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NOTE

from : Presidency

to : Customs Cooperation Group

No. prev. doc.: 8134/94 ENFOCUSTOM 24

Subject: Draft Convention on Mutual Assistance between Customs Administrations in the internal market (Naples II)

There has been close cooperation between Member States' customs administrations ever since the beginning of the EC. The completion of the Customs Union created a need for more extensive cooperation. The response to that need was the 1967 Naples Convention ("Naples I") which allowed a surprising degree of cooperation between administrations even in those days and has provided a tried and tested basis for day-to-day cooperation right up to the present day.

However, in recent years the EC has undergone further development, via the internal market, to become the EU. This has created a need for new forms of cooperation so that on the one hand the public can benefit from the advantages of the internal market without frontiers and on the other the authorities can have the resources necessary for combating those elements eager to exploit the disappearance of the internal borders for illegal dealings detrimental to the Member States and the Community.

Accordingly, in November 1993 the Justice and Home Affairs Ministers took up the request of the heads of European customs administrations contained in the Harrogate Declaration of 1992 and asked the Customs Cooperation Group to update "Naples I".

The previous document, 8134/94 ENFOCUSTOM 24, enumerates the principles which should be contained in "Naples II". At the Customs Cooperation Group's last meeting in Brussels on 13.7.1994 there was agreement in principle that "Naples II" should not only be an adjustment to changes in the legal position in recent years but should provide in particular for new forms of cooperation in response to the abolition of internal borders.

In the light of the above and of Member States' reactions so far, the German Presidency of the Council has prepared the attached draft comprising the following components:

The draft consists of five Titles:

- Title I adapts the scope to the present legal position, i.e. taking account in particular of the transfer of competences to the EC;

- Titles II and III lay down the usual basic principles for mutual assistance. In order to take account of the parallel with cooperation in the EC area the provisions here have been taken over from Regulation 1468/81 (new) on which negotiations have largely been completed;

- Starting with Article 17, Titles IV and V provide for additional forms of cooperation over and above traditional mutual assistance. Thought has been given in particular to the use of covert investigators, cross-border observation, hot pursuit, controlled forwarding, as well as to the use of liaison officers and joint investigation teams. Before the wording of such provisions is drafted delegations should take the opportunity of discussing the content not only within the Customs Co-operation Group but above all also with other Ministries in their capitals. It must then be decided whether other Working Parties under Title VI of the Treaty on European Union should be involved.

In addition the outcome of discussions in the fields of "external frontiers strategy" and "combatting fraud" should also be recorded. Delegations are invited to submit suggestions and drafting proposals to the Council Secretariat at any time.

Draft
Convention between the EC Member States
on Mutual Assistance and Cooperation
between Customs Administrations in the Internal Market

"Naples II"
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Draft
Convention between the EC Member States
on Mutual Assistance and Cooperation
between Customs Administrations in the Internal Market
"Naples II"

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Article 1

(Scope)

1. The Member States of the European Union shall provide each other with mutual assistance through their customs administrations, in particular with a view to preventing, detecting and prosecuting contraventions of national and EC customs regulations. [As well as with a view to assuring the fixing and collection of non-harmonized consumption taxes.]

2. This Convention shall not affect judicial assistance provided by the judicial authorities in criminal cases. For more detailed provisions see Article 3.

3. This Convention shall not affect cooperation between administrations in areas the regulation of which comes within competence of the EC.

Explanatory note on Article 1:

At the Group's meeting on 13 July 1994 the view was expressed that

- on the one hand the wording of the scope should be "flexible", in order to take account of provisions adopted in the future to cover extended EC jurisdiction, while

- on the other hand in the text of a Convention legal reasons and the need for proper practical application meant that the scope in particular needed to be formulated clearly and unambiguously in the legal text.

The intention is to take account of both requirements by laying down in positive terms in paragraph 1 the scope of the areas of cooperation established at the present time while allowing for possible future developments by means of a negative circumscription in paragraphs 2 and 3.

Unlike Article 1 of Naples I, paragraph 1 no longer needs to regulate cooperation on the correct setting and collection of duties and agricultural levies (which now come under Regulation 1468/81), on VAT (which now comes under Regulation 218/92 and the mutual assistance Directive) or on harmonized consumption taxes on tobacco, alcohol and petroleum (which now come under the mutual assistance Directive and the collection Directive).

Cooperation on criminal investigations other than those carried out by the judicial authorities has not been transferred to EC jurisdiction with regard to all

- national customs regulations
  - on trade in goods subject to bans, restrictions or controls under Articles 36 and 223 of the EC Treaty;
  - for combating the evasion of non-harmonized consumption taxes; and with regard to all
- EC customs regulations

since the EC does not have any jurisdiction over the criminal prosecution of such cases and as Regulation (EEC) No 1468 and Regulation (EEC) No 218/92 therefore contain no relevant arrangements for mutual assistance.

In the second sentence of paragraph 1 assistance not coming under EC jurisdiction in setting and collecting non-harmonized consumption taxes in the Member States has been incorporated in [ ]. The Group will examine whether there is any need for this.

Paragraph 2 corresponds to the arrangements in Article 52 of Regulation 1468/81 (new).

Paragraph 3 established a negative demarcation in relation to EC law. This make it clear that, in the event of the further development of EC jurisdiction in the future, EC law will take precedence.

Article 2

(Definition of terms):

1. "National customs provisions" means all legal and administrative provisions the application of which comes wholly or partly within the jurisdiction of the customs administration of that Contracting State concerning:

   - cross-border traffic in goods subject to bans, restrictions or controls under Articles 36 and 223 of the EC Treaty;
   - the transfer, processing, concealment or obscuration of assets or earnings gained or used directly or indirectly through cross-border illicit drug trafficking;

2. "EC customs regulations" The body of Community provisions and associated implementing provisions governing the import, export, transit and presence of goods traded between Member States and third countries, and between Member States in the case of goods that do not have Community status within the meaning of Article 9(2) of the Treaty or goods subject to additional controls or investigations for the purposes of establishing

		their Community status as well as the body of provisions adopted under the common agricultural policy and the special rules adopted with regard to goods resulting from the processing of agricultural products and all indirect taxes within the meaning of the EC mutual assistance Directive 77/799 in the version of Article 30 of Directive 92/12.
3.	"Mutual assistance"	Every act of assistance which Member States' customs administrations grant each other in performance of this Convention, regardless of whether specific investigative activities require the assistance of the judicial authorities.
4.	"applicant authority"	means the competent authority of a Member State which makes a request for assistance;
5.	"requested authority"	means the competent authority of a Member State to which a request for assistance is made;
6.	"Customs administrations"	Member States' customs authorities, plus other authorities wholly or partly responsible for implementing customs regulations;
7.	"Personal data"	means all information relating to an identified or identifiable individual.

Explanatory note on Article 2:

No 1 is modelled mutatis mutandis on Article 1 of the CIS Convention.

The definition in No 2 for "customs provision" and "agricultural provision" is taken from the draft of Regulation 1468/81 (new). A direct cross reference is not an option since the Regulation has not yet been adopted.

No 3 is intended to demarcate the term from the judicial assistance granted in other criminal matters between the authorities and the courts.

No 6 defines the concept of "customs administrations" in the functional sense in order to include in the mutual assistance the other administrations which apply the customs provisions pursuant to Nos 1 and 2 irrespective of the authorities' jurisdictions in the Member States. This ensures the comprehensive application of this Convention regardless of the different areas of competence in the Member States.

Article 3

(Relationship to judicial assistance provided by the judicial authorities)

1. Notwithstanding the provisions on judicial assistance provided by the judicial authorities in criminal matters, this Convention covers mutual assistance in the framework of criminal investigations for infringements of national and EC customs provisions, insofar as the applicant authority is responsible for those investigations on the basis of national provisions in the relevant Member State.

2. In the relationship between the applicant and requested authority in principle it is for the applicant authority to select the channel of judicial assistance according to the national provisions of the applicant State.

Explanatory note on Article 3:

Paragraph 1 contains the principle that with regard to the question of whether under this Convention the judicial assistance sought comes within the jurisdiction of the judicial authorities or the customs administration the decisive factor shall be the investigative competence of the customs authorities in the criminal field. In other words where the customs authorities carry out investigations upon suspicion of a customs offence the judicial assistance comes under the present Convention. This arrangement has the advantage that competence in matters of judicial assistance is adapted to the relevant investigative competence of the customs authorities in the various Member States.

Paragraph 2 ensures that the requested authority does not reject an application for assistance merely because it believes that the applicant authority should have applied through judicial assistance channels. The decision must be taken by the applicant authority. This is a necessary consequence of the provisions in paragraph 1 since only the applicant authority can reliably judge, on the basis of the relevant national provisions, whether in the procedure pending investigative competence rests with it or with the judicial authorities.

Article 4

(Central co-ordinating units)

1. Member States shall appoint through their customs administrations a central unit (co-ordinating unit). This will be responsible for co-ordinating mutual assistance and for cooperation with other authorities involved in a support measure under this Convention. The co-ordinating units of the Member States shall maintain constant direct contact with each other particularly in the cases covered by Title IV.

2. The activity of the central co-ordinating units shall not exclude direct cooperation between the customs authorities of the Member States.

3. If the customs administration is not, or not completely, competent to process a request the central co-ordinating unit shall forward the request to the competent national authority. If it is not possible to accede to the request for legal or substantive reasons, the co-ordinating unit shall return the request to the applicant authority with an explanation from which it must be clear why the request could not be processed.

Explanatory note on Article 4:

In essence Article 4 corresponds to Article 3 of the third protocol to the Convention on Assistance between Customs Administrations of 25 October 1990 92 from the Mutual Assistance Group 92 - GAM 92/ MAG 92 - (XXI/875/89-DE Rev 7a).

The CIS Convention also provides for such central units. In the framework of this Convention they serve firstly the purpose of forwarding the request to the competent national authority. This releases the applicant authority from the problem of finding out which authority in the requested Member State is competent from the local and substantive point of view. Secondly, in the framework of the special forms of cooperation under Title IV they are also responsible for co-ordinating cross-border investigations with the authorities involved in the other Member States.

Paragraph 2 ensures that notwithstanding the special functions of the co-ordinating units direct contact between the authorities of the Member States is neither hindered nor interrupted. This ensures that urgent requests are dealt with swiftly and that contacts established between Member States' customs authorities are not interrupted.

Title II

Assistance on request

Article 5

(Principles)

1. In order to provide the assistance required under this section the requested authority or the administrative authority which it has addressed shall proceed as though it were acting on its own account or at the request of another authority in its own country. In doing so it shall avail itself of all the legal powers at its disposal in order to respond to the request.

2. The requested authority shall extend its assistance to all circumstances of the infringement which have any recognizable bearing on the subject of the request for assistance without this requiring any additional request. In case of doubt the requested authority shall initially contact the applicant authority.

Explanatory note on Article 5:

Paragraph 1:

Paragraph 1 begins by establishing the principle that requests for assistance must be processed with the same priority and intensity as administrative action taken on the authority's own behalf or in response to requests for assistance from national authorities. This takes account of the legal thinking underlying Article 209a of the EC Treaty for the third pillar of the EU Treaty.
The parallel provision is contained in Article 9(1) of Regulation 1468/81 (new).

Paragraph 2

This provision is intended to prevent excessively narrow interpretation of the request resulting in the omission of useful additional support action which the applicant authority would have included in its request had it been aware of all the circumstances.

Article 6

(Form and content of the request for assistance)

1. Requests shall always be made in writing. Documents necessary for the execution of such requests shall accompany the request. When required because of the urgency of the situation, oral requests shall be accepted, but must be confirmed in writing immediately.

2. Requests pursuant to paragraph 1 of this Article shall include the following information:
   (a) the applicant authority making the request;
   (b) the measure requested;
   (c) the object of and the reason for the request;
   (d) the laws, rules and other legal elements involved;
   (e) indications as exact and comprehensive as possible on the natural or legal persons being the target of the investigations;
   (f) a summary of the relevant facts, except in cases provided for in Article.

3. Requests shall be submitted in an official language of the requested authority or in a language acceptable to such authority.

4. If a request does not meet the formal requirements, its correction or completion may be demanded; the ordering of precautionary measures may however take place.

Explanatory note on Article 6:

The text corresponds to that of Article 6 of protocol No 6 on mutual assistance in customs matters with Poland (OJ No L 114/145, 30.4.1992)

Article 7

(Requests for information)

(1) At the request of the applicant authority, the requested authority shall communicate to it all information likely to enable the former to prevent, detect and prosecute infringements against national and EC customs provisions [and in order to ensure the fixing and collection of non-harmonized consumption taxes].

(2) The provision of information is to be accompanied by reports and other documents, plus certified copies or extracts of the same, on which the information provided is based and which are available to the requested authority or which were produced or secured in order to execute the request for information. The communication of the above documents shall be regarded as a special form of provision of information.

(3) By agreement between the applicant authority and the requested authority, officials authorized by the applicant authority may, subject to detailed instructions from the requested authority, obtain information pursuant to paragraph 1 from the offices of the requested Member State. This shall apply to all information derived from documentation to which the staff of those offices have access. These officials shall be authorized to take copies of the said documentation.

Explanatory note on Article 7:

Paragraphs 1 and 2 are modelled on Articles 4 and 8 of the new draft of Regulation 1468/81. They are intended to enable the applicant authority successfully to continue or conclude the investigations in their own Member State with the aid of the information and the documentation relating to it.

The second sentence of paragraph 2 makes it clear that the documentation relating to and accompanying the information provided is not subject to a special judicial release and confiscation procedure as material used in evidence. As an enclosure accompanying the written information such documentation forms part of the information itself and is therefore subject to the legal arrangements governing the provision of information under this Convention.

It was decided to dispense with arrangements for a separate obligation to hand over available documents: (i.e. outwith a request for information) as provided for in Article 5 of Regulation 1468/81 (new), since any such mere handing over of available documents simply constitutes a way of providing information pursuant to paragraph 2.

Paragraph 3 is modelled on the wording of Article 10 of Regulation 1468/81 (new). It permits the officials of the applicant authority or other authorized officials to obtain from any administrative authority of a Member State information which they require in the performance of the duties described in Article 1 of the Convention and where necessary to make copies of the documentation available there.

Article 8

(Requests for surveillance)

At the request of the applicant authority, the requested authority shall keep a watch on persons of whom there are reasonable grounds for believing that they have infringed the national customs provisions of one or more Member States or EC customs provisions or that they are planning such an infringement. At the request of the applicant authority, the requested authority shall also keep a watch on places, means of transport, goods and cash movements connected with activities which might be detrimental to the abovementioned customs provisions.

[The surveillance request may also concern activities detrimental to the collection and fixing of non-harmonized consumption taxes by individual Member States.]

Explanatory note on Article 8:

Article 8 corresponds to the provisions of Article 7 of Regulation 1468/81 (new) and of Article 6 of the Naples I Convention. The transfer of funds was accepted in order to take account of the fight against money laundering in the context of drug trafficking (second indent of Article 2(1)).

Article 9

(Requests for enquiries)

1. The requested authority shall at the request of the applicant authority carry out, or arrange to have carried out, the appropriate enquiries concerning operations in connection with a breach of customs legislation [or the fixing and collection of non-harmonized excise duties].

   The requested authority shall communicate the results of such administrative enquiries to the applicant authority. Article 7(2) shall apply mutatis mutandis.

2. By agreement between the applicant authority and the requested authority, officials appointed by the applicant authority may be present at the administrative enquiries referred to in paragraph 1.

   Administrative enquiries shall at all times be carried out by staff of the requested authority. The applicant authority's staff may not, of their own initiative, assume the powers conferred on officials of the requested authority. They shall, however, have access to the same premises and the same documents as the latter, through their intermediary and for the sole purpose of the administrative enquiry being carried out.

Explanatory note on Article 9:

Paragraph 1:

The provision is modelled on Article 9 of Regulation No 1468/81 (new) and Article 13 of the Naples I Convention. The request for an enquiry is in practice frequently coupled with a request for information. In numerous cases the requested authority has first to conduct enquiries in order to be able to provide the requested information.

Paragraph 2:

The officials present from the applicant authority have solely an advisory function while the enquiry activities are reserved for the officials of the requested authority.

Article 10

(Obligation to prove identity)

Staff of the applicant authority present in another Member State in order to exercise the rights laid down in Article 7(3) and Article 9(2) must at all times be able to produce written authority stating their identity and their official functions.

Explanatory note on Article 10:

Corresponds to the wording of Article 11 in Regulation No 1468/81 (new).

Article 11

(Use as evidence)

Findings, certificates, information, documents, certified true copies and other papers obtained by the staff of the requested authority and transmitted to the applicant authority in the cases provided for in Articles 7 to 9 of this Regulation may be used as evidence by the competent bodies of the Member States of the applicant authority in accordance with national law.

Explanatory note on Article 11:

Corresponds to the wording of Article 12 of Regulation No 1468/81 (new).

The Article lays down that the information which the requested authority gives the applicant authority may also be invoked as evidence in judicial or extrajudicial proceedings. National procedural regulations governing the admission and use of evidence are not affected.

Article 12

(Delivery)

1. At the request of the applicant authority, the requested authority shall, in accordance with its national rules, notify the addressee or have it notified of all instruments or decisions which emanate from the administrative authorities and concern the application of this Convention.

2. Requests for notification, mentioning the subject of the instrument or decision to be communicated, shall be accompanied by a translation in the official langauge or an official language of the Member State in which the requested authority is based, without prejudice to the latter's right to waive such a translation.

Explanatory note on Article 12:

The wording is modelled on Article 6 of Regulation No 1468/81 (new).

Title III

Spontaneous assistance

Article 13

(Principle)

The competent authorities of each Member State shall, as laid down in Articles 14 and 15 of this Regulation, provide assistance to the competent authorities of the other Member States without prior request.

Article 14

(Surveillance)

Where it serves the prevention of, enquiry into and pursuit of customs offences in another Member State, each Member State's competent authorities shall:

(a) as far as is possible keep, or have kept, the special watch described in Article 8 of this Regulation;

(b) communicate to the competent authorities of the other Member States concerned all information in their possession, and in particular reports and other documents or certified true copies or extracts thereof, concerning operations which are connected with a planned or committed breach of customs legislation [or are contrary to the collection and fixing of non-harmonized excise duties in the Member State to which the communication is addressed].

The second sentence of Article 7(2) shall apply mutatis mutandis.

Explanatory note on Article 14:

The wording is based on Article 14 of Regulation 1468/81 (new).

Article 15

(Spontaneous information)

The competent authorities of each Member State shall immediately send to the competent authorities of the other Member States concerned all relevant information concerning planned or committed breaches of customs legislation, and in particular information concerning the goods involved and new ways and means of carrying out such offences.

[The same shall apply in the case of operations which are contrary to the collection and fixing of non-harmonized excise duties in a Member State.]

Explanatory note on Article 15:

The wording corresponds to that of Article 15 of Regulation No 1468/81 (new) which is itself based on Article 9 of the Naples I Convention.

This communication obligation primarily concerns the transmission of general information on new methods of crime. Unsolicited information on specific breaches is already covered by Article 14.

Article 16

(Use as evidence)

Surveillance reports and information obtained by staff of one Member State and communicated to another Member State in the course of the spontaneous assistance provided for in Articles 13 to 15 of this Regulation may be used as evidence by the competent bodies of the Member State receiving the information.

Explanatory note on Article 16:

Article 16 is the parallel provision to Article 11. The explanation given in that instance similarly applies to Article 16.

Title IV

Special forms of cooperation

Article 17

(Crossborder observation)

Object of provision:

In a Europe with uncontrolled internal borders it is essential to provide the customs authorities with the possibility in the context of an observational investigation of continuing that observation, or arranging for its continuation, beyond the border of a Member State. This is the only way to ensure that the investigative contact is not broken when the suspect crosses the border. This calls for a provision to ensure cross-border continuation of such investigations in the framework of mutual assistance.

Content of provision:

- co-ordination procedure prior to carrying out a cross-border observation;
- arrangements for particularly urgent cases;
- restriction of the observation in terms of time and territorial limits;
- the legal powers of the observing officers in the requested Member State;
- provisions on carrying and using official firearms.

Article 18

(Hot pursuit)

Object of provision:

With the opening of the borders between Member States there is an increasing danger of persons caught red-handed contravening customs regulations escaping across an internal border to avoid being apprehended by officials. This calls for a provision to make it possible for suspects to be pursued onto the territory of the neighbouring State under special circumstances. This is the only way to ensure that the pursuit is continued.

Content of provision:

- A procedure for informing the competent authorities of the neighbouring Member State;
- restriction of the hot pursuit in terms of time and territorial limits;
- the legal powers of the officers engaged in the hot pursuit;
- provisions on carrying and using official firearms.
- the procedure for transferring the hot pursuit to officers of the assisting Member State.

Article 19

(Controlled forwarding)

Object of provision:

In order to discover the intended recipient of a particularly sensitive item of merchandise which is banned or restricted in the various Member States (such as narcotics, arms, weapons-grade material, strategic goods etc.), it may become necessary to allow the merchandise to cross the border of a Member State for delivery to the recipient. This can make it possible to identify the individuals behind organized smuggling rings.

As far as narcotics are concerned, such a provision corresponds to Article 11 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 20.12.1988.

Content of provision:

- the procedure for co-ordination of the execution of controlled forwarding;
- arrangements in the event of special urgency;
- provision for the officials of the requested State to take over;
- co-ordination with the judicial authorities.

Article 20

(Joint investigation teams)

Object of provision:

In the framework of the fight against international organized groups of criminals, for a limited period of time and in order to attain a specific investigative objective, it can become necessary to form a joint investigation team involving officials from two or more Member States. The idea is to make it possible to identify and combat the organizational structures of the groups of criminals.

Content of provision:

- The conditions for operations and the procedure for co-ordination between the Member States concerned;
- provisions on the composition of the teams and who is to be in charge;
- legal powers of officials on the territory of another Member State;
- provision on carrying and using official firearms on the territory of another Member State.

Article 21

(Covert investigators)

Object of provision:

In the fight against drugs and arms trading covert investigators represent one of the most effective means of detection. Their duties include making fictitious or sample purchases. In practice an increasing number of promising operations are having to be aborted because suspects wish to complete part of the deal in a Member State other than that in which the investigations began. Since it is not possible to switch to a different covert investigator in such cases it would be desirable to be able to continue the operation in the requested Member State without changing personnel.

Content of provision:

- The categories of cases in which operations of this kind are an option;
- the procedure for co-ordination with the requested Member State;
- the logistical support by the requested Member State;
- protection for the covert investigator;
- powers of the official on the territory of the foreign Member State;
- Involvement of the judicial authorities.

Title V

Computerized exchange of data

Article 22

(investigation database, data protection)

[The objective is to set up a common automated customs database which will serve as an effective aid in conducting investigations. The system must take account of the protection required for personal data held on computer. Such an investigative database corresponds to the objective envisaged in Article 7 of the third protocol to the Convention on Assistance between Customs Administrations of 25 October 1990 92 by the Mutual Assistance Group 92 (GAM 92/MAG 92). In examining the need for this database and its design particular account will need to be taken of the extent to which it will be possible to use the work carried out in the field of the CIS (Convention)] .

Title VI

Conventional exchange of data

Article 23

(Data protection)

[As a supplement to the protection arrangements for computerized personal data this provision refers to the regulation of data protection for data stored by conventional means.]

Title VII

Final provisions