



**EUROPEAN COMMISSION**  
EUROPEAN ANTI-FRAUD OFFICE (OLAF)  
General Affairs  
**Legislation & legal affairs**

Brussels,  
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## **NOTE TO THE FILE**

**Subject: Amending Regulation 515/97 — Definition of customs legislation — VAT-related information**

### **1. WHY DO CUSTOMS AUTHORITIES NEED VAT-RELATED INFORMATION?**

Customs authorities control all goods entering and exiting the Community. In this context, their task is not limited to the enforcement of customs legislation: they also apply Community law in the fields of VAT, excise and agricultural legislation. Their control function is crucial both for Member States and the Community, since goods cleared by customs can freely circulate in the internal market.

For the moment exchange of information between customs authorities and liaison departments responsible for VAT-related administrative cooperation is not complete and fast enough; for instance it is not possible at night and on week-ends because of the lack of stand-by officers. The proposal seeks to make best use of Customs cooperation and increase the value added of the mutual assistance mechanism, in particular to allow customs authorities to use the automated information exchange systems set up by Regulation 515 for VAT-related information, as well. To that end, it is more than logical to propose that the definition of customs legislation for the purposes of the Regulation include VAT legislation. This clearly echoes requests<sup>1</sup> from the Council itself when asking the Commission in 2001 to mirror the Naples II Convention, the third-pillar equivalent of the Regulation.

### **2. EXAMPLES**

Examples on the practical implication of the inclusion of VAT in the definition of customs legislation for the purposes of the mutual assistance regulation:

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<sup>1</sup> Doc. 13202/01 – ENFOCUSTOM 43 – 5 November 2001 addressed to COREPER

## **2.1. De-registration and cancellation of VAT numbers and the abuse of customs procedure 4200**

The simplified customs procedure consists of postponing the payment of the importation VAT to the final European supplier of the goods. For that purpose the importer has to provide the customs administration with the VAT registration number of this final European supplier.

When a container, imported by a Spanish company from Russia, enters the Community customs territory in a Finnish port, the Finnish customs will examine the import documents, will levy the customs duties and will check whether the import company actually exists. This is necessary to make sure that the importer is not a “phantom”, the VAT registration number is not false, invalid or hijacked, and that the VAT will be paid in Spain. The only way to check that the import company exists is to verify whether its VAT identifier has been allocated and is still in use.

## **2.2. Fictitious export to a third country**

When a consignment of mobile phones, produced in Hungary, is being exported by an Austrian company to Moldova, the exporter can claim the refund of VAT. The Romanian customs authorities, controlling the export of the merchandise, will be interested in checking that the goods effectively leave the customs territory, to make sure that no fictitious exportation is taking place. In fact, customs authorities, which are also responsible for formalities and/or the collection of VAT when customs formalities are completed, should be able to prevent and detect fictitious exports of highly-taxed products to third countries by effective customs cooperation.

## **2.3. False or double invoice**

Even if the issue and the use of false or accommodation invoices is not linked in particular with VAT fraud but can be encountered to avoid the antidumping duties linked to specific quotas, this has to be mentioned here also as a tool which completes the full arsenal of the fraudulent mechanisms to evade VAT. Indeed, where antidumping duties are not integrated in the value, the VAT amount collected should be severely decreased. Such fraud affecting the community and national budgets shall be particularly difficult to detect with the implementation of the centralized clearance mechanism if the provisions on mutual administrative assistance in customs matters are not amended.

## **2.4. Contra trading**

“Contra trading” is a mutation of the VAT carousel affecting the intra-community trade of mobile phones and computers chips for which some Member States introduced recently a change to the rules for VAT repayments in order to prevent such VAT carousel.

The VAT carousel fraud will probably mutate to “contra trading” which involves setting up of two overlapping carousels spinning between various EU Member States and Third countries. One will often involve services (eg software or licences) and the other goods (eg iPods, MP3 players or digital

cameras, cosmetics, etc). Some of the trades will be legitimate and a gang will often make a small VAT payment in one country to disguise a much bigger reclaim in another.

Efforts should be focusing on the better exchange of information to limit as much as possible the contra trading fraud mechanism by the extension of the provisions on mutual administrative assistance in customs to community provisions governing VAT legislation as regards import and export.

### **3. THE COMMISSION PROPOSAL**

The Commission Proposal amending Regulation 515/97 aims at improving cooperation between customs authorities. It seeks to achieve that aim by, inter alia, bringing the definition of customs legislation into line with the Naples II Convention by inserting a reference to VAT legislation. This amendment to Article 2, paragraph 1, indent 1, point (b), which has also received support by the Court of Auditors<sup>2</sup>, is vital to help customs authorities to assist each other efficiently in export-import transactions where no customs duties are payable, since the customs authorities are also responsible for formalities and collection of VAT.

### **4. THE LEGAL BASIS**

On 10 September 2007, the Council's Legal Service presented an opinion<sup>3</sup> on the legal basis of the Commission proposal as far as references to VAT legislation are concerned.

In paragraphs 17 and 18 the Legal Service concludes that Article 280 EC cannot be the appropriate legal basis for extending the cooperation measures provided for in Regulation (EC) n° 515/97 to VAT legislation and that the appropriate legal basis for such a measure must necessarily be Article 93 EC.

That conclusion is based on the assumption that the objective of the Proposal is not to protect the Community's financial interests but to ensure compliance with legislation. The Legal Service considers that "the protection of the Community's financial interests in the Proposal would at best be secondary, both in terms of amounts involved and types of irregularities involved, since only those irregularities or fraud affecting the VAT assessment bases would have an impact on the Community's own resources".

However, the recent opinion of the Legal Service does not seem to exclude the possibility of adopting a proposal foreseeing the exchange of VAT-related information for the purposes of the protection of the Community's financial interest.

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<sup>2</sup> Opinion No. 3/2007, Paragraph 7

<sup>3</sup> 12648/07

In fact, the Council's Legal Service, in paragraph 15 of its opinion<sup>4</sup> of 8 March 2005 on the proposed mutual administrative assistance regulation<sup>5</sup>, stated that "[...] distortions caused by VAT fraud in a Member State affect the overall balance of the own resources system [...] and the (financial) interest of the Community in guaranteeing its proper functioning. The result is that Article 280 of the TEC is in fact the appropriate legal basis for the proposed act."

It follows from these considerations that Article 280 EC is a valid legal basis for a piece of legislation seeking to enhance the protection of the Community's financial interests through the exchange of VAT-related information.

The question whether Regulation 515/97 is aimed at the protection of the Community's financial interests has been, however, already answered by the European Court of Justice<sup>6</sup>. Regrettably, the opinion of the Legal Service does not make reference to this case law.

In that case brought by the Commission, the Council argued before the ECJ that

*"[t]he objective of the contested regulation [...] is to combat fraud in the context of the customs union and the common agricultural policy, which calls for cooperation between the same authorities. The protection of the financial interests of the Community, introduced by [Article 280 EC], does not follow from the establishment of the customs union but constitutes an independent objective"; and that*

*"[...] the contested regulation reflects the objective of protecting the financial interests of the Community since it sets up a system to combat [...]"*.<sup>7</sup>

The ECJ pointed out that

*"[...] the protection of the financial interests of the Community does not follow from the establishment of the customs union, but constitutes an independent objective which, under the scheme of the Treaty, is placed in Title II (financial provisions) of Part V relating to the Community institutions and not in Part III on Community policies, which includes the customs union and agriculture"; and that*

*"[the contested regulation] lays down a system of cooperation both between the administrative authorities of the Member States and between those authorities and the Commission, under which the former assist each other by transmitting, in accordance with the detailed rules laid down in the*

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<sup>4</sup> 7125/05

<sup>5</sup> COM(2004) 509 final of 20 July 2004

<sup>6</sup> Case C-209/97 *Commission v Council* ECR [1999] I-8067

<sup>7</sup> See paragraphs 19 and 20 of the judgment.

*regulation, information concerning operations which are or appear contrary to customs or agricultural legislation, or by conducting appropriate administrative enquiries [...]. Furthermore, a specific infrastructure, namely the CIS [...] allows the rapid and systematic exchange of information forwarded to the Commission.”*<sup>8</sup>

The ECJ concluded that “[i]t is apparent from [Regulation 515/97] that, taken as a whole, its aim and specific content is the fight against fraud in the context of the customs union and the common agricultural policy, so that it seeks to protect the financial interests of the Community”<sup>9</sup>.

Consequently, according to the settled case law, Article 280 EC can serve as a valid legal basis for Regulation 515/97 and its amendments.

In any event, the proposal is not incompatible with the case law<sup>10</sup> cited in the opinion<sup>11</sup> of the Legal Service. According to the ECJ, not any exchange of VAT-related information requires Article 93 EC as legal basis, but only legislation which necessitates the amendment of national tax legislation<sup>12</sup>.

The Commission considers that the Council’s Legal Service should be called on to further specify its opinion.

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<sup>8</sup> See paragraphs 29 and 32 of the judgment.

<sup>9</sup> See paragraph 33 of the judgment.

<sup>10</sup> Case C-533/03 *Commission v. Council* ECR [2006] I-1025

<sup>11</sup> See paragraph 18 of the opinion.

<sup>12</sup> See paragraph 58 of the judgment.