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THE EUROPEAN UNION**

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**ENFOCUSTOM 53**

**NOTE**

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from : Spanish delegation

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to : Working Party on Customs Cooperation

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Subject : Suppression by customs administrations of illicit drug trafficking on the high seas  
– Draft Convention

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**DRAFT**  
**CONVENTION**

Drawn up on the basis of Article 34 of the Treaty on European Union, on the suppression by customs administrations of illicit drug trafficking on the high seas

**THE HIGH CONTRACTING PARTIES** to this Convention, Member States of the European Union,

**ACKNOWLEDGING** the need to strengthen the commitments made in the Convention on Mutual Assistance between customs administrations, signed in Rome on 7 September 1967, and in the Council Act of 18 December 1997 drawing up, on the basis of Article K.3 of the Treaty on European Union, the Convention on Mutual Assistance and cooperation between customs administrations;

**TAKING INTO ACCOUNT** the United Nations Convention on the Law of the Sea, signed in Montego Bay on 10 December 1982, which provides inter alia for the right of hot pursuit, and the United Nations Convention against illicit traffic in narcotic drugs and psycotropic substances, done at Vienna on 20 December 1988;

**CONSIDERING** that the customs administrations are responsible within the customs territory of the Community, including its territorial sea and air space and especially at its points of entry and exit, for the prevention, investigation and prosecution of breaches not only of the Community customs rules but also of national laws, and in particular for combating smuggling, including the smuggling of narcotic drugs and psychotropic substances;

**CONSIDERING** that occasionally in the fight against drug trafficking it is necessary and effective for the customs to take action outside Community customs territory, particularly on the high seas;

**CONSIDERING** that the increase in trafficking in narcotic drugs and psychotropic substances at sea is a situation which seriously threatens public safety and security in the European Union;

**CONSIDERING** that under the special forms of cooperation which have been established between Member States of the European Union both within the Member States themselves and in their respective territorial waters, officials of one Member State are empowered to take action in the territory of another Member State, on occasion without prior authorisation;

**CONVINCED** that it is necessary to strengthen cooperation between the customs administrations in combating drug trafficking by giving vessels of the competent authorities of a Member State greater scope to take immediate action without prior authorisation against vessels from another Member State in emergencies, where currently it is not possible to take action without prior authorisation outside territorial waters,

**HAVE AGREED ON THE FOLLOWING PROVISIONS:**

#### **Article 1. Definitions**

For the purposes of this Convention:

- (a) "vessels" means any structure or floating craft operating on the high seas suitable for the carriage of goods and/or persons, including hovercraft, non-displacement craft and submersibles.

- (b) "Intervening State" means the Member State party to this Convention which has taken action under this Convention against a vessel flying the flag or holding the registration of another Member State party to this Convention.
- (c) "Preferential jurisdiction" means that where both Member States party to this Convention have concurrent jurisdiction over a relevant offence, the flag State has the right to exercise its own jurisdiction to the exclusion of the jurisdiction of the other State.
- (d) "Relevant offence" means the offences defined in Article 3 of the Convention.
- (e) "Customs authorities" means the authorities responsible for implementing the customs rules and also the other authorities given the responsibility of implementing the provisions of this Convention.

To this end, each Member State shall forward to the other Member States and to the Council Secretariat the list of competent authorities appointed for the purpose of implementing this Convention.

## **Article 2. Objective**

The customs authorities of the Member States of the European Union shall cooperate to the fullest extent possible to suppress illicit trafficking in narcotic drugs and psychotropic substances by sea, in conformity with the International Law of the Sea.

### **Article 3. Offences**

Each Member State shall adopt the measures necessary to classify as an offence in its national law and penalise offences on board vessels or on any other craft or floating medium not excluded from the scope of this Convention under Article 4 thereof, involving the possession for distribution, transport, transshipment, storage, sale, manufacture or processing of narcotic drugs or psychotropic substances as defined in the relevant international instruments.

### **Article 4. Vessels excluded from the scope of the Convention**

Warships and official non-commercial public service vessels shall be excluded from the scope of this Convention.

### **Article 5. Jurisdiction**

1. Save as provided for in the Convention on mutual assistance and cooperation between customs administrations, as adopted by the Council Act of 18 December 1997, Member States shall exercise sole jurisdiction in relation to offences committed in their territorial and national waters including situations where offences originated or are due to be completed in another Member State.
2. As regards the offences described in Article 3 and committed outside the territorial waters of a Member State, the State under whose flag the vessel was flying and on board which or on which the offence was committed shall exercise the preferential jurisdiction.

## **Article 6. Right of representation**

1. Where there are good grounds to suspect that one of the offences referred to in Article 3 has been committed, each Member State shall allow the other Member States a right of representation, which shall give legitimacy to action taken by ships or aircraft belonging to their respective customs administrations against vessels from another Member State.
2. In exercising the right of representation referred to in paragraph 1, official ships or aircraft may give pursuit, stop and board the vessel, examine documents, identify and question the persons on board and inspect the vessel and, should their suspicions be confirmed, seize the drugs, detain the persons alleged to be responsible and escort the vessel to the nearest or most suitable port where it shall be detained prior to being returned, informing – beforehand if possible or immediately afterwards – the State whose flag was being flown by the vessel.
3. This right shall be exercised in accordance with the general provisions of international law.

## **Article 7. Safeguards**

1. Where action has been taken pursuant to Article 6, due account shall be taken of the need not to endanger the safety of life at sea or the security of the vessel and cargo, or to prejudice the commercial and legal interests of the flag State or the commercial interests of third parties.
2. In any case, should the action have been taken without adequate grounds for carrying out the operation, the Member State which carried it out shall be held responsible for damage and losses incurred unless the action was taken at the request of the flag State.

3. A vessel's period of detention shall be reduced to the absolute minimum and the vessel returned to the flag State or given the right to free passage as soon as possible.
4. Persons detained shall be guaranteed the same rights as those enjoyed by nationals, especially the right to have an interpreter and be assisted by a lawyer.
5. The period of detention shall be subject to supervision by the courts and to the time limits laid down by the law of the intervening Member State.

#### **Article 8. Surrender of jurisdiction**

1. Each Member State shall have preferential jurisdiction over its vessels but may surrender it in favour of the intervening State.
2. Before taking initial proceedings, the intervening State shall forward to the flag State – if possible by fax or other means – a summary of the evidence assembled pertaining to all the relevant offences committed, to which the flag State shall respond within one month stating whether it will exercise its jurisdiction or surrender it and possibly asking for further information should it deem it necessary.
3. If the time limit referred to in the previous paragraph has lapsed without any decision being notified, the flag Member State shall be deemed to have surrendered its jurisdiction.
4. If the State whose flag is being flown by the vessel surrenders its preferential jurisdiction, it shall send the other Member State the information and documents in its possession. Should it decide to exercise its jurisdiction, the other State shall transfer to the preferential State the documents and evidence it has assembled, the corpus delicti, the persons detained and any other relevant evidence.

5. Urgent mandatory judicial proceedings to be completed, such as the request to waive the exercise of preferential jurisdiction, shall be governed by the law of the Intervening State.
6. Surrender of detained persons shall not be subject to formal extradition proceedings; an order for detention of the person concerned or an equivalent document shall suffice, provided that the fundamental principles of each Party's legal system are observed. The Intervening State shall certify the length of time spent in detention.
7. The length of time for which a person was deprived of his liberty in one of the Member States shall be deducted from the penalty imposed by the State having exercised its jurisdiction.
8. Without prejudice to the general powers of Member States' Ministries of Foreign Affairs, any communication provided for in this Convention shall, as a rule, pass through their Ministries of Justice.

#### **Article 9. Settlement of disputes**

1. Member States agree to settle disputes between them on the interpretation or application of this Convention, including those concerning damages, by direct negotiation between the respective Ministries of Justice and Foreign Affairs.
2. Where agreement cannot be reached using the arrangement in the previous paragraph, the Court of Justice of the European Communities shall have jurisdiction to rule on any dispute between Member States regarding the interpretation or the application of this Convention, whenever such dispute cannot be settled by the Council within six months of its being referred to the Council by one of its members.



3. The Court of Justice shall have jurisdiction, subject to the conditions laid down in paragraphs 4 to 7, to give preliminary rulings on the interpretation of this Convention.
4. By a declaration made at the time of the signing of this Convention or at any time thereafter, any Member State shall be able to accept the jurisdiction of the Court of Justice of the European Communities to give preliminary rulings on the interpretation of this Convention as specified in either paragraph 5(a) or(b).
5. A Member State which has made a declaration pursuant to paragraph 4 shall specify that either:
  - (a) any court or tribunal of that State against whose decisions there is no judicial remedy under national law may request the Court of Justice of the European Communities to give a preliminary ruling on a question raised in a case pending before it and concerning the interpretation of this Convention if that court or tribunal considers that a decision on the question is necessary to enable it to give judgment, or
  - (b) any court or tribunal of that State may request the Court of Justice of the European Communities to give a preliminary ruling on a question raised in a case pending before it and concerning the interpretation of this Convention if that court or tribunal considers that a decision on the question is necessary to enable it to give judgment.
6. The Protocol on the Statute of the Court of Justice of the European Communities and the Rules of Procedure of that Court of Justice shall apply.

7. Any Member State, whether or not it has made a declaration pursuant to paragraph 4, shall be entitled to submit statements of case or written observations to the Court in cases which arise under paragraph 5.
8. The Court of Justice shall not have jurisdiction to check the validity or proportionality of operations carried out by competent law enforcement agencies under this Convention nor to rule on the exercise of responsibilities which devolve upon Member States for maintaining law and order and for safeguarding internal security.

#### **Article 10. Final provisions**

1. This Convention shall be subject to adoption by the Member States in accordance with their respective constitutional requirements.
2. Member States shall notify the depositary of the completion of the constitutional procedures for the adoption of this Convention.
3. This Convention shall enter into force ninety days after the notification referred to in paragraph 2 by the State, Member of the European Union at the time of adoption by the Council of the Act drawing up this Convention, which is last to complete that formality.

#### **Article 11. Accession**

1. This Convention shall be open to accession by any State that becomes a Member State of the European Union.

2. This Convention shall come into force with respect to any State that accedes to it ninety days after the deposit of its instrument of accession or on the date of entry into force of the Convention if it has not already entered into force upon expiry of the said period of ninety days.

#### **Article 12. Amendments**

1. Amendments to this Convention may be proposed by any Member State that is a Party to it. Any proposed amendment shall be sent to the depositary, who shall communicate it to the Council and the Commission.
2. The amendments to the Convention shall be adopted by the Council, which shall recommend them to the Member States for adoption in accordance with their respective constitutional requirements.
3. Amendments adopted in accordance with paragraph 2 shall come into force in accordance with Article 10(3).

#### **Article 13. Depositary**

1. The Secretary-General of the Council of the European Union shall act as depositary of this Convention.
2. The depositary shall publish in the Official Journal of the European Communities information on the progress of adoptions and accessions, implementation, declarations and reservations, and also any other notification concerning this Convention.

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