

Import, Export and Transit Directory at OLAF
Prior Checking Opinion
Case 2016-0674

The Import, Export and Transit Directory (IET) at OLAF collects information on movements of goods for customs purposes, including the sender and recipient of goods, which, although they usually refer to companies, may also identify natural persons. It is important to provide adequate information to persons whose data are processed and to ensure that the competent authorities of third countries who may use the system as well provide adequate data protection safeguards.

Brussels, 07 December 2016

1) The Facts

The Import, Export and Transit Directory (IET or “the Directory”) stores declarations for the import, export (only sensitive goods: alcohol, tobacco, energy products) and international transit of goods. The purpose is to allow competent national authorities and the Commission (OLAF)¹ to analyse movements to prevent, investigate and prosecute breaches of customs and agricultural legislation.

The transit part of the IET is an updated version of the Anti-Fraud Transit Information System (ATIS) notified earlier.²

In the vast majority of cases the consignors (senders) and consignees (recipients) will be legal persons, but in some cases their names may allow identifying natural persons. It is also possible - although rare - that consignors and consignees may directly be natural persons.

Access to this information is restricted to nominated users in the designated authorities and at OLAF.

Compared to the earlier ATIS, the main changes are the following:

- conservation periods of data: as long as necessary with a maximum conservation period of five years, plus a possible extension for two years if justified. So far, no criteria for determining whether an extension is necessary have been defined. OLAF plans to conduct consultations of its own investigators as well as of the Member States with a view to establishing criteria;
- access for third-country authorities: OLAF plans to open the use of the *transit* part of the IET to countries outside the EU/EEA that are part of the Convention on a common transit procedure.³ This concerns the Former Yugoslav Republic of Macedonia (FYROM), Serbia and Turkey. Authorities from these countries will be required to sign a set of data protection clauses attached to the ATIS administrative arrangement; the Member States will be consulted before a third country is connected to the system. This third-country access is not active yet;
- sources of data: ATIS sourced its content from the New Computerized Transit Information System (NCTS)⁴; the IET also includes information from the Import Control System (ICS)⁵ and the Export Control System (ECS).

OLAF has prepared a data protection notice for the IET, to be published on its website.

The image below provides an overview of data flows in the system:

¹ The list of competent authorities is the same as for the Customs Information System (CIS), see EDPS cases 2010-0797 to -0799, joint Opinion of 17 October 2011, see https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Supervision/Priorchecks/Opinions/2011/11-10-17_OLAF_EN.pdf.

² EDPS case 2013-1296, Opinion of 18 May 2016, see https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Supervision/Priorchecks/Opinions/2016/16-05-18_OLAF_PC_EN.pdf.

³ Convention between the European Community, the Republic of Austria, the Republic of Finland, the Republic of Iceland, the Kingdom of Norway, the Kingdom of Sweden and the Swiss Confederation on a common transit procedure, OJ L 226 13.8.1987; that Convention has been amended in the meantime, latest by Decision No 1/2016 of the EU-EFTA Joint Committee on common transit of 28 April 2016 amending the Convention of 20 May 1987 on a common transit procedure. Norway, Iceland and Liechtenstein already had access to ATIS as notified in case 2013-1296 as members of the EEA.

⁴ <http://ec.europa.eu/dpo-register/details.htm?id=38088>

⁵ http://ec.europa.eu/ecip/help/faq/ens7_en.htm

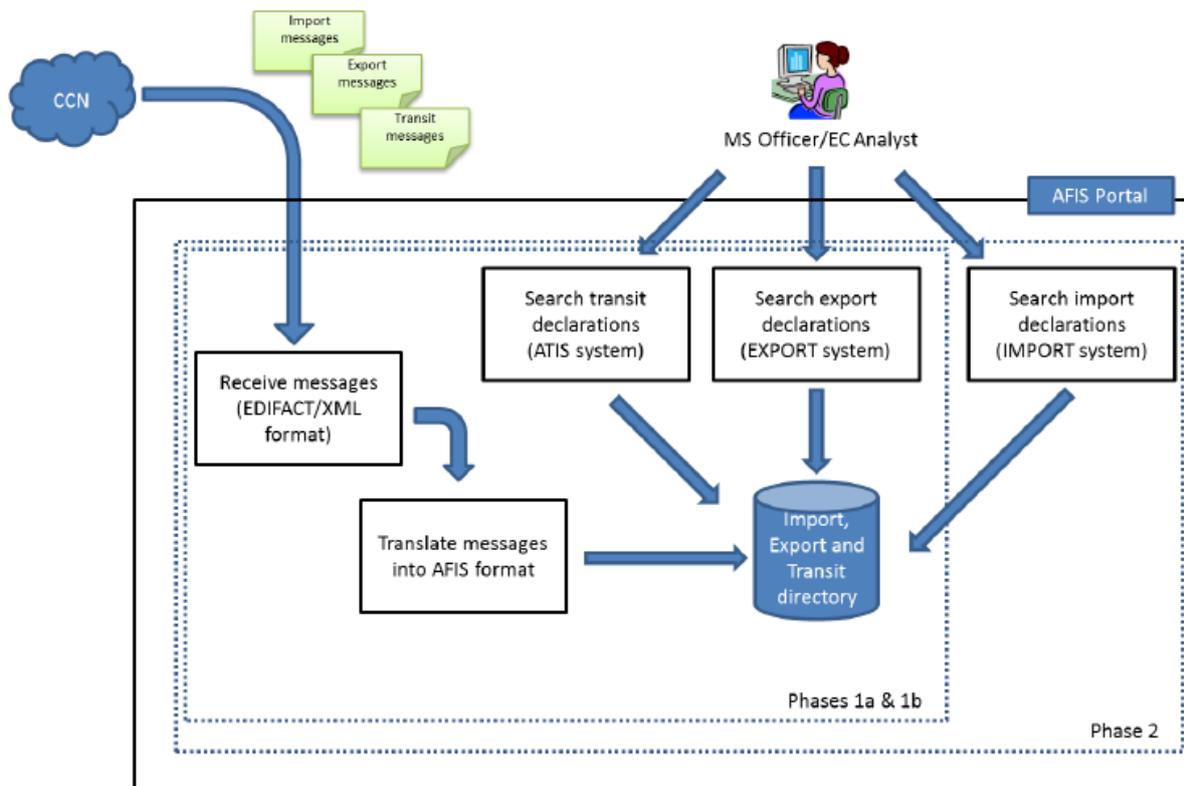


Figure 1: Overview of Import, Export and Transit Directory

2) Legal analysis

This prior checking Opinion⁶ under Article 27 of Regulation (EC) 45/2001⁷ (the Regulation) will focus on those aspects which raise issues of compliance with the Regulation or otherwise merit further analysis. For aspects not covered in this Opinion, the EDPS has, based on the documentation provided, no further comments.

a) Legal basis - interconnection of databases (Article 27(2)(c) of the Regulation)

The legal basis for the Import, Export and Transit Directory is Article 18d(1) of Regulation (EC) 515/1997, this Article added by Regulation 1525/2015 having become applicable on 1 September 2016.

This Article states that the Commission (in practice: OLAF) shall establish and manage a directory on import of goods, transit of goods and exports of goods (only certain goods). This provides the legal basis for the Directory.

The third subparagraph of that Article provides that “[t]he Commission shall systematically replicate data from the sources operated by the Commission on the basis of Regulation (EU) No 952/2013” into the Directory. This provides the legal basis for automatically connecting these other databases (ICS, ECS and NCTS) with the Directory. The details of the transit

⁶ According to Article 27(4) of the Regulation, the EDPS has to provide his Opinion within two months of receiving the notification, not counting suspensions. The notification form was received on 25 July 2016. On 29 July 2016, 2 September and 31 October, the EDPS requested further information, suspending the case; after receipt of the information, the case was unsuspended on 29 August, 21 September and 15 November 2016. On 24 November 2016, the EDPS consulted OLAF’s DPO on the draft opinion; comments were received on 5 December 2016. The EDPS shall thus render his Opinion by 9 December 2016.

⁷ OJ L 8, 12.1.2001, p. 1.

system's operation are laid down in the ATIS Administrative Agreement, adopted by the Member States.

b) Third-country access

Article 9 of the Regulation contains specific rules on transferring personal data to third countries.⁸ In addition to constituting a legal basis for the transfer as such, this Article lays down requirement for the safeguards to be applied when carrying out such transfers.

For the first question (**legal basis**), Article 18d(2) of Regulation (EC) 515/1997, as amended, defines which authorities may have access to the directory by means of a cross-reference to Article 29 of the same Regulation. This list, based on notifications from the Member States and published is explicitly limited to competent authorities *of the Member States*.

However, Article 19 contains rules for exchanges with third-country authorities:

“Provided that the third country concerned has legally committed itself to providing the assistance necessary to assemble all the evidence of the irregular nature of operations which appear to be in breach of customs or agricultural legislation or to determine the extent of the operations which have been found to be in breach of such legislation, information obtained pursuant to this Regulation may be communicated to it [...] by the Commission [...], subject, where appropriate, to the prior agreement of the competent authorities of the Member State which provided it”.

The third countries that are planned to receive access to IET are signatories to the Convention on a common transit procedure and have signed agreements on customs cooperation with the EU.⁹ There is thus a legal basis for cooperation with these third countries.

The second question refers to the **safeguards** applied - *how are these transfers done?*

There are different possibilities for providing such safeguards:

- 1) For third countries that are recognised as offering adequate protection (Art. 9(1) of the Regulation), no additional safeguards on top of what would be required for intra-EU transfer are needed. FYROM, Serbia and Turkey have not been recognised as providing adequate protection.
- 2) In some cases, the derogations under Article 9(6) of the Regulation can be used. However, they should not be used for structural, repeated or massive transfers.¹⁰ The use of the Directory appears to entail repeated transfers, as the designated third-country authorities will be normal users of the system.
- 3) Finally, the controller can adduce adequate safeguards, e.g. via contractual arrangements or international agreements (Article 9(7) of the Regulation).

Article 7 of Appendix 1 to the Common Transit Convention states that:

“(1) The Contracting Parties shall use the personal data exchanged in application of the Convention solely for the purposes of the common transit procedure and

⁸ For this whole section, see also EDPS position paper on the transfer of personal data to third countries and international organisations by EU institutions and bodies, 14 July 2014 (“position paper”), see here: https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Supervision/Papers/14-07-14_transfer_third_countries_EN.pdf.

⁹ See further information here: https://ec.europa.eu/anti-fraud/about-us/legal-framework/customs_matters_en

¹⁰ Position paper, page 15.

any customs procedure or temporary storage following the common transit procedure.

This restriction shall not prevent the use of such data by the customs authorities for the purposes of risk analysis and investigations during the common transit procedure and for legal proceedings arising out of this common transit procedure. Where that data is used for those purposes, the customs authorities which supplied the information shall be notified immediately.

(2) The Contracting Parties shall ensure that the processing of personal data exchanged in the application of the Convention is done in accordance with Directive 95/46/EC of the European Parliament and of the Council.

(3) Each Contracting Party shall take the necessary steps to ensure compliance with this Article.”

FYROM, Serbia and Turkey have also all ratified the Council of Europe’s Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS No. 108).¹¹

In order to adduce additional safeguards on top of those provided by the Common Transit Convention and recipient countries’ ratifications of ETS No. 108, OLAF plans to have the competent national authorities of the third countries that have signed up to the Convention on a common transit procedure sign contractual clauses on data protection as a precondition for access to the system. These clauses are annexed to the updated ATIS Administrative arrangement and are based on the standard clauses OLAF uses for administrative cooperation arrangements.¹² The differences are stricter rules on outsourcing (clause 2.2) and the absence of a clause requiring OLAF to “make available to data subjects, upon request, a copy of this Administrative Cooperation Arrangement and its Annex”.

Those clauses have been approved by the EDPS for the use in Administrative Cooperation Arrangements entailing *occasional* transfers of personal data under Article 9(6)(d) of the Regulation (public interest derogation), in order to provide *some* safeguards there. Such occasional transfers are a different situation from the Directory, where third-country authorities can be normal users for the transit part of the IET, like those in the Member States.

However, it should also be noted that while consignors and consignees may be natural persons (in the vast majority of cases they will be legal persons) and that the information provided is limited (addresses of consignors and consignees).

For transparency, the EDPS **recommends** that OLAF publish the text of the contractual clauses as well as a list of the clauses signed on the OLAF website.

c) **Information to persons concerned**

As the information is not directly obtained from the data subject, Article 12 of the Regulation applies for the controller's information duties; this Article contains a list of information items the controller has to provide to data subjects. According to Article 12(2), actively providing

¹¹ ETS No. 108, see <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/108>

¹² See also EDPS case 2012-0086, see https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Consultation/Comments/2012/12-04-03%20Model%20Data%20Protection%20Clauses_OLAF_D-746_EN.pdf and https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Consultation/Comments/2012/12-07-16Model%20Data%20Protection%20Clauses_OLAF_D-1051_EN.pdf.

this information to the data subject is not necessary where this is impossible or would require a disproportionate effort. In such cases, other safeguards have to be devised.

OLAF intends to publish the data protection notice about the Import, Export and Transit Directory, which contains the information required under Article 12, on its website

The EDPS **recommends** that OLAF publish the data protection notice prepared for the IET on its website.

However, simple publication is not necessarily enough to comply with Article 12, as this Article requires actively informing the data subject. Only if this is impossible or would require a disproportionate effort, other safeguards, such as *only* publishing it can be considered.¹³

OLAF argues that actively informing all persons affected would indeed be a disproportionate effort, due to the high numbers involved. The EDPS accepts this argument, also noting that OLAF does not have easy contact information (e.g. e-mail) for data subjects. The question thus becomes which other safeguards can be applied.

One recommendation made in the EDPS Opinion on ATIS was to have information on ATIS provided via the information provided on the NCTS. A similar approach should be taken for the Import, Export and Transit Directory: the fact that information will end up in the Directory should be mentioned at the initial point of collection (ICS, ECS, NCTS).

However, these other systems are not managed by OLAF, so it is not in a position to implement this on its own. OLAF should, however, liaise with the relevant controllers to have the information provided there (basically, information on the Directory as recipient and a reference to the information published about it by OLAF). OLAF plans to raise this issue with the Member States during the next scheduled meeting of the relevant customs working party (December 2016).

The EDPS **recommends** that OLAF liaise with the relevant controllers to have a link to information about IET included in the information provided to data subjects at the initial point of collection.

d) **Conservation periods**

According to Article 4(1)(e) of the Regulation, personal data are not to be kept for longer “than is necessary for the purposes for which [they] were collected [or] further processed”. Article 18d(3), fourth subparagraph establishes a retention period of five years, plus “an additional period of two years, if justified”.

The criteria for when an extension would be “justified” have not been defined yet.

The EDPS **recommends** that OLAF define the assessment criteria to be used for deciding whether the conservation period should be prolonged in accordance with Article 18d(3), fourth subparagraph of Regulation (EC) 515/1997, as amended.

e) **Security / technical setup**

According to Article 22 of the Regulation, controllers have to "implement appropriate technical and organisational measures to ensure a level of security appropriate to the risks represented by the processing and the nature of the personal data to be protected", having regard to "the state of the art and the cost of their implementation".

[...]

¹³ See also EDPS cases 2014-0888 and 2015-0545.

3) Recommendations and suggestions for improvement

In this Opinion, the EDPS has made several recommendations to ensure compliance with the Regulation, as well as several suggestions for improvement. Provided that the recommendations are implemented, the EDPS sees no reason to believe that there is a breach of the Regulation.

For the following **recommendations**, the EDPS expects **implementation and documentary evidence** thereof within **three months** of the date of this Opinion:

1. publish the text of the contractual clauses as well as a list of the clauses signed on the OLAF website;
2. publish the data protection notice prepared for the IET on the OLAF website;
3. liaise with the relevant controllers to have a link to information about IET included in the information provided to data subjects at the initial point of collection;
4. define the assessment criteria to be used for deciding whether the conservation period should be prolonged in accordance with Article 18d(3), fourth subparagraph of Regulation (EC) 515/1997, as amended;
5. [...];
6. [...].

Done at Brussels, 07 December 2016

[signed]

Wojciech Rafał WIEWIOROWSKI