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Subject : Draft explanatory report on the convention on mutual assistance and cooperation
between customs administrations (Naples II)

I. BACKGROUND

Effective co-operation between Customs administrations has been a high priority for many years.

In 1967 the Member States of the European Economic Community signed the Naples Convention on the provision of mutual assistance by their customs authorities. All Member States of the European Union have since acceded to the Convention. The Convention came about as a result of recognising that co-operation between customs authorities would make prevention of customs infringements more effective.

A particular need for enhanced Customs co-operation on law enforcement matters was recognised by Directors General of Customs services in 1989, and as a result the Mutual Assistance Group of 1992 (MAG 92) was formed to prepare Customs services to meet the challenges of the Single Market in matters outside EC competence. MAG 92's 'External Frontier Strategy Report' recommended:

'The 1967 Naples Convention, which is the current legal base governing mutual assistance on sensitive goods controls between Member States, is out-of-date and should be fully reviewed in the new committee structure foreseen in Article K4 of the Maastricht Treaty'.

Discussions on a new Convention began in 1992. Early drafts of the Convention incorporated proposals for a Customs Information System (CIS) which were subsequently removed and progressed under a separate Convention. The CIS Convention was agreed in 1995. Following agreement to the CIS Convention, negotiations on the Naples II recommenced.

In recognition of the important role Customs administrations have to play in fighting organised crime, the High Level Group on Organised Crime recommended in its Action Plan which was endorsed by the Amsterdam European Council in June 1997 that discussions on Naples II should be concluded by the end of 1997. That Action Plan also included a general recommendation that any ratification procedures be put urgently on the agendas of national parliaments.

II. INTRODUCTION

The Naples II Convention is intended to improve Customs cross-border co-operation in the fight against drugs trafficking and other customs infringements. The Convention provides for 'administrative' assistance between Customs authorities. These provisions largely repeat the provisions of the 1967 Naples Convention. In addition, Naples II also provides for 'special forms of co-operation' between Customs authorities. These special forms of co-operation include hot pursuit, cross-border surveillance, covert investigations and controlled deliveries.

Naples II includes data protection provisions which cover data exchanged outside the CIS. This will largely be non-automated exchanges of data. The CIS Convention includes its own data protection arrangements.

Naples II will enter into force when all Member States have completed their constitutional procedures in relation to the Convention. But on completing these procedures, Member States may declare that they will apply the Convention with other Member States which have made the same declaration. This means that Member States do not have to wait for the last Member State to complete their constitutional procedures before they can apply the provisions of the Convention.

III. COMMENTARY ON THE ARTICLES

TITLE 1 - GENERAL PROVISIONS

Article 1: This article states that the purpose of the Convention is preventing and detecting infringements of national customs provisions and prosecuting and punishing infringements of Community and national customs provisions. This makes clear that the Convention is concerned with customs law enforcement matters. Preventing Community Customs infringements is a matter for the first pillar. This article is based on Article 1, paragraph 1 of the 1967 Naples Convention. 'Community customs provisions' and 'national customs provisions' are defined in Article 4 of the Convention.

The article also states that the Convention shall not affect more favourable co-operative arrangements already in place. This means Member States are not precluded from entering into or using existing mutual legal assistance arrangements or bilateral or multilateral mutual assistance agreements.

The choice of which route to use for mutual assistance will depend on the particular circumstances of each case.

Article 2: This article makes clear that the customs administrations can only apply the Convention within the limits of their national powers and that the Convention does not affect the national powers of customs administrations.

Article 3: This article notes that the Convention relates to mutual assistance and co-operation in the framework of criminal investigations concerning infringements of national and Community customs provisions. It states that a judicial authority carrying out a criminal investigation may choose whether to use this Convention or provisions relating to mutual assistance in criminal matters.

The decision will depend on the particular circumstances of any given case.

Article 4: This article contains a set of definitions of terms used in the Convention.

1. 'National customs provisions' are all laws, regulations and administrative provisions which are wholly or partly within the jurisdiction of the customs administration of that Member State concerning cross-border traffic in prohibited or restricted goods and non-harmonised excise duties.
2. 'Community customs provisions' are provisions connected with import, export, transit and presence of goods between Member States and third countries, and between Member States in the case of goods without Community status or which are subject to additional controls.
3. 'Infringements' are defined to include participation in or attempts to commit infringements, participation in a criminal organisation committing such infringements and the laundering of money deriving from infringements.
4. 'Mutual assistance' is assistance between customs administrations.
5. The 'applicant authority' is the competent authority which makes a request for assistance.
6. The 'requested authority' is the competent authority which receives a request for assistance.

7. 'Customs administrations' are defined to include customs authorities as well as other authorities with jurisdiction for implementing the provisions of the Convention. This definition recognises the different competences of different law enforcement agencies in the Member States. If the police or another authority in a particular Member State were responsible for enforcing the law in relation to drug trafficking (or any infringement of the customs provisions in Article 4.1 or 4.2), the appropriate provisions of the Convention would apply to that authority by virtue of this definition.
8. 'Personal data' means all information relating to any identified or identifiable person. This definition relates to the data protection provisions in Article 25 of the Convention.
9. 'Cross-border co-operation' means co-operation between customs administrations across internal borders.

Article 5: This article states that requests for assistance under the Convention shall be coordinated by a central unit and that a central unit shall be appointed in each of the customs administrations of the Member States for this purpose. It adds, however, that direct co-operation is not excluded particularly in an emergency. The purpose of these provisions is to seek to ensure efficiency and consistency, but to ensure that bureaucracy does not hinder effective co-operation.

If a request for assistance falls outside the competence of a customs authority, it must be forwarded by that Member State to the competent authority. This provision recognises that different agencies and administrations in different Member States have different areas of responsibility and competence. The provision is intended to ensure that co-operation is not hindered by one Member State not knowing the precise allocation of competence in another Member State.

If requests cannot be met, their refusal must be accompanied by an explanation. This last provision corresponds to Article 19, para 2 of the 1967 Naples Convention.

Article 6: This article allows for liaison officers from one Member State to be based in another Member State on mutually agreed terms. It makes clear that these officers will have no powers of intervention, but will simply act to facilitate co-operation.

Article 7: This article states that officers present in another member state in connection with the Convention must at all times be able to demonstrate by a written authority their identity and their official status. This is equivalent to the first part of Article 16 of the 1967 Naples Convention.

TITLE II - ASSISTANCE ON REQUEST

The provisions in Title II covers how requests for assistance should be made and the actions to be taken by a Member State when it receives a request for assistance under the provisions of this Convention. These provisions describe mutual administrative assistance between customs administrations.

The principle underlying this title is that Member States should honour requests for assistance from other Member States. In signing up to the provisions of Naples II, Member States are entering into a commitment to provide information and assistance on request to other Member States where possible and within the bounds of national law. Article 28 sets out the exemptions to this general obligation to provide assistance.

The terms 'requested authority' and 'applicant authority' which are used frequently in this title are defined in article 4 of this Convention.

This title repeats similar provisions found in the 1967 Naples Convention.

Article 8: This article lays down the general principles of assistance. These are that a requested authority shall proceed as if it was acting on its own account and shall use all the legal powers available to it. Furthermore, it shall extend its assistance to all aspects of the infringement that may have a bearing on the request it received.

Article 9: This article sets out the form and content of requests for assistance.

Requests shall always be in writing and in either the official language of the requested Member State or in a language acceptable to it.

Oral requests are possible but must subsequently be confirmed in writing.

Article 10: This article covers requests for information. It states that a requested authority will provide all information which may enable another authority to prevent, detect or prosecute infringements. This is based on Article 4 of the 1967 Naples Convention.

By mutual agreement officers from one Member State may obtain information from documents held in the offices of another Member State. They may take copies of this documentation. This is based on Article 11 of the 1967 Naples Convention.

Article 11: This article covers requests for surveillance to be carried out by one Member State on behalf of another. It states that a requested authority will keep a special watch on persons where there are serious grounds for thinking they are involved in infringements.

If requested, the Member State will also keep a watch on places, means of transport and goods.

This is based on Article 6 of the 1967 Naples Convention.

Article 12: This article relates to requests for enquiries to be made. A requested Member State shall carry out appropriate enquires into operations which may constitute infringements. Officers from the applicant authority may be present while such enquiries are being carried out.

Similar provisions appear in articles 13 and 14 of the 1967 Naples Convention.

Article 13: This article states that on request an authority will notify addressees living in its country of instruments and decisions from the competent authorities of the applicant Member State. Requests for notification should be accompanied by a translation in an official language of the requested Member State.

This is based on Article 17 of the 1967 Naples Convention.

Article 14: This article states that all information and documents obtained under the Convention may be used as evidence in accordance with national law by the appropriate authorities of the applicant State.

This is based on Article 15 of the 1967 Naples Convention.

TITLE III - SPONTANEOUS ASSISTANCE

The provisions of this title cover arrangements for customs administrations to provide assistance to other Member States without requests being made. The general principle underlying this title is that Member States should, without being asked, carry out relevant investigative activity and offer up any evidence or information they come across which may be of use to another Member State in detecting, investigating or prosecuting customs infringements.

Article 15: This article lays down the general principle that, subject to any limitations imposed by national law, each Member State will in the cases described in Article 16 and 17 provide assistance without prior request.

Article 16: This article states the Member States will keep persons and goods under special watch where this will serve to prevent, detect or prosecute infringements in another Member State and will communicate to that Member State all information it has concerning operations connected with planned or committed infringements.

This is based on Article 6 of the 1967 Naples Convention.

Article 17: This article states that the competent authorities of each Member State shall immediately send to the competent authorities all relevant information concerning planned or committed infringements and in particular information concerning new ways and means of committing infringements.

This is based on Article 8 and 9 of the 1967 Naples Convention.

Article 18: This article states that surveillance reports and information obtained under this title may be used as evidence by the Member State receiving the information.

This relates to Article 15 of the 1967 Naples Convention.

TITLE IV - SPECIAL FORMS OF CO-OPERATION

This title sets out special forms of co-operation for detecting, investigating and prosecuting customs infringements. The provisions in this title were not included in the 1967 Naples Convention and they form one of the most significant developments between that Convention and Naples II.

The forms of co-operation outlined in this title involve officers from one Member State being present in the territory of another Member State for the purpose of investigating cross-border crime.

Member States may opt not to be bound by some or all of the provisions in certain specified articles of this title.

Article 19: This article sets out general principles relating to special forms of co-operation. It makes clear that the special forms of cross-border co-operation described in this title shall only be allowed in relation to infringements concerning:

- (a) illicit traffic in drugs and other prohibited goods,
- (b) trade in precursor substances,
- (c) illegal cross-border commercial trade in taxable goods to evade tax or obtain unauthorised payments where the potential cost to the EC or a Member State is considerable, or
- (d) any other trade in goods prohibited by Community or national customs rules.

It states that a Member State can refuse a request if the form of investigation is not permitted or provided for by its national law.

Where judicial approval is necessary, this must be sought and any conditions imposed conformed to.

If damage is caused by the officers of one Member State in the territory of another, the latter shall make good the damage. Money paid to third parties for damages shall be reimbursed by the Member State from where the officers came.

In the course of cross-border operations officers on mission will be treated in the same way as officers of the host Member State as regards infringements committed by or against them.

Article 20: This article relates to hot pursuit. It states that officers from one Member State may pursue an individual observed in the act of committing an extraditable offence of the kind defined in Article 19 into another Member State without prior authorisation if the urgency of the situation makes prior notification impossible. The pursuing officers have no right to arrest the individual but may if necessary apprehend him, conduct a security search and handcuff the suspect in order to hand him over to the competent authorities of the Member State on whose territory the pursuit took place. Pursuit may take place over land, air or sea borders. Entry into private homes and places not accessible to the public is prohibited and pursuing officers must always be easily identifiable.

Pursuing officers may carry their service weapons unless the Member State whose territory they wish to enter has made a declaration prohibiting this.

Member States may opt not to be bound by all or part of this article.

Article 21: This article relates to cross-border surveillance. It states that officers from one Member State may be continue their observation of a suspect into another Member State if the latter authorises this. Conditions may be attached to the authorisation. Where there are urgent reasons for doing so, the border may be crossed without prior authorisation provided that the competent authorities are noted immediately and a request submitted without delay. Officers conducting an observation must act within the law of the Member State in whose territory they are operating, they must be able to prove their official identity and cannot enter private homes or non-public places. Officers will have no powers of intervention - ie they may neither challenge nor arrest the person under observation. Officers may carry their service weapons unless the Member State whose territory they wish to enter has made a declaration prohibiting this.

Member States may opt not to be bound by of all or part of this article.

Article 22: This article relates to controlled delivery. Controlled delivery is an investigation technique in which consignments of prohibited or restricted goods are not seized at the frontier but are kept under surveillance until they reach their destination. This allows customs services to identify and prosecute organisations responsible for drug trafficking, for example, rather than just seizing drugs at the frontier.

The article states that Member States shall undertake to ensure that controlled deliveries may be permitted in relation to criminal investigations into extraditable offences. Controlled deliveries shall take place under the direction of the competent authorities of the Member State where the delivery is taking place. Consignments may be intercepted and their contents left intact, removed or replaced in part or in whole.

Article 23: This article relates to covert investigations. In the context of this article, covert investigation means an officer of one Member State being authorised to operate in the territory of another Member State under the cover of a false identity.

The article says that this practice may be authorised. However requests for covert investigations may only be made where it would otherwise be extremely difficult to elucidate the facts.

In the course of covert investigations, officers are authorised only to collect information and make contact with suspects or other persons associated with them.

The covert investigation shall be conducted under conditions set by the national law of the Member State where it occurs, and shall be of limited duration. The requested authority shall provide necessary manpower and technical support.

Member States may opt not to be bound by all or part of this article.

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Article 24: This article relates to joint special investigation teams and allows Member States to set these up by mutual agreement. They shall implement investigations requiring simultaneous, co-ordinated action and co-ordinate joint activities to prevent and detect customs infringements.

These teams shall only be set up for a specific purpose and limited duration. An officer from the Member State in which the team is located will be in-charge of the team and that Member State shall make the necessary arrangements for the team to operate. The team must work within the law in that Member State.

Membership of the team shall not bestow any powers of intervention in another Member State's territory.

TITLE V - DATA PROTECTION

Article 25: This article covers data protection issues in relation to data exchanged by customs administrations under the provisions of the Convention. The article is without prejudice to the CIS Convention which contains its own provisions for protection of data exchanged using the CIS.

The article commits Member States to respecting the requirements for the protection of personal data in the 1981 Council of Europe Convention on data protection for automated exchanges of data.

It allows Member States to impose conditions with regard to the processing of data when it passes information to another Member State.

It says personal data may only be processed by a recipient authority for the purposes of the Convention as set out in Article 1(1). The authority which receives data under this Convention may pass them on to customs, investigators and judiciary bodies without the permission of the authority supplying the data. Data transmitted for reasons outside the purpose set out in Article 1(1) may only be passed on to others with the permission of the Member State which supplied it.

Data must be kept up-to-date, amended if inaccurate and erased if unlawfully communicated.

The person concerned has the right to correct the data and can ask to be told what data about him has been communicated and for what purposes. The person's right to obtain this information is determined by the national laws, regulations and procedures of the Member State in whose territory the data is requested.

Member States are liable in accordance with their own laws, regulations and procedures for injury cause to people through the processing of data communicated in relation to this Convention.

Member States may assign a supervisory role to the national data protection authorities who perform this role in relation to the CIS Convention.

The term 'processing of personal data' is defined in Article 2(b) of Directive 95/46/EC.

TITLE VI - INTERPRETATION OF THE CONVENTION

Article 26: This article covers the role of the Court of Justice of the European Communities in relation to the Convention. The ECJ will have jurisdiction to resolve disputes between Member States in relation to the interpretation or application of the Convention where the Council itself is unable to do so within six months. The Court will also have jurisdiction in relation to disputes between Member States and the Commission concerning the interpretation or application of the Convention. The Court will also have jurisdiction to give preliminary rulings on the interpretation of the Convention only for those Member States who make a declaration that they will accept this role for the Court.

TITLE VII - IMPLEMENTATION AND FINAL PROVISIONS

Article 27: This article commits customs administrations to taking account of the requirements of investigation secrecy when exchanging information. Member States may impose conditions on the use of information they pass to another Member State.

Article 28: This article states the Member States will not be obliged to offer assistance where doing so would harm the public policy or other essential interests of the state concerned, especially in relation to data protection. It adds that requests under Title IV may be refused when the proposed action is obviously disproportionate to the seriousness of the presumed infringement. Reasons must be given for refusals.

Article 29 This article states that Member States shall normally waive all claims for reimbursement of cost incurred in the implementation of this Convention with the exception of expenses for fees paid to experts. If expenses are substantial or extraordinary, Member States shall consult to decide how the expenses shall be borne.

Article 30: This article concerns reservations to the Convention and states that the only reservations permissible are those provided for in Articles 20, 21 and 23 which allow Member States to opt not to be bound by all or part of the provisions on hot pursuit, cross-border surveillance and covert investigation. It also notes that obligations from other agreements and notably the Schengen Agreement will not be affected by this Convention.

Article 31: This article limits the territorial application of the Convention to the Community Customs Territory.