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THE COUNCIL

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**NOTE**

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from: German Presidency

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7712/94 ASIM 119

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Subject: Commission initiative for a Decision establishing a Convention on controls on  
persons crossing external frontiers

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Priority was given in the 1994 work programme to adapting the draft Convention on the crossing of external frontiers following the entry into force of the Treaty on European Union, to signing that draft Convention, and to concluding the work underway on its application.

In December 1993 the Commission presented a proposal for a Decision, based on Article K.3 of the Treaty on European Union, establishing a Convention on the crossing of the external frontiers of the Member States. Under the Greek Presidency, progress was made in discussions on that draft in the External Frontiers Group.

In order to settle outstanding issues as quickly as possible, the German Presidency intends to structure subsequent discussions as follows (aspects listed under I should be referred to Steering Group I because of their political nature):

I. **Fundamental issues of a political nature**

1. **Treatment of EEA nationals as persons entitled under Community law pursuant to Article 1(1)(a)(iii)**

The Spanish delegation entered a reservation on EEA nationals being given equal treatment to Member States' nationals under the Convention. It thought the EEA Agreement offered no guarantee that obligations with regard to free movement of persons would be met on a reciprocal basis.

## 2. Article 26 - Implementing measures

It still has to be clarified whether the implementing measures laid down in the text of the Convention, as proposed by the Commission, should be adopted by a 2/3 majority or unanimously. One alternative would be to go back to Article 26(4) in the old version which starts from the principle of unanimity but allows for the possibility of deciding unanimously on a list of cases where decisions may be taken by a 2/3 majority. A number of delegations have already suggested that this is something to be clarified at political level.

## 3. Article 29 - Jurisdiction of the Court of Justice

Since several delegations had suggested that, because of the connection with the Europol Convention and the EIS Agreement, this was something on which a decision should be taken not by the External Frontiers Group but at a higher level, the Group decided at its last meeting under the Greek Presidency to refer the matter initially to Steering Group I.

## II. Legal questions connected with the provisions of the Convention

### 1. Treatment of persons entitled under Community law within the meaning of Article (1)(a)(ii) and (iii)

(a) Checks on members of the family of persons entitled under Community law:

Under Article 1(1)(a)(ii), members of the family of Union citizens who are nationals of a third State and have the right of entry and residence in a Member State by virtue of an instrument enacted under the Treaty establishing the European Community, are deemed "persons entitled under Community law".

However, family membership and the resultant Community entitlement pursuant to Article 1(1)(a)(ii) is not established by the travel document to be produced pursuant to Article 5(1). It is not clear therefore whether or not the persons concerned must be subject to more stringent checks pursuant to Article 7.

To resolve these difficulties, there should be an addition to Article 5(2) and Article 7 making it clear that simplified border controls are to take place only in instances in which Community entitlement is obvious. How tangible evidence is to be produced could be considered in the discussions on the common handbook.

(b) Notifications for refusing entry

The second sentence of Article 10(2) of the old version prohibited the inclusion of Member States' nationals in the joint list of persons to be refused entry. That specific rule was not retained in this Commission draft. The question therefore arises as to whether persons entitled under Community law pursuant to Article 1(1)(a)(ii) and (iii) are also to be excluded from measures pursuant to Article 10.

2. Visa provisions

Under the 1991 draft Convention on External Borders, Member States had sweeping jurisdiction over visa policy. The European Union Treaty, however, transferred to the Community the powers specified in Article 100c of the EC Treaty.

Several provisions in the Commission proposal (Article 1(1)(c)(d)(f), Article 5(2) and Article 17) refer to Article 100c. As a result of this reference it is not clear how to treat nationals of third countries which are not on the joint list of States from which visas are required but which require visas under national law.

What is more, the situation with regard to jurisdiction created by Article 100c of the EC Treaty is adduced as the reason why several provisions have been deleted from the 1991 version of the Convention (see paragraph 20 of the Explanatory Memorandum).

The legal issues which those provisions involve primarily concern demarcation between Article 100c of the EC Treaty, on the one hand, and Articles K.1 and K.3 of the European Union Treaty on the other. Since the terms of reference for amending the draft Convention issued by the Ministers responsible for Immigration at their meeting on 1 and 2 June 1993 were to confine amendments to what was strictly necessary on technical grounds, and the reference to Article 100c of the EC Treaty is of a purely declaratory nature, the need for that reference should also be examined in subsequent discussions.

The Ministers further stated that no legal vacuum should result from the amendments. The deletion of the final clause of Article 18(1), Article 18(2), (3) and (4),

Article 19(3) and Article 21(1) should be examined more closely with that in mind.

3. Definition of the term "External Frontiers" (Article 1(1)(h))

All delegations were in agreement that there had to be a clear definition of the term "external frontiers". In the discussions to date, however, opinions have differed as to whether the text proposed by the Commission should be clarified directly in the Convention or in a supplementary statement, such as in 6533/94 ASIM 82, II(2). For ease of application, incorporating the statement in a footnote to Article 1(1)(h) might be envisaged. Another alternative would be to include the statement in the Final Act.

III. Questions of legal form relating to the provisions of the Convention

1. Preamble

Delegations were in agreement that the text of the Convention should include a preamble. The Commission proposed incorporating recitals 5 to 8 from the draft Decision into the preamble. A few delegations, on the other hand, thought that - after being brought into line with the preamble to the 1991 version - all the recitals ought to be incorporated in the text of the Convention.

The Presidency proposes bringing the preamble to the 1991 draft into line with the new legal situation resulting from the Union Treaty and incorporating it in the Convention.

2. Adoption and entry into force

At the last meeting under the Greek Presidency, the Commission submitted a working paper on this subject which needs to be discussed further. In this connection a comparison should also be made with the final provisions of the Convention concerning the Use of Information Technology for Customs Purposes.

3. Inclusion of a Final Act

Delegations agreed that additional statements corresponding to the final act of the 1991 draft agreement should be added to the Convention. These should be of a legally binding nature. Whether such statements should be described as the "Final Act"

or the "Annex" has still to be settled. The precise content and scope of the "Final Act" also needs examining more closely.

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