

**Proposal for a Council Decision concerning the conclusion of an Agreement in the form of an exchange of letters between the European Community and Malta adding a Protocol on mutual administrative assistance in customs matters to the Agreement establishing an association between the European Economic Community and Malta**

(2003/C 45 E/09)

COM(2002) 509 final — 2002/0249(ACC)

(Submitted by the Commission on 17 October 2002)

**EXPLANATORY MEMORANDUM**

1. The Agreement establishing an association between the European Economic Community and Malta entered into force on 1 April 1971. It included among its objectives close and extensive co-operation to increase and diversify trade between the parties, and provided for the reciprocal liberalisation of commerce.
2. However, this Agreement contains no specific requirements with regard to methods of administrative co-operation to be applied to its general provisions.
3. In order to provide greater security in the customs sector for legitimate trade, the respective Agreement parties considered it necessary to conclude an additional protocol to the Agreement on mutual administrative assistance in the customs sector.
4. On this basis, negotiations have taken place between the Commission and Malta. These exchanges have resulted in the Protocol and the Agreement in the form of an exchange of letters initialled in Valletta in October 2001.
5. The purpose of this Protocol is the prevention, detection and prosecution, by way of mutual assistance conducted between the parties' competent authorities of activities in breach of customs legislation. The assistance in question chiefly involves the forwarding of information and documents with regard to investigations, and the surveillance of specific individuals, goods, and places or means of transport.
6. This Protocol is virtually identical to the standard version drawn up in 1997 by the Council Working Group on Economic Questions.
7. In cases involving questions relating to the applicability of the Protocol, the Contracting Parties agree to consult with each other in order to resolve such matters. Such consultation is to be carried out within the framework of the Special Co-operation Committee set up by the Association Council.
8. The Agreement now needs to be signed and concluded. The Council is therefore invited:
  - to approve, on behalf of the Community, the Agreement in the form of an exchange of letters between the Community and the Malta adding a Protocol on mutual administrative assistance in customs matters to the Association Agreement;
  - to designate a person empowered to sign the exchange of letters.

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 133 in conjunction with the first sentence of the first subparagraph of Article 300(2) thereof,

Having regard to the proposal from the Commission,

Whereas:

- (1) To allow mutual administrative assistance in customs matters between the two parties as provided for in the Agreement establishing an association between the European Economic Community and Malta <sup>(1)</sup>, which entered into force on 1 April 1971, a Protocol should be added to that Agreement.
- (2) To that end, the Commission has negotiated on behalf of the Community a bilateral Agreement in the form of an Exchange of Letters.

- (3) The Agreement in the form of an Exchange of Letters should be approved on behalf of the Community,

HAS DECIDED AS FOLLOWS:

*Article 1*

The Agreement in the form of an Exchange of Letters between the European Community and Malta adding a Protocol on mutual administrative assistance in customs matters to the Agreement establishing an association between the European Economic Community and Malta is hereby approved on behalf of the Community.

The text of the Agreement in the form of an exchange of letters is attached to this Decision.

*Article 2*

The President of the Council is hereby authorised to designate the persons empowered to sign the Agreement in the form of an Exchange of Letters, referred to in Article 1, in order to bind the Community.

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<sup>(1)</sup> OJ L 61, 14.3.1971, p. 1.

**AGREEMENT****in the form of an exchange of letters between the European Community and Malta adding a Protocol on mutual administrative assistance in customs matters to the Agreement establishing an association between the European Economic Community and Malta***A. Letter from the European Community*

Brussels, . . .

Sir,

I have the honour to refer to the negotiations between representatives of the European Community and Malta with a view to concluding an Agreement on Mutual Administrative Assistance in Customs Matters adding a Protocol to the Agreement establishing an association between the European Economic Community and Malta signed in Valletta on 5 December 1970.

The Protocol, the text of which is annexed hereto, shall form an integral part of the Agreement and shall enter into force on the first day of the second month following the accomplishment of this exchange of letters.

I should be grateful if you could confirm the agreement of Malta to the foregoing.

Please accept, Sir, the assurance of my highest consideration.

*On behalf of the European Community*

*B. Letter from Malta*

Valletta, . . .

Sir,

I have the honour to acknowledge receipt of your letter of today's date with the following content:

'I have the honour to refer to the negotiations between representatives of the European Community and Malta with a view to concluding an Agreement on mutual administrative assistance in customs matters adding a Protocol to the Agreement establishing an association between the European Economic Community and Malta signed in Valletta on 5 December 1970.

This Protocol, the text of which is annexed hereto, shall form an integral part of the Agreement and shall enter into force on the first day of the second month following the accomplishment of this exchange of letters.

I should be grateful if you could confirm the agreement of Malta to the foregoing.'

I can confirm the agreement of Malta to the foregoing.

Please accept, Sir, the assurance of my highest consideration.

*For Malta*

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## PROTOCOL

### on mutual administrative assistance in customs matters

#### Article 1

##### Definitions

For the purposes of this Protocol:

- (a) 'customs legislation' shall mean any legal or regulatory provisions adopted by the Community or Malta governing the import, export and transit of goods and their placing under any other customs regime or procedure, including measures of prohibition, restriction and control;
- (b) 'applicant authority' shall mean a competent administrative authority which has been designated by a Contracting Party for this purpose and which makes a request for assistance on the basis of this Protocol;
- (c) 'requested authority' shall mean a competent administrative authority which has been designated by a Contracting Party for this purpose and which receives a request for assistance on the basis of this Protocol;
- (d) 'personal data' shall mean all information relating to an identified or identifiable individual;
- (e) 'operation in breach of customs legislation' shall mean any violation or attempted violation of customs legislation.

#### Article 2

##### Scope

1. The Contracting Parties shall assist each other, in the areas within their competence, in the manner and under the conditions laid down in this Protocol, to ensure the correct application of the customs legislation, in particular by preventing, investigating and combating operations in breach of that legislation.

2. Assistance in customs matters, as provided for in this Protocol, shall apply to any administrative authority of the Contracting Parties which is competent for the application of this Protocol. It shall not prejudice the rules governing mutual assistance in criminal matters. Nor shall it cover information obtained under powers exercised at the request of a judicial authority, except where communication of such information is authorised by that authority.

3. Assistance to recover duties, taxes or fines is not covered by this Protocol.

#### Article 3

##### Assistance on request

1. At the request of the applicant authority, the requested authority shall provide it with all relevant information which may enable it to ensure that customs legislation is correctly applied, including information regarding activities noted or

planned which are or could be operations in breach of customs legislation.

2. At the request of the applicant authority, the requested authority shall inform it:

- (a) whether goods exported from the territory of one of the Contracting Parties have been properly imported into the territory of the other Contracting Party, specifying, where appropriate, the customs procedure applied to the goods;
- (b) whether goods imported into the territory of one of the Contracting Parties have been properly exported from the territory of the other Party, specifying, where appropriate, the customs procedure applied to the goods.

3. At the request of the applicant authority, the requested authority shall, within the framework of its legal or regulatory provisions, take the necessary steps to ensure special surveillance of:

- (a) natural or legal persons in respect of whom there are reasonable grounds for believing that they are or have been involved in operations in breach of customs legislation;
- (b) places where stocks of goods have been or may be assembled in such a way that there are reasonable grounds for believing that these goods are intended to be used in operations in breach of customs legislation;
- (c) goods that are or may be transported in such a way that there are reasonable grounds for believing that they are intended to be used in operations in breach of customs legislation;
- (d) means of transport that are or may be used in such a way that there are reasonable grounds for believing that they are intended to be used in operations in breach of customs legislation.

#### Article 4

##### Spontaneous assistance

The Contracting Parties shall assist each other, at their own initiative and in accordance with their legal or regulatory provisions, if they consider that to be necessary for the correct application of customs legislation, particularly by providing information obtained pertaining to:

- activities which are or appear to be operations in breach of customs legislation and which may be of interest to the other Contracting Party;
- new means or methods employed in carrying out operations in breach of customs legislation;

- goods known to be subject to operations in breach of customs legislation;
- natural or legal persons in respect of whom there are reasonable grounds for believing that they are or have been involved in operations in breach of customs legislation;
- means of transport in respect of which there are reasonable grounds for believing that they have been, are, or may be used in operations in breach of customs legislation.

#### Article 5

##### **Delivery, Notification**

At the request of the applicant authority, the requested authority shall, in accordance with legal or regulatory provisions applicable to the latter, take all necessary measures in order:

- to deliver any documents; or
- to notify any decisions

emanating from the applicant authority and falling within the scope of this Protocol, to an addressee residing or established in the territory of the requested authority.

Requests for delivery of documents or notification of decisions shall be made in writing in an official language of the requested authority or in a language acceptable to that authority.

#### Article 6

##### **Form and substance of requests for assistance**

1. Requests pursuant to this Protocol shall be made in writing. They shall be accompanied by the documents necessary to enable compliance with the request. When required because of the urgency of the situation, oral requests may be accepted, but must be confirmed in writing immediately.
2. Requests pursuant to paragraph 1 shall include the following information:
  - (a) the applicant authority;
  - (b) the measure requested;
  - (c) the object of and the reason for the request;
  - (d) the legal or regulatory provisions and other legal elements involved;
  - (e) indications as exact and comprehensive as possible on the natural or legal persons who are the target of the investigations;

- (f) a summary of the relevant facts and of the enquiries already carried out.

3. Requests shall be submitted in an official language of the requested authority or in a language acceptable to that authority. This requirement shall not apply to any documents that accompany the request under paragraph 1.

4. If a request does not meet the formal requirements set out above, its correction or completion may be requested; in the meantime, precautionary measures may be ordered.

#### Article 7

##### **Execution of requests**

1. In order to comply with a request for assistance, the requested authority shall proceed, within the limits of its competence and available resources, as though it were acting on its own account or at the request of other authorities of that same Contracting Party, by supplying information already possessed, by carrying out appropriate enquiries or by arranging for them to be carried out. This provision shall also apply to any other authority to which the request has been addressed by the requested authority when the latter cannot act on its own.

2. Requests for assistance shall be executed in accordance with the legal or regulatory provisions of the requested Contracting Party.

3. Duly authorised officials of a Contracting Party may, with the agreement of the other Contracting Party and subject to the conditions laid down by the latter, be present to obtain in the offices of the requested authority or any other concerned authority in accordance with paragraph 1, information relating to activities that are or may be operations in breach of customs legislation which the applicant authority needs for the purposes of this Protocol.

4. Duly authorised officials of a Contracting Party may, with the agreement of the other Contracting Party and subject to the conditions laid down by the latter, be present at enquiries carried out in the latter's territory.

#### Article 8

##### **Form in which information is to be communicated**

1. The requested authority shall communicate results of enquiries to the applicant authority in writing together with relevant documents, certified copies or other items.

2. This information may be in computerised form.

3. Original documents shall be transmitted only upon request in cases where certified copies would be insufficient. These originals shall be returned at the earliest opportunity.

*Article 9***Exceptions to the obligation to provide assistance**

1. Assistance may be refused or may be subject to the satisfaction of certain conditions or requirements, in cases where a Party is of the opinion that assistance under this Protocol would:

- (a) be likely to prejudice the sovereignty of Malta or that of a Member State which has been requested to provide assistance under this Protocol; or
- (b) be likely to prejudice public policy, security or other essential interests, in particular in the cases referred to under Article 10(2); or
- (c) violate an industrial, commercial or professional secret.

2. Assistance may be postponed by the requested authority on the ground that it will interfere with an ongoing investigation, prosecution or proceeding. In such a case, the requested authority shall consult with the applicant authority to determine if assistance can be given subject to such terms or conditions as the requested authority may require.

3. Where the applicant authority seeks assistance which it would itself be unable to provide if so requested, it shall draw attention to that fact in its request. It shall then be for the requested authority to decide how to respond to such a request.

4. For the cases referred to in paragraphs 1 and 2, the decision of the requested authority and the reasons therefor must be communicated to the applicant authority without delay.

*Article 10***Information exchange and confidentiality**

1. Any information communicated in whatever form pursuant to this Protocol shall be of a confidential or restricted nature, depending on the rules applicable in each of the Contracting Parties. It shall be covered by the obligation of official secrecy and shall enjoy the protection extended to similar information under the relevant laws of the Contracting Party that received it and the corresponding provisions applying to the Community authorities.

2. Personal data may be exchanged only where the Contracting Party which may receive it undertakes to protect such data in at least an equivalent way to the one applicable to that particular case in the Contracting Party that may supply it. To that end, Contracting Parties shall communicate to each other information on their applicable rules, including, where appropriate, legal provisions in force in the Member States of the Community.

3. The use, in judicial or administrative proceedings instituted in respect of operations in breach of customs legis-

lation, of information obtained under this Protocol, is considered to be for the purposes of this Protocol. Therefore, the Contracting Parties may, in their records of evidence, reports and testimonies and in proceedings and charges brought before the courts, use as evidence information obtained and documents consulted in accordance with the provisions of this Protocol. The competent authority which supplied that information or gave access to those documents shall be notified of such use.

4. Information obtained shall be used solely for the purposes of this Protocol. Where one of the Contracting Parties wishes to use such information for other purposes, it shall obtain the prior written consent of the authority which provided the information. Such use shall then be subject to any restrictions laid down by that authority.

*Article 11***Experts and witnesses**

An official of a requested authority may be authorised to appear, within the limitations of the authorisation granted, as an expert or witness in judicial or administrative proceedings regarding the matters covered by this Protocol, and produce such objects, documents or certified copies thereof, as may be needed for the proceedings. The request for appearance must indicate specifically before which judicial or administrative authority the official will have to appear, on what matters and by virtue of what title or qualification the official will be questioned.

*Article 12***Assistance expenses**

The Contracting Parties shall waive all claims on each other for the reimbursement of expenses incurred pursuant to this Protocol, except, as appropriate, for expenses to experts and witnesses, and those to interpreters and translators who are not public service employees.

*Article 13***Implementation**

1. The implementation of this Protocol shall be entrusted, on the one hand, to the customs authorities of Malta and, on the other hand, to the competent services of the Commission of the European Communities and the customs authorities of the Member States, as appropriate. They shall decide on all practical measures and arrangements necessary for its application, taking into consideration the rules in force in particular in the field of data protection. They may recommend to the competent bodies amendments which they consider should be made to this Protocol.

2. The Contracting Parties shall consult each other and subsequently keep each other informed of the detailed rules of implementation which are adopted in accordance with the provisions of this Protocol.

*Article 14***Other agreements**

1. Taking into account the respective competencies of the European Community and the Member States, the provisions of this Protocol shall:

- not affect the obligations of the Contracting Parties under any other international agreement or convention;
- be deemed complementary to agreements on mutual assistance which have been or may be concluded between individual Member States and Malta; and
- not affect the Community provisions governing the communication between the competent services of the Commission of the European Communities and the

customs authorities of the Member States of any information obtained under this Protocol which could be of interest to the Community.

2. Notwithstanding the provisions of paragraph 1, the provisions of this Protocol shall take precedence over the provisions of any bilateral agreement on mutual assistance which has been or may be concluded between individual Member States and Malta insofar as the provisions of the latter are incompatible with those of this Protocol.

3. In respect of questions relating to the applicability of this Protocol, the Contracting Parties shall consult each other to resolve the matter in the framework of the Special Committee set up by the Association Council under Article 12 of the Association Agreement.