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"Emerging threats in the European Union",
The Hague, 14-15 November 2013

Delegations will find in the Annex the Report of the above-mentioned seminar.

Strategic Seminar Cross-border excise fraud: emerging threats in the European Union

The Hague, 14-15 November 2013

Report

1. Introduction

This strategic seminar was organised jointly by the Lithuanian Presidency and Eurojust in The Hague on 14 and 15 November 2013. Over 80 participants from tax and customs policy and operational backgrounds as well as prosecutorial and judicial backgrounds came together to consider emerging trends in cross-border excise fraud. The aim of the seminar was to examine the current challenges to the successful investigation and prosecution of cross-border excise fraud and consider potential legislative and operational solutions and best practices. In order to stimulate debate, Eurojust asked Member States' authorities to complete a questionnaire in advance of the seminar identifying the main issues encountered in and best practices arising from the investigation and prosecution of cross-border excise fraud, particularly regarding the abuse of Customs Procedure 42 and the Excise Movement and Control System (EMCS).

Two sessions took place on the first day to set the scene and help the group consider the key challenges being faced and the resources available to tackle them at EU level. On the second day, participants were invited to take part in more detailed discussions during workshops devoted to the following topics: (i) Main issues in investigating and prosecuting cross-border excise fraud: challenges and best practices; (ii) Enhancing control mechanisms at national and EU level to prevent and combat excise fraud; (iii) The assistance of Eurojust, Europol and OLAF: how to better exploit their support in combating excise fraud; (iv) Targeting the proceeds of crime: how to locate, seize, confiscate and recover them more effectively. The chairs of each workshop reported the key findings from their respective discussions before recent developments and next steps were considered in a final session.

2. Opening session: Welcoming speeches

The opening session was chaired by *Laima Čekelienė, Eurojust National Member for Lithuania*. The chair highlighted that cross-border excise fraud poses a direct threat to the promotion of economic growth and competitiveness within the EU as it can lead to huge revenue losses for the EU's Member States from duties on goods such as alcohol, tobacco and energy products.

Francisco Jiménez-Villarejo, Vice-President of Eurojust and National Member for Spain, noted that the Justice and Home Affairs (JHA) Council meeting in June 2013 included excise fraud as one of the EU's priorities in the fight against serious and organised crime for the 2014 -2017 policy cycle. Excise fraud is often cross-border in nature, involving Member States and third countries alike. It is a high impact crime, perpetrated by sophisticated organised criminal groups (OCGs) who abuse customs procedures to avoid billions of euros in excise duties. He highlighted that, as noted in the Multi Annual Strategic Plan "MTIC/Excise Fraud", some of the major issues that need to be tackled to reduce cross-border excise fraud are: differences in national excise legislation; weaknesses in EU excise control and inspection systems; and corruption. The successful investigation and prosecution of cross-border excise fraud requires a multi-disciplinary approach including coordination between Eurojust, Europol and the European Anti-Fraud Office (OLAF).

The chair delivered remarks prepared by Darius Valys, the Prosecutor General of Lithuania, who had been unavoidably detained. In the current economic climate demand for cheap goods is increasing. However, it is difficult to trace the production and distribution of goods on which excise duty has been avoided as the schemes used by the OCGs involved are extremely diverse and are continually evolving. This is why it is so important for the EU and its Member States need to work together at EU and international level to combat the problem of cross-border excise fraud.

Susanne Knöfel, member of the Cabinet of Algirdas Šemeta, EU Commissioner for Taxation, Customs, Statistics, Audit and Anti-Fraud agreed that excise fraud is becoming increasingly common and cannot be tackled by individual Member States in isolation as OCGs are operating across borders and are exploiting differences in national legislation. The European Commission (the Commission) is committed to a strong, coordinated EU response to cross-border fraud. Taking into account that excise, VAT and customs fraud are often linked, a key feature of this response to date has been the development of enhanced cooperation between tax and customs authorities through operational contacts and Joint Customs Operations (JCOs). Cigarette smuggling is a serious issue, as it is estimated that it may result in losses to the EU and its Member States of approximately EUR 10 billion per year. It is hoped that this seminar will help strengthen operational contacts, will help the Commission and the EU JHA Agencies and bodies to understand the issues being faced on the ground and further enhance cooperation.

3. First session: Current challenges in investigating and prosecuting excise fraud cases

The first session, chaired by the Eurojust National Member for Lithuania, focused on the practical experiences of investigating and prosecuting authorities.

Denis Kerr and Adam Kingsgate, Fiscal Crime Liaison Officers, Her Majesty's Revenue and Customs, The United Kingdom gave a presentation about tobacco smuggling. They noted that the UK is an attractive market for smugglers as the UK has some of the highest tobacco duties in the world. It is estimated that the loss of excise duty from cigarette smuggling amounts to approximately GBP 2.5 billion a year. They noted the sources of illicit production inside and outside of the EU and explained how surveillance has shown the ways in which community transit procedures can be abused by OCGs, who transfer goods between free zones or into and out of the EU for months at a time until they can find a way to smuggle the goods into their target market.

Darius Kuliesius, Head of Intelligence Division, Financial Crime Investigation Service, Lithuania gave his perspective on a fuel excise fraud case involving diesel imported from a third State into the EU territory under Customs Procedure 42. The diesel fuel was stored in excise warehouses in Lithuania before being sent to other EU countries. Through surveillance and physical checks on vehicles, the Lithuanian authorities discovered that although the diesel fuel was recorded in the EMCS as having been sent to two different Member States, in reality it had been mixed with other substances and transformed into another type of oil which could be sold in a third Member State free from excise duty. The exchange of information between the relevant authorities in these Member States was facilitated by the use of a Joint Investigation Team (JIT) set up with assistance from Eurojust. This was fundamental to tracking the activities of the OCG behind this operation and to establishing a money trail leading to a number of related accounts in the name of a Cyprus registered company.

Janja Bernard Korpar, State prosecutor, Specialised State Prosecution Office, Slovenia then presented a current fuel excise fraud case. The Slovenian tax and customs authorities exchanged information with the tax and customs authority of two other Member States to uncover a complex missing trader scheme whereby lubricating oil was transformed into diesel and sold to petrol stations in Slovenia, avoiding duties of approximately EUR 2 million in Slovenia alone. The fraud involved the falsification of road transportation documents and the fraudulent use of an Italian registered company. The key challenges for the investigators were that it was hard to determine where the lubricant was being transformed and where it was coming from as the OCG was able to change the identity of the buying and selling companies and the country of departure. Good cooperation was needed between authorities on the ground as in Slovenia different departments oversee the payment of tax on base oil and the payment of excise duty on diesel fuel. International cooperation was also important during the investigation, but has created delays, for example due to the lack of links between the databases of the customs, tax and statistical offices in different Member States. The case is now proving difficult to prosecute as it is hard to demonstrate that the base oil was intended to be used as fuel rather than lubricant. It is also difficult to trace the proceeds of the fraud, as even whilst the investigation was on-going, the perpetrators were able to sell most of the companies involved or remove them from the company register.

Jacek Łazarowicz, Prosecutor, General Prosecutor's Office of Poland and Zbigniew Kowalski, Head of Unit, Polish Internal Security Agency also gave a presentation about fuel fraud. They noted that the Polish authorities became suspicious when there was a sudden surge in the production of lubricating oils and a decrease in demand for diesel in 2011 and 2012. They explained that Poland's location makes it a hub for the importation of lubricating oil and its transformation into diesel. Poland and its neighbouring Member States subsequently adopted a number of measures to tackle fuel fraud. Poland has made lubricating oil subject to excise duty. It has also introduced a "purchaser pays" Value Added Tax (VAT) scheme as well as solidarity payments, whereby both the buyer and the seller pay VAT on these goods. They have also shortened the period for the payment of VAT to 30 days to try and curb missing trader fraud. In addition, authorities on the

ground have been carrying out searches on the borders. Furthermore, last year Slovakia started to include the movements of lubricating oil within the EMCS. These efforts appear to have been successful as fewer fraudulent schemes have since been detected. However, it is clear that fuel fraud is an EU wide problem and that, in addition to closer cooperation between tax and customs authorities, Member States need to harmonise their legislation to ensure that lubricating oil is subject to excise duty and/or is brought within the scope of EMCS monitoring.

A brief discussion followed the presentations, which highlighted that counterfeiting of legitimate cigarette brands has dropped significantly compared to the situation five years ago and that cigarette smugglers are now focusing on the sale of cheap white cigarettes that have no legitimate market in the EU. It further underlined that the EMCS was designed to facilitate trade and so is not an effective way for enforcement authorities to prevent OCGs from diverting goods.

4. Second session: Actions at EU level in the fight against excise fraud

The second session was chaired by Frances Kennah, Eurojust National Member for the United Kingdom. During this session, three presentations were given which highlighted the actions being taken at EU level to help combat cross-border excise fraud.

Ladislav Hamran, Eurojust National Member for Slovakia, explained how Eurojust had added value in a recent investigation into the smuggling of cigarettes from outside the EU (Operation Tsar). The Slovakian National Desk at Eurojust was able to help the authorities of a Member State to prepare a Letter of Request to ensure that it met the criteria for execution in the Slovak Republic. They advised that the specificities of Slovakian procedure would require some amendments to the draft Letter of Request. For example, the Slovakian authorities needed a specific description of the crime, including the time frame for the commission of the offence, to determine whether the criterion of double criminality was met. The authorities also needed to understand whether each person of interest was to be treated as a suspect or as a witness for the purposes of conducting

interviews. Further, as the case involved a request to freeze bank accounts located in Slovakia, the Letter of Request needed to demonstrate that there was a clear link between the crime, the losses suffered and the proceeds of crime. The amendments to the draft were completed through cooperation between the competent national desks at Eurojust in a matter of days. Eurojust then facilitated the issue and execution of the Letter of Request. In this case a coordination meeting was also organised at Eurojust which allowed counterparts from all of the Member States involved to co-ordinate their searches and arrests. Translation services were provided and financial support was offered to cover travel expenses. This example showcases the wide range of support that Eurojust can offer to investigators and prosecutors. Indeed, tools such as coordination meetings and JITs can be invaluable as they can remove the need for lots of long requests for Mutual Legal Assistance (MLA) between authorities.

Janos Juhasz, Specialist, Focal Point SMOKE, Europol explained the role of Europol in collating and disseminating criminal intelligence and providing operational support and analysis to investigating authorities. He explained that Europol has established a number of strategic Focal Points for certain types of crime. These bring together operational analysis and intelligence gathered in similar cases by a number of different agencies to assist intelligence-led policing. Member States asked Europol to set up a Focal Point dedicated to tobacco smuggling given the serious revenue losses suffered by Member States and the links which have been established between this and serious organised crime and terrorist activities. The aim of Focal Point SMOKE is to identify common features and problems and launch new investigations. It has enabled Europol to carry out detailed operational analyses, for example of the group's key contacts and social networks. This helps investigating authorities to predict the potential routes that a group could use to smuggle tobacco. During Operation Tsar, referred to in Ladislav Hamran's presentation, Eurojust found that the involvement of Europol was vital, as it provided analytical support from an early stage in the investigation. He stressed that Europol works in partnership with national authorities, providing help and support to progress investigations.

Mariusz Koter, Policy Officer, OLAF's Strategic Analysis, Reporting and Joint Operations Directorate then gave an overview of its policy and operational work. Many OLAF staff comes from a customs or law enforcement background. Although OLAF does not have the power to prosecute, it can conduct administrative investigations, provide analysis and support through its IT applications and make recommendations to Member States. The presentation focused on how OLAF can organise JCOs. These bring representatives of national authorities together to jointly investigate suspicious transactions by exchanging data, cross checking databases and carrying out surveillance or controlled deliveries. OLAF has been involved in a number of successful JCOs which have allowed authorities to seize, amongst other things, many millions of counterfeit and illicit white cigarettes. These JCOs show that the OCGs involved in cigarette smuggling are continually adapting by changing their sources of production, the means of concealing the cigarettes and the routes of shipments and transshipments. In addition to the use of JCOs, he identified a number of other good practices for tackling cigarette smuggling, such as seeking funding and intelligence from the big tobacco companies and the posting of liaison officers, such as the OLAF liaison officer posted to Kiev in 2011.

There followed a brief discussion between participants as to the added value of JCOs coordinated by OLAF, including how this helped ensure the full involvement of EU JHA Agencies such as Eurojust and Europol.

5. Third session: Workshops

5.1. Workshop 1: main issues in investigating and prosecuting cross-border excise fraud: challenges and best practices

Chair: Francesco Lo Voi, Eurojust National Member for Italy

The group considered the key challenges in investigating and prosecuting cross-border excise fraud and discussed the best practices arising from some of the cases presented during the first and second sessions as well as from their own experiences. The key investigative challenges identified by the group were that it was difficult to determine the routes taken by the excise goods, including the places where such goods are transformed or diverted. OCGs are able to develop very complicated schemes and can adapt them at short notice to escape detection. Excise fraud schemes often involve missing traders which can make it especially hard to trace the proceeds.

The cross-border nature of excise fraud also makes it challenging to investigate. This is because Member States' laws on the classification of excise goods and the imposition of excise tariffs are not uniform and the offence of excise fraud can be classed as administrative, civil and/or criminal in different Member States. This lack of common ground makes the use of special investigative measures, such as controlled deliveries, quite challenging. Participants reported delays in obtaining information from customs authorities in other Member States which can make it difficult to successfully prosecute cross border excise fraud, given the large amounts of specific evidence needed. There is also a lack of awareness amongst prosecutors and judges of customs procedures and the functioning of mechanisms such as the EMCS.

Participants stressed that greater harmonisation of Member States' legislation is needed to successfully investigate and prosecute cross-border excise fraud. This would require Member States to apply a uniform set of tariffs to an agreed set of goods and to class excise fraud as a criminal offence which could be investigated on the basis of a common set of procedural rules so that the proceeds of crime could be more systematically traced and seized and meaningful convictions secured. However, participants also considered that a number of practical steps could be taken within the existing legislative framework. These included making greater use of confiscation regimes to seize and destroy assets such as the vehicles involved in excise fraud schemes; improving the system of licensing and verification of EMCS users; and seeking to ensure that the financial guarantee payable to excise warehouses in all Member States is set at such a level as to discourage fraud. The timely exchange of intelligence, information and evidence among Member States' investigating and prosecuting authorities should also be encouraged.

In terms of best practices, participants recognised that Eurojust could provide invaluable assistance in ensuring the exchange of information from the outset of investigations. For example Eurojust can organise coordination meetings between authorities so that they can share information and coordinate searches, seizures and arrests. It can also help authorities to establish and finance JITs and can facilitate the execution of MLA requests or contribute to training activities for the legal profession.

Participants queried whether it would be possible to create a network of officials and prosecutors specialising in excise fraud in order to resolve recurring issues and to ensure that best practices are shared and implemented in all Member States. Participants also queried whether the European Public Prosecutor's Office could play a role in the successful prosecution of cross border excise cases in future, but noted that as the proposal is currently drafted, excise fraud does not fall within its sphere of competence.

5.2. Workshop 2: enhancing control mechanisms at national and EU level to prevent and combat excise fraud

Chair: Denis Kerr, Fiscal Crime Liaison Officer, Her Majesty's Revenue and Customs, the UK.

The group considered the functioning of existing systems as well as best practices and steps that could be taken at national and EU level to improve control mechanisms. Participants recognised that the major control mechanisms currently in place were search and surveillance tools and JCOs. It was acknowledged that authorities on the ground could use a wide range of controls, including low tech solutions such physical searches and tolls, as well as more high tech solutions such as scanners, gas chromatographs and number plate recognition technology. Participants noted that investment in further controls would be worthwhile, given the revenues lost by Member States through excise fraud.

Participants recognised that excise fraud is a problem in all Member States and so requires EU-wide control mechanisms. The EMCS was designed as a means of facilitating trade within the EU. The broad requirements of the system were established at EU level but the detailed implementation was left to individual Member States. In the absence of other EU-wide tools, the EMCS is being used as a control mechanism. The EMCS is not an effective or efficient control mechanism because it was not designed for this purpose. It does not cover national movements of goods, does not note when warehouse guarantees have been exceeded and does not allow risky movements to be flagged. It is little more than a messaging system which is difficult to use efficiently as messages are being sent in too many languages and are not being responded to promptly by receiving authorities. The EMCS is open to abuse as the permitted timescales for the movement of goods are far too generous, differences in national tax rates and differing excise classifications can be exploited and the system may be used by corrupt officials. The EMCS does not always accurately reflect movements of goods and does not allow for the physical control of goods. This makes it difficult for authorities to detect the transformation of goods or the diversion of part of a shipment.

The implementation of the EMCS in Hungary was highlighted as an example of how the system could be developed into an effective control mechanism. In Hungary, the EMCS has been implemented so that it can track duty suspended goods and duty paid excise goods, create risk profiles, alert other authorities about high risk or suspicious shipments and generate semi-automatic notifications when excise warehouse guarantees have been exceeded. Further, best practices identified included increased co-operation between tax and customs authorities on the ground and making greater use of EU level resources. Participants noted that greater use could be made of JCOs and recommended that OLAF's analytical tools be used to provide authorities with a systematic analysis of External Community Transit data. They also noted the assistance that Eurojust could provide, for example in resolving evidential issues by facilitating MLA or improving the exchange of information between authorities by organising coordination meetings or by supporting the establishment of JITs.

In terms of additional mechanisms which might assist, participants considered that systems used to ensure the security of shipments in the private sector may also assist, such as hiring security guards to travel with shipments or using GPS or barcode tracking. Participants also noted that greater public education about the harm caused by excise fraud, such as the use of the proceeds in serious organised crime and terrorism, could help reduce demand for some goods. It was also noted that creating a greater deterrent effect for fraudsters could be an effective control mechanism. This could be achieved by making it harder to set up and run companies; by increasing the level of excise warehouse guarantees; by systematically prosecuting basic tax and accounting offences; or by following the money trail in every case where a warehouse guarantee is given or exceeded.

5.3. Workshop 3: the assistance of Eurojust, Europol and OLAF: how to better exploit their support in combating excise fraud

Chair: Howard Pugh, Senior Specialist, Focal Point SMOKE, Europol

The group considered how these three organisations have worked together in the past, shared good practices and identified areas where cooperation could be reinforced in the future. The participants discussed Operation Tsar on cigarette smuggling, referred to during the presentations in the second session, as a good example of cooperation between national authorities, Europol and Eurojust. They considered the complementary roles played by Europol and Eurojust and the crucial support that these two organisations can provide, particularly when involved at an early stage of investigations. Participants also recognised the value of OLAF's administrative investigations to protect the EU budget. OLAF mentioned that entering into cooperation agreements with tobacco manufacturers had proved to be of great benefit in the fight against excise fraud, in particular for intelligence gathering purposes. The workshop highlighted ways that OLAF's cooperation with Europol and Eurojust could improve in the future, for example through OLAF's association with Europol's Focal Point SMOKE. In this regard, it was noted that providing OLAF with access to information held by Europol, currently considered in the proposal for a Regulation on Europol, could help improve cooperation between JHA Agencies, bodies and offices in future.

Participants also focused on certain areas where improved coordination between national authorities would be beneficial. For instance, with respect to the exchange of information it was noted that numerous communication channels exist but do not interact with each other. This in turn creates a burden for national authorities as they need to feed the same information in to a number of different systems. A "one seizure, one report" database should be created at EU level so that all national authorities can insert information on the same operation into the same system which is visible to all.

At EU level, the need to ensure greater coordination of work was recognised, in particular between Europol and Eurojust, so that greater synergies can be achieved and national authorities can direct their requests for assistance more efficiently. In this connection, the cooperation between the Eurojust's Case Analysis Unit and the relevant Europol Focal Points was raised as an example of good practice. It was further recognised that awareness needed to be raised amongst prosecutors as to the tools typically used by customs and administrative investigators. In particular, reference was made to the Naples II Convention, which also provides a legal basis for establishing JITs. In addition, it was highlighted that the crucial expertise and know-how of customs and administrative authorities should be made available to (criminal) investigating and prosecutorial authorities more frequently. For example, it was suggested that these authorities should attend Eurojust coordination meetings in relevant cases.

Finally, participants discussed the importance of retaining Eurojust's casework files. This information should be archived and retained as a record of lessons learnt and best practices so that valuable procedural and practical knowledge can be passed down through successive generations of Eurojust National Members and Staff.

5.4. Workshop 4: Targeting the proceeds of crime: how to locate, seize, confiscate and recover them more effectively

Chair: Ritva Sahavirta, Eurojust Deputy National Member for Finland

The participants discussed the circumstances in which the freezing and confiscation of the proceeds of cross-border excise fraud are possible in the Member States, examined common difficulties and considered best practices. Generally, a criminal conviction is a prerequisite for the freezing and confiscation of assets. In cases where there are barriers to obtaining a conviction (e.g. insufficient evidence), some Member States provide for and make use of non-conviction based procedures.

These can be efficient in excise fraud cases, as they allow confiscation to take place on a lower standard of proof, a reversed burden of proof may be applied and it may not be necessary to demonstrate a link to criminal proceedings. However, it was noted that these procedures can only be used in cases involving the freezing and confiscation of cash. Some Member States found that making “illegal enrichment” a separate criminal offence and seeking conviction and subsequent confiscation on this basis was an effective solution. Some Member States are also able to use value-based confiscation, extended confiscation and third party confiscation measures, all of which have generated good results.

Participants recognised that the overall amount recovered from cross-border excise fraud is modest compared to the estimated profits of the OCGs. In their view this was not due to differences in the Member States’ freezing and confiscation regimes or to insufficient legislation at EU or national level. Participants agreed that the real barrier to asset recovery is identifying and tracing the proceeds to be frozen and confiscated. These two critical steps in the process prove to be extremely challenging, especially when the proceeds are located outside the requesting Member State. Being able to demonstrate that there is a link between the crime and proceeds is equally challenging.

Participants acknowledged the complexity of schemes used by criminals to divert goods imported into the EU under duty suspension arrangements on to the black market. They recognised the valuable assistance provided by the case law of the Court of Justice of the EU in determining which national authority is best placed to recover excise duties, prosecute, seize the illegally diverted goods and recover the proceeds of crime in such cases.

Participants also noted that a variety of natural persons can be prosecuted for excise fraud from company owners, to persons acting on behalf of companies, to lorry drivers. In some Member States, legal persons can also be held liable and can be deprived of their assets. Concerns were raised about the difficulties in proving the involvement of OCGs or in proving that defendants such as lorry drivers were engaged in excise fraud as part of, or for the benefit of, such groups. The high evidentiary requirements needed to prove the involvement of OCGs in some Member States can be difficult to fulfil, in particular when front men are used to conceal the excise fraud, legitimate businesses are involved in transporting the goods and the movement of goods within the EU is legally recorded in the EMCS.

Participants concluded by stressing the need for proactive investigations using tools such as surveillance, undercover operations and wiretapping. The valuable assistance that Eurojust can offer in asset recovery cases was also highlighted. In this context, participants shared a number of positive outcomes achieved as a result of Eurojust's intervention. These included speeding up and facilitating MLA requests for asset freezing and confiscation; establishing, supporting the running of and providing finance to JITs; and facilitating cooperation with third States in asset recovery cases.

6. Fourth session: Latest developments and way forward

The fourth session was chaired by *Simonas Minkevičius, State Prosecutor, Prosecutor General's Office of Lithuania*. The presentations given considered a current example of enhanced cooperation between authorities as well as potential developments in tax, customs and audit policies.

Jevgenijus Pacharevas, Chief Investigator, Lithuanian Customs Criminal Service Information Analysis Division, presented a current operation, JCO Warehouse. The JCO was established by the Lithuanian tax and customs services with OLAF in 2011 after customs officials began to suspect that the EMCS and Customs Procedure 42 were being used fraudulently in Lithuania. The purpose of the JCO was to target excise and VAT fraud; to understand the scale of problem; to detect new means of committing excise fraud; to identify risks in reliance on the EMCS; and to improve intelligence gathering and cooperation between authorities on the ground. It was the first time that a JCO has involved cooperation between tax and customs authorities as well as cooperation between all 28 Member States. The JCO established its permanent operation coordination unit (POCU) at OLAF in Brussels which coordinated the JCO and ensured communication between national coordination points in the Member States. The JCO was managed with the support of liaison officers from eight Member States, as well as from the Commission's Directorate-General for Taxation and Customs Union (DG TAXUD) and Europol.

The preliminary indications are that new trends have been identified and a number of seizures have taken place. It is estimated that the JCO resulted in the seizure of approximately 60 million illicit white cigarettes in three Member States. This would not have been possible without close cooperation between Member States and authorities on the ground.

Balazs Pataki, Policy Officer, DG TAXUD, European Commission then gave a presentation which focused on action which could help prevent illicit trade in tobacco products. To demonstrate the scale of the issue, he explained that in 2010, total cigarette consumption in the EU was estimated to be 649 billion. The estimated amount of cigarettes on which non-domestic duty was paid was 88 billion. Illicit trade has flourished due to price differentials within the EU and with third countries; the lack of internal border control within the EU; divergences in penalties for customs and tax offences; insufficient infrastructure and equipment; insufficient information exchange or cooperation between the competent authorities in different regions. The EU's external border control has not evolved to reflect the development of the internal market and the challenges posed by excise fraud. Illicit trade in cigarettes in the EU is concentrated in the Member States which impose the highest taxes on tobacco products and in Member States with a third country land border. The estimated loss in excise and VAT revenue was more than EUR 10 billion in 2010. In addition to these budgetary losses, illicit trade damages legitimate trade, undermines public health objectives and can help finance serious organised crime such as terrorism.

From a taxation policy perspective, it is expected that the gradual decrease in tax differentials between Member States over the coming years will have a significant impact on illicit trade, as will international agreements regarding the approximation of excise rates and the harmonisation of approaches to illicit trade such as the WHO Framework Convention on Tobacco Control. He stressed that stricter rules regarding the authorisation of warehouse keepers could help reduce trade in illicit cigarettes, as could ensuring that penalties for tax and customs offences are set at a high enough level to have a serious dissuasive effect.

Good examples of practical cooperation were also highlighted. These included raising public awareness about the harm caused by tax fraud, taking additional steps to combat corruption amongst tax and customs officials and entering into binding cooperation agreements with tobacco manufactures. These agreements help authorities not only to finance the fight against illicit trade but also to gather intelligence and to track and trace movements of tobacco through the distribution chain.

Enhanced cooperation between border control, law enforcement and investigating agencies was recommended so that movements of goods under duty and excise suspension can be tracked and traced. The creation of dedicated task forces and mobile control units with effective tools to gather intelligence and conduct risk analyses was also seen as a good practice. It was recognised that further resources are required to strengthen border controls and to roll out the use of surveillance tools.

Carlos Soler Ruiz, Team leader auditor, the European Court of Auditors (ECA) gave the final presentation which considered the ECA's findings on the use of Customs Procedure 42 and the prevention and detection of VAT evasion. The presentation explained the outcome of an audit carried out in a sample of seven Member States and in the Commission to determine whether they have effective regulatory and control mechanisms in place to monitor the use of Customs Procedure 42. This procedure allows VAT to be paid on goods imported into the EU in the Member State where it is destined for sale or consumption rather than in the Member State into which it was initially imported. The key risks arising from the use of this procedure are that imported goods remain in the Member State of importation so they are never sent to the Member State of declared destination where the VAT would be payable or that imports are consumed in the Member State of destination without VAT being collected. The audit was carried out through the use of a control model developed by the ECA. It found that in 2009, the VAT losses in the seven Member States audited were estimated to be 29 % of the total VAT theoretically payable on all the imports made under Customs Procedure 42 in these seven Member States.

The ECA found that the Commission's regulatory framework does not ensure the uniform and sound management of this VAT exemption by the Member States' customs authorities and does not lead to sufficient information conveyed to the tax authorities in the Member State of destination. The ECA made a number of recommendations to address this issue. Some, such as amendments to the Customs Code Implementing Provisions and the Customs Audit Guide have already been carried out. The status of the implementation by Member States' customs authorities of the ECA recommendation concerning the automatic verification by the customs electronic clearance system of VAT ID numbers in the VAT Information Exchange System, are due to be reported by the Commission by the end of this year.

However, a number of recommendations for legislative change which would really help prevent the fraudulent use of this procedure have not been implemented. These include imposing joint and several liability for VAT losses in the Member State of destination when traders fail to report information about intra-Community transactions in the supplying Member State; amending the VAT Directive to record intra-community supplies imported under Customs Procedure 42 separately in traders' VAT recapitulative statements so that customs and tax data to be easily reconciled in the Member State of importation; VAT information exchange requirements; the creation of an EU risk profile for Customs Procedure 42 imports; and the creation of an early warning system so that customs authorities in the Member State of importation can alert the tax authorities of the Member State of destination of suspicious or high risk transactions.

Next year, the ECA will consider the effectiveness of the anti-VAT fraud strategy. It is clear that further follow up is needed as Eurofisc's annual activity reports for 2011 and 2012 show that the problems identified by the ECA are recurring. Furthermore, a report commissioned by the European Commission was published in July 2013. The report showed that the VAT gap for the EU-26 countries (excluding Cyprus and Croatia) amounted to approximately EUR 193 billion in 2011, or about 1.5% of the GDP of these States. It also estimates that the average VAT gap for the period 2000-2011 was 17%.

In closing the chair noted that as long as there are differences in the prices of goods and in taxation levels there will be incentives to smuggle. This means that our first line of defence against cross-border excise fraud will continue to be cooperation between enforcement authorities at national level.

7. General conclusions

Michèle Coninsx, President of Eurojust and National Member for Belgium, stressed that disrupting OCGs involved in cross-border excise fraud is one of the EU's top priorities and that Member States' authorities need to work together to achieve this. This is an important issue as Member States generate a great deal of revenue from excise duties on goods such as tobacco, alcohol and fuel. Excise fraud undermines governments' fiscal, public health and environmental objectives, distorts competition between businesses within the EU and puts jobs at risk. It also finances serious crime.

The President noted that the discussions held during the seminar have shown that the effective investigation and prosecution of excise fraud is challenging as the issues raised are technical, complex and cross border by their very nature. This means that a multidisciplinary approach is needed to tackle them effectively. There are a number of EU institutions, JHA Agencies and bodies that can provide assistance to national authorities, from the analytical work carried out by Europol to the administrative investigations and information on fraud types and trends provided by OLAF to the judicial support offered by Eurojust. The support from Eurojust includes the organisation of co-ordination meetings, joint action days and support for the establishment and functioning of JITs. The President noted that JITs can be a valuable way to ensure that all relevant authorities work together from as early a stage as possible in cross-border excise fraud cases.

A number of challenges have been identified in the investigation and prosecution of cross border excise cases, such as differences in national tax legislation, a lack of uniform rules on excise warehouses and different national rules as to which products should be subject to excise duties. In this context, one proposal could be to amend the existing EU legal framework to make lubricating oils subject to excise duties in all Member States and to be able to monitor their movements within the EU through the EMCS. Where legislative harmonisation cannot be achieved, Member States need to strive for effective and efficient practical cooperation between authorities on the ground to combat cross border excise fraud, for example by the posting of liaison officers or the establishment of JCOs. It is also clear that Member States need to do everything they can to trace and seize the proceeds of cross-border excise fraud, by running both criminal and financial investigations wherever possible.

Eurojust and the Lithuanian Presidency are particularly keen to promote the best practices identified during this seminar. It is hoped that this report draws together the discussions held and may serve as the basis for further action in this area over the next few years.
