

Paving the Way for Improved Mutual Assistance in the Context of Customs Fraud

An introduction to Regulation (EU) 2015/1525

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euclid

European Law Forum: Prevention • Investigation • Prosecution

Article

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CITATION SUGGESTION

E. Porebska, "Paving the Way for Improved Mutual Assistance in the Context of Customs Fraud", 2016, Vol. 11(1), euclid, pp52–55. DOI: <https://doi.org/10.30709/euclid-2016-005>

Published in

2016, Vol. 11(1) euclid pp 52 – 55

ISSN: 1862-6947

<https://euclid.eu>



I. Introduction

Customs fraud is a growing phenomenon, which causes significant damage to the Union's financial interests. The losses resulting from some of the most common types of customs-related fraud (i.e., misdeclaration of origin, misdescription of goods, and misuse of the transit system) are estimated at around €185 million per year.¹ Under Article 325 of the TFEU, it is the responsibility of the Union – as well as its Member States – to protect the EU's financial interests.

Given the scale of the problem, coupled with the growing threat of transborder crime, the importance of combating customs fraud and ensuring effective enforcement is critical. This has led to greater awareness that strengthened and enhanced cooperation is essential at both the national and European level.

In the customs area, a central theme for this cooperation is the gathering and sharing of information and intelligence within the framework of mutual assistance. In this context, Regulation (EC) 515/97² is considered a cornerstone that provides a legal basis for the exchange of information between Member States as well as between Member States and the Commission on matters relating to detection, prevention, and investigation of customs fraud.³

A good example of how the regulation seeks to facilitate the information sharing is the establishment of centralised databases, which include information on customs-related fraud cases and ongoing cross-border investigations (Customs Information System "CIS" and File Identification Database "FIDE"). Both CIS and FIDE are managed by the European Anti-Fraud Office ("OLAF") and used by Member States in their day-to-day operational activities relating to breaches of customs legislation.

Despite the successful application of Regulation (EC) 515/97, in the years following its adoption, quick changes in the way trade operates and has adjusted to new computerised conditions on the market prompted the need to reform the Act. Since the last amendment of Regulation (EC) 515/97 in 2008, the necessity for advancing and expanding the tools available to the authorities when identifying fraud cases became apparent. In its Impact Assessment,⁴ the Commission acknowledged that the limited availability of data was suboptimal for detection of customs fraud, given the volume of trade and rapidly improving methods of operation by fraudsters. In addition, a number of deficiencies in the mutual assistance framework were identified, including the following:

- Legal uncertainty regarding the use of information obtained by means of mutual assistance as evidence in criminal proceedings;
- Delays in OLAF investigations caused by impeded access to supporting documents.⁵

Recognising these shortcomings, the Commission adopted a proposal to amend the legislative act of 1997 on 25 November 2013.⁶ The proposal put forward key ideas designed to tackle the existing loopholes. The intention was as follows:

- To clarify that information obtained via mutual assistance may be used as evidence in criminal proceedings;
- To allow OLAF to request supporting documents directly from the economic operators;
- To create new centralised directory containing data on physical movements of containers and new centralised directory including data relating to goods entering, leaving and transiting the EU.

The legislative negotiations, which were conducted throughout 2014, resulted in the amending Regulation (EU) 2015/1525 being adopted on 9 September 2015.⁷ The following sections will give a summary of and rationale behind the changes introduced by the amendment.

II. Admissibility of Evidence

Articles 12 and 16 of Regulation (EC) 515/97 provide scope for using information obtained on the basis of mutual assistance as evidence. During recent years, however, the question emerged as to in what type of proceedings such information may be relied upon. In particular, it was disputed whether the available legal bases permit Member States to use the information not only in an *administrative* but also in a *criminal* context. A number of national prosecutors voiced their concerns over the lack of legal certainty in this regard and indicated that the legal text is not sufficiently clear to allow them to rely on the evidentiary value of the materials obtained under Regulation (EC) 515/97 in criminal cases.

In order to address this problem, Regulation (EU) 2015/1525 amended both articles, clarifying that information obtained may be used as evidence not only in administrative but also in judicial (criminal) proceedings – provided that the Member State sending the information does not explicitly object.

It is important to emphasise that the adopted modifications *allow* and by no means oblige Member States to rely on the results of mutual assistance in criminal cases. It remains within the competence of national courts to decide whether or not the information in question satisfies the procedural requirements laid down in the national law. This is confirmed by the inclusion in Articles 12 and 16 of references to Article 51 of Regulation (EC) 515/97, which stipulates that the regulation “shall not affect the application in the Member States of rules on criminal procedure.”

The amendment to Articles 12 and 16 is a welcome change that introduces legal certainty. It is hoped that it will further facilitate and increase the utilisation of the results of customs mutual assistance in national courts. However, given the conditionality imposed, the effectiveness of these provisions will ultimately depend on the attitudes of Member States and their willingness to facilitate the cooperation with and use of their findings by other national authorities.

III. Access to Supporting Documents by OLAF

The EU’s mutual assistance framework covers not only cooperation between Member States but also cooperation between the Commission and the Member States. The latter is important in the context of OLAF’s mandate to protect the EU’s financial interests.

OLAF regularly relies on the information obtained from the national authorities in its customs-related investigations. This often includes supporting documents such as invoices, certificates of origin, etc. The problem with the exchange of these documents came up with the introduction of the e-Customs initiative designed to replace paper format customs procedures with EU wide electronic ones. Prior to this, supporting documents were held by the national authorities, and it was relatively easy for OLAF investigators to obtain them, by means of a simple request, within a short period of time. However, since the e-Customs was put in place, the process has been prolonged by several months. The delay was caused by the fact that Member States were no longer in possession of the relevant documentation and needed to approach the economic operator first, before transmitting it to OLAF.

The importance of fast procedures in the context of customs investigations is linked to the possibility of proving breaches of legislation and recovering financial losses before they are time-barred.⁸ Therefore, the delay in obtaining crucial pieces of evidence was indeed problematic.

To remedy the situation, the Commission included in its original proposal a provision allowing OLAF to request relevant documents directly from the economic operators concerned, thereby eliminating any unnecessary delays in obtaining critical information necessary for efficient and effective completion of customs-related investigations.

This part of the proposal, however, proved to be particularly controversial during subsequent legislative negotiations. Many Member States feared that such far-reaching power could potentially interfere with their competences. There were also concerns that the possibility of directly contacting the economic operators without the national authorities serving as interlocutors could undermine ongoing national investigations. A request from OLAF could in many cases serve as a red flag for those companies who might also be involved in a parallel investigation.

Ultimately, a compromise was reached that prescribes specific deadlines for the Member States in providing relevant documentation. The uniform deadlines across the EU seem to offer an optimal, balanced solution to preventing unnecessary delays without jeopardising national investigations.

IV. Improved Availability of Data

The key and most far-reaching part of the amendment of Regulation (EC) 515/97 is the creation of two new data directories that will contain valuable information for detecting customs fraud.

1. CSM directory

Article 18a of Regulation (EC) 515/97 (as amended) provides for the creation of a “CSM directory.” CSM stands for Container Status Message and refers to data relating to physical movements of containers that can be useful in detecting potential fraud patterns and suspicious shipments. Such messages are collected by most major international container lines in the ordinary course of business dealings.

The potential use of CSMs has already been explored in other jurisdictions. For instance, the U.S. Customs and Border Protection has been relying on CSMs since January 2009 as part of security filing (“10+2 rule”), in particular for safety and security purposes.⁹

The added-value offered by CSMs was also studied by OLAF, together with the Commission’s Joint Research Centre, in the so-called “Contraffice project”. This initiative was developed on the basis of CSMs obtained from open sources (i.e., the Internet). A special IT system was created to automatically detect potential fraud cases related to misdeclaration of origin. The underlying analysis relies on the automatic comparison of information included in CSMs (actual physical movements of containers) and information declared in the import declarations known as “SAD” data (Single Administrative Document). Any discrepancy between the two sets of data are considered abnormal, flagged as potentially fraudulent, and sent for information to the customs authorities participating in the pilot project.

With the new Regulation (EU) 2015/1525, the concept initially developed as part of the Contraffice project will now reach its full potential. Instead of relying on incomplete data available on the Internet, the directory will be completed with CSMs provided directly by maritime carriers. The obligation to submit CSMs will apply from 1 September 2016 and will cover import CSMs as well as export CSMs for sensitive goods (i.e., energy products, tobacco, and alcohol).

2. Import, export and transit directory

The second new data directory provided for in Regulation (EU) 2015/1525 is the “Import, export and transit directory.” It is closely interlinked with the CSM directory and constitutes an integral part of the new analytical instrument to be used for operational activities. The sets of data covered relate to importation, exportation, and transit including, *inter alia*, SAD data that will be compared with CSMs and will facilitate the conduct of the analysis outlined above.

The creation of these two new directories has the potential to provide the Member States and OLAF with an effective weapon in the fight against customs-related fraud. As long as data analysis is properly interpreted and applied, it is expected that changes brought about by Regulation (EU) 2015/1525 will allow authorities to better target suspicious shipments, thus facilitating the smooth flow of legitimate trade. This, in fact, is the ultimate purpose of mutual assistance in the area of customs.

V. Conclusion

Regulation (EU) 2015/1525 constitutes an important development in the area of customs mutual assistance. Whilst it was proposed with a view to closing off the loopholes in the existing framework, it aims to go one step further by way of ensuring that the system for detecting customs-related fraud can aptly respond to the challenges posed by the use of increasingly sophisticated *modus operandi* by fraudsters.

Regulation (EU) 2015/1525 addresses several problems that had come up during the implementation of Regulation (EC) 515/97 since the 2008 amendment, such as the use of information collected in mutual assistance procedures in criminal cases and impeded access to supporting documents. What is more, it equips the relevant authorities with a powerful tool to detect fraud cases: the utilisation of modern technology and well developed IT-based analysis.

With the legislative basis in place, the real challenge will lie in managing the voluminous data contained in the new data directories and using it in a resourceful way. This is by no means an easy task, but the experience gathered from the Contraffice project proves that the benefits of coming up to speed with technological advancements in order to be better able to conduct targeted investigations can be significant.

The provisions of Regulation (EC) 2015/1525 will start applying from 1 September 2016 together with the related implementing acts and a delegated act.¹⁰ Importantly, the effectiveness and added value of this initiative will be reviewed relatively soon. Pursuant to the new Article 43b of Regulation (EC) 515/97, the Commission is obliged to publish a report, by 9 October 2017, assessing the necessity of expanding the two new directories to export data not limited to sensitive goods and to explore the feasibility of enlarging the project to include transportation by land and air.

* The content of this article does not reflect the official opinion of the European Union.

1. SWD(2013) 483 final.↔

2. Regulation (EC) No 515/97 of 13 March 1997 on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs and agricultural matters, OJ L 82, 22.3.1997, p. 1↔

3. Regulation (EC) No 515/97 is supplemented by Council Decision 2009/917/JHA, which applies in the areas of Member State's competences.↔

4. SWD(2013) 483 final↔

5. In this context supporting documents include any documentation held by economic operators which relate to the potentially fraudulent operation (e.g., invoices).↔

6. COM(2013) 796 final↔

7. Regulation (EU) 2015/1525 of the European Parliament and of the Council of 9 September 2015 amending Council Regulation (EC) No 515/97 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, *OJ L 243*, 18.9.2015, p. 1–12↔
 8. Article 103 of Regulation (EU) 952/2013↔
 9. Importer Security Filing and Additional Carrier Requirements (commonly known as “10+2 rule”) apply to import cargo arriving to the United States by vessel. Under this rule, before merchandise can be imported into the United States certain advance cargo information must be first submitted to CBP.↔
 10. Commission Implementing Regulation (EU) 2016/345 of 10 March 2016 setting out the frequency of reporting of container status messages, the format of the data and the method of transmission, *OJ L 65*, 11.3.2016, p. 38–39; Commission Implementing Regulation (EU) 2016/346 of 10 March 2016 determining the items to be included in the Customs Information System, *OJ L 65*, 11.3.2016, p. 40–48.↔
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The project is co-financed by the [Union Anti-Fraud Programme \(UAFP\)](#), managed by the [European Anti-Fraud Office \(OLAF\)](#).



**Co-funded by
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