ou pour la protection des droits et libertés d'autrui. L'accès est refusé dans tous les cas durant la période de signalement aux fins de surveillance discrète ou d'observation et de compte-rendu.

Artikel 14(2)

Die Auskunfterteilung an den Betroffenen unterbleibt, wenn dies zur Durchführung einer rechtmäßigen Aufgabe im Zusammenhang mit der Ausschreibung gemäß Artikel 6 (1), oder zum Schutz der Rechte und Freiheiten Dritter unerläßlich ist. Die Auskunfterteilung unterbleibt immer während der verdeckten Registrierung beziehungsweise während der Feststellung und Unterrichtung.