



**COUNCIL OF
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LEGISLATIVE ACTS AND OTHER INSTRUMENTS

Subject: Protocol 2 to the Interim Agreement with a view to an Economic Partnership Agreement between the European Community and its Member States, of the one part, and the SADC EPA States, of the other part

PROTOCOL 2
MUTUAL ADMINISTRATIVE ASSISTANCE
IN CUSTOMS MATTERS

ARTICLE 1

Definitions

For the purposes of this Protocol:

- (a) "Goods" means all goods falling within the scope of the Harmonised System, irrespective of the scope of this Agreement;
- (b) "Customs legislation" means any legal or regulatory provisions applicable in the territories of the Parties or the SADC EPA States, as the case may be, 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;
- (c) "Applicant Authority" means a competent administrative authority which has been designated by the Parties or the SADC EPA States, as the case may be, for this purpose and which makes a request for assistance on the basis of this Protocol;
- (d) "Requested Authority" means a competent administrative authority which has been designated by the Parties or the SADC EPA States, as the case may be, for this purpose and which receives a request for assistance on the basis of this Protocol;
- (e) "Personal data" means all information relating to an identified or identifiable individual; and
- (f) "Operation in breach of customs legislation" means any violation or attempted violation of customs legislation.

ARTICLE 2

Scope

1. The Parties or the SADC EPA States, as the case may be, 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 Parties or the SADC EPA States, as the case may be, 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 has the prior authorisation of that authority.
3. Assistance in recovery proceedings regarding 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 the Party have been lawfully imported into the territory of the other Party, or the SADC EPA States, as the case may be, specifying, where appropriate, the customs procedure applied to the goods; and
 - (b) whether goods imported into the territory of the Party have been lawfully exported from the territory of the other Party, or the SADC EPA States, as the case may be, 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; and
- (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 Parties or the SADC EPA States, as the case may be, shall assist each other, on 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:

- (a) operations which are, or appear to be, in breach of customs legislation and which may be of interest to the other Party, or the SADC EPA States, as the case may be;
- (b) new means or methods employed in carrying out operations in breach of customs legislation;

- (c) goods known to be subject to operations in breach of customs legislation;
- (d) 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; and
- (e) 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 and notification

1. 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:
 - (a) to deliver any documents 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, and, where appropriate;
 - (b) 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.

2. 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. Requests may also be communicated in electronic form.

2. Requests pursuant to paragraph 1 of this Article shall include the following information:

- (a) the name of 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; and
- (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 of this Article.

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 Party, or the SADC EPA States, as the case may be, 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 Party or the SADC EPA States, as the case may be.

3. Duly authorised officials of a Party or the SADC EPA States, as the case may be, may, with the agreement of the other Party or the SADC EPA States involved, as the case may be, and subject to the conditions laid down by the latter:

- (a) be present in the offices of the Requested Authority or any other concerned authority in accordance with paragraph 1 of this Article, to obtain 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; and
- (b) 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. If requested, the information provided for in paragraph 1 of this Article may be in electronic 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 or the SADC EPA States concerned, as the case may be, is of the opinion that assistance under this Protocol would:
 - (a) be likely to prejudice the sovereignty of an SADC EPA State or that of a Member State of the European Union 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) of this Protocol; 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 of this Article, the decision of the Requested Authority and the reasons must be communicated to the Applicant Authority without delay.

ARTICLE 10

Information exchange and confidentiality

1. Any information communicated in whatsoever form pursuant to this Protocol shall be of a confidential or restricted nature, depending on the rules applicable in each of the 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 Party or the SADC EPA States, as the case may be, that received it and the corresponding provisions applying to the European Community authorities.
2. Personal data may be exchanged only where the Party which may receive them agrees to ensure an adequate level of protection of such data. To that end, Parties or the SADC EPA States, as the case may be, shall communicate to each other information on their applicable rules, including, where appropriate, legal provisions in force in the Member States of the European Union.
3. The use, in judicial or administrative proceedings instituted in respect of operations in breach of customs legislation, of information obtained under this Protocol, is considered to be for the purposes of this Protocol. Therefore, the Parties or the SADC EPA States, as the case may be, 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 Parties or the SADC EPA States, as the case may be, 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 Parties or the SADC EPA States, as the case may be, shall waive all claims on each other for the reimbursement of expenses incurred pursuant to this Protocol, except, as appropriate, for expenses of experts and witnesses, and those of 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 the SADC EPA States 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.
2. The 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

Amendments

The Parties may recommend to the Trade and Development Committee amendments which they consider should be made to this Protocol.

ARTICLE 15

Final provisions

1. This Protocol shall complement and not impede application of any agreements on mutual administrative assistance which have been concluded or may be concluded between the Parties nor shall it preclude more extensive mutual assistance granted under such agreements.
2. The provisions of this Protocol shall not affect the obligations of the Parties under any other international agreement or convention.
3. The provisions of this Protocol shall not affect the European 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 the European Union of any information obtained under this Protocol which could be of interest to the European Community.

4. Notwithstanding the provisions of paragraph 1 of this Article, 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 of the European Union and any SADC EPA State in so far as the provisions of the latter are incompatible with those of this Protocol.

5. In respect of questions relating to the applicability of this Protocol, the Parties shall consult each other to resolve the matter in the framework of the Special Committee on Customs and Trade Facilitation set up under Article 47 of the Agreement.