

COMMISSION OF THE EUROPEAN COMMUNITIES

COM(93) 684 final

Brussels, 10 December 1993

Communication from the Commission to the Council and the European Parliament

- (I) Proposal for a decision, based on Article K3 of the Treaty on European Union establishing the Convention on the crossing of the external frontiers of the Member States.
- (II) Proposal for a regulation, based on Article 100C of the Treaty establishing the European Community, determining the third countries whose nationals must be in possession of a visa when crossing the external borders of the Member States.



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1. The Commission herewith transmits to the Council and the Parliament two proposals which are closely linked and need to be examined together.

2. The need for a revised draft of the Convention on the crossing of the external frontiers of the Member States results from a number of relevant developments which have taken place since negotiations on the earlier draft, conducted by Ministers responsible for immigration policy, were broken off in June 1991 when it proved impossible to find a solution to the sole outstanding question (the territorial application article) which was preventing the signature of the Convention. The text proposed by the Commission does not attempt to solve this question which will therefore require sustained further bilateral negotiations between the two Member States principally concerned.

3. The most significant such development was the entry into force on 1 November 1993 of the Treaty on European Union itself, particularly its Article 100C. This article provides that certain aspects of visa policy, hitherto covered by articles in the draft Convention, should pass to Community competence and be adopted on the basis of Community instruments.

4. Together these draft proposals cover all the substantive elements previously brought together in the single instrument represented by the draft Convention. The explanation of why each of the changes to the Convention is necessary is set out in the explanatory memorandum.

5. These proposals, once adopted, will provide the legislative base for establishing the agreed rules for crossing the external borders in which all Member States can have confidence. As the European Council has often stated, most recently at its meeting in Edinburgh in December 1992, this is an essential element in the creation of an area without internal frontiers, as provided for in Article 7A of the Treaty on European Union.

PROPOSAL FOR A COUNCIL DECISION
ESTABLISHING A CONVENTION
ON CONTROLS ON PERSONS
CROSSING EXTERNAL FRONTIERS

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(presented by the Commission to the Council
in accordance with Article K.3(2)
of the Treaty on European Union)

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EXPLANATORY MEMORANDUM

1. The efforts of the Ministers responsible for immigration, working through intergovernmental cooperation, to conclude a Convention on crossings at the external frontiers of the Member States of the European Community - something which they regard as vital for the establishment of an area without internal frontiers as required by Article 7a of the Treaty establishing the European Community - have been overtaken by events in the shape of the European Union. For the Treaty on European Union introduces a specific procedure for the conclusion of conventions in the fields of justice and home affairs.

On the formal side, the work done in the past cannot have any formal status since the Convention, not having been signed, does not exist legally. As regards the substance, however, there is still the political outcome of the negotiations conducted between 1989 and 1991, in the course of which a consensus had emerged between the Member States on the basic rules that should govern crossings at external frontiers, even though that agreement never took concrete shape because of the difference between the United Kingdom and Spain over Gibraltar.

2. The aim of this proposal is to preserve that political consensus by adapting the text in line with the legal requirements of the Union Treaty - in particular Title VI - and of the future European Economic Area.

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I. ORIGIN OF THE DRAFT CONVENTION

Earlier work

3. Following the programme approved by the Madrid European Council for the establishment of an area without internal frontiers as required by Article 7a ("Palma document"), the Member States started work at intergovernmental level on drawing up a Convention on crossings at the external frontiers of the Member States. Supported by successive European Councils, this work, conducted under the authority of the Ministers responsible for immigration, resulted in the Member States reaching agreement in June 1991 on a set of principles that were to be given formal shape in a Convention, which the Ministers were due to sign at the end of the Luxembourg Presidency.

4. In the final stages of the negotiations, however, a difference arose between the United Kingdom and Spain over the territorial extent of the Convention with regard to Gibraltar. Despite two years of attempts by successive presidencies to find a compromise, the Convention was never signed. Nevertheless, in the absence of a formal conclusion by the Ministers, it was decided that all the other provisions of the Convention would be deemed to have been accepted *de facto* by the Member States.

5. These matters stood until the entry into force of the Union Treaty on 1 November 1993. Title VI of the Treaty provides for cooperation between the Member States in the fields of justice and home affairs.

As regards the **substance**, Article K.1 states that *inter alia* "rules governing the crossing by persons of the external borders of the Member States and the exercise of controls thereon" (point (2)) shall be regarded as matters of common interest "[f]or the purposes of achieving the objectives of the Union, in particular the free movement of persons, and without prejudice to the powers of the European Community". As far as the **means** are concerned, Article K.3(2) spells out three courses open to the Council, including the option of "draw[ing] up conventions, which it shall recommend to the Member States for adoption in accordance with their respective constitutional requirements" (point (c)). The special procedure applicable is laid down in Title VI.

Need for adoption of the Convention

6. The Ministers responsible for immigration, recognizing the need to abide by this new legal framework, are concerned to preserve the political consensus arrived at in the earlier negotiations. Thus at their meeting in Copenhagen on 1 and 2 June 1993:

"Ministers took note of the possible impact of the Treaty on European Union and the Agreement on the European Economic Area on the draft Convention on the crossing of external frontiers. Ministers agreed that:

- any changes made to the draft Convention to bring it into line with the Treaty on European Union should be technical in character and confined to what is strictly necessary; there is no question of reopening negotiations on any other articles than those which need to be revised for that purpose;
- this is a purely technical matter and must not be allowed to cause an impasse on legal grounds;
- there must be no legal vacuum."

7. The main developments since 1991 requiring amendments to the text are as follows:

(a) Changes in the Community framework

- Firstly, in July 1991 the full range of Community legislation to remove controls on **goods** at internal frontiers had not yet been adopted. This is now fully in place and controls have effectively been removed since 1 January 1993.
- Secondly, on 2 May 1992 the Community concluded the Agreement establishing the European Economic Area, which - once it enters into force - will give nationals of the EFTA countries covered by that Agreement the same rights of entry and residence as nationals of the Member States.

(b) Procedure introduced by Title VI of the Union Treaty

Article K.3 of the Treaty lays down a special procedure for the adoption of legal instruments in the context of cooperation in the fields specified in Title VI, including in particular the right of initiative for the Commission as well as the Member States, consultation of Parliament (by the Presidency), and the option of granting jurisdiction to the Court of Justice. Now that the Treaty has entered into force, the Member States can therefore no longer conclude conventions between one another in the areas listed in Article K.1 in the traditional manner prescribed by public international law.

(c) Community competence regarding visas

Under the new Article 100c of the EC Treaty, the tasks of determining "the third countries whose nationals must be in possession of a visa when crossing the external borders of the Member States" and preparing "measures relating to a uniform format for visas" are matters of Community competence. They must, then, be dealt with through decisions taken under the procedures laid down in the EC Treaty rather than in Title VI of the Union Treaty.

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II. AMENDMENTS REQUIRED

Grounds for the Commission initiative

8. Under the intergovernmental approach followed in preparing the 1991 draft, the Commission enjoyed no right of initiative. Now that the Union Treaty has entered into force, it **does have a legal right of initiative**, a right also enjoyed by the Member States (first indent of Article K.3(2)). As guardian of the Treaty, it must act to prevent any danger of further delay in ensuring the free movement of persons in accordance with Article 7a of the EC Treaty that might result from failure to adopt the Convention. The Edinburgh European Council clearly stated that one of the essential instruments was implementation of the Convention. The issue should therefore be referred to the Council as soon as possible.

Form of the proposal

9. Article K.3 defines the Council's role in the following terms: "The Council may ... draw up conventions which it shall recommend ... for adoption". Article 220 of the EEC Treaty simply provided that: "The Member States shall ... enter into negotiations with each other with a view to securing ...". Consequently the Convention should no longer take the form of a traditional instrument of public international law concluded by the plenipotentiaries of the Heads of State.

The Council, then, is now entitled to **draw up** conventions. It has a specific power to recommend their adoption by the Member States in accordance with their respective constitutional requirements. These two functions will be reflected in a specific act of the Council, signed solely by its President and distinct from the Convention itself.

10. Since the Treaty gives no indication as to the legal nature of the act by which the Council is to exercise this specific power and Article 189 of the EC Treaty does not apply to Title VI, the act must necessarily be a decision *sui generis*. Thus the present proposal comprises two separate parts: a "Council Decision" and, annexed to it, the text of the Convention.

Proposed Council Decision¹

11. The preamble comprises the normal citations (legal basis, reference to the Commission's proposal, Parliament's involvement as prescribed by Article K.6) plus a series of recitals giving the grounds not only for the Decision itself but also for the Convention annexed to it. The recitals originally preceding the body of the Convention are now included with the Decision. Their wording has been altered in line with the Treaty to include references to closer cooperation on visa policies (fourth recital) and to the European Convention on Human Rights (eighth recital).

A further recital has been added, referring to Article K.1 and in particular to the fact that the Convention is without prejudice to the powers of the Community. This replaces the former Article 27(2), which is not now needed as the Convention comes under the institutional arrangements of the Union.

12. The substantive provisions embody the Council's exercise of its powers. Besides formally establishing the text of the Convention annexed to the Decision, Article 1(1) spells out the recommendation to the Member States to adopt it in accordance with their respective constitutional requirements. For this provision to be effective, a time limit needs to be specified. Since the Convention serves an objective for which the deadline was 1 January 1993, the time limit must needs be short and is therefore set at 31 December 1994. The Convention will, then, enter into force by 1 January 1995, which was the date specified in Article 6 laying down a derogation applicable to airports; this reference is thus superfluous and can be deleted in paragraphs 1 and 4 of that Article. This does not affect the timing.

13. Since the Decision is the operative instrument, it should include the provisions governing the Convention's entry into force that were contained in the former Article 32 of the Convention. These comprise the obligation on Member States to give notice of their adoption of the Convention within the time limit laid down (Article 1(2)) and the rules governing the Convention's entry into force (Article 2).

Furthermore, as the Convention is being concluded under the European Union, the instruments of ratification now have to be deposited with the Secretary-General of the Council, as for conventions concluded under Article 220 of the EC Treaty.

¹ Comparisons and references (former Article ...) are to the July 1991 proposal.

Amendments to the text of the Convention itself

14. The main element behind the amendments made to the July 1991 text is the entry into force of the Union Treaty. There is also the need to ensure that the Convention will be compatible with the Agreement on the European Economic Area once that comes into force. To make the structure clearer, the Convention has been divided into titles and articles, each of them carrying a heading.

(a) Amendments required by the Treaty on European Union

(i) Purely formal

15. Being concluded in the framework of the Union, the Convention is necessarily between the Member States. It is, then, unnecessary to mention this explicitly every time: this change has been made in the title and throughout the body of the Convention. The former Articles 33 and 34 on the accession of future Member States and the revision of the Convention should also be deleted, these matters now being governed by Articles O and K.3 of the Union Treaty.

With the recitals incorporated in the Decision, there is no need to repeat them in the Convention. Furthermore, since the Convention is annexed to the Decision, no provision needs to be made for its signature by the plenipotentiaries of the Heads of State. These deletions do not affect the substance in any way.

16. The Convention falls under the Union Treaty, which must be applied without prejudice to the powers of the Community, and so it cannot include a definition of internal frontiers, since that is a matter which falls under the EC Treaty. Consequently reference should be made to the relevant Community instruments. The new Article 1(h), replacing the former Article 1(f) and (g), no longer gives a substantive definition but merely refers to the Community instruments defining intra-Community flights and sea crossings.² This change does not affect the substance.

The same is true of Article 13(2): work to prepare the computerized system is proceeding under the Convention establishing a European Information System. This is simply a clarification.

² At present these are paragraphs 3 and 5 of Article 2 of Council Regulation (EEC) N° 3925/91 of 19 December 1991.

(ii) Formal amendments with practical consequences

17. The Treaty now contains rules on the procedures for the application of conventions, and so the relevant provisions of the Convention must be amended accordingly. The Committee set up in the former Article 26 as a decision-making body need no longer be defined at all. This power now rests with the Council, but that need not be spelled out because the second subparagraph of Article K.3(2)(c) does so. It is sufficient to refer to the measures adopted in implementation of the Convention. This change is reflected in the many articles which referred to the Committee.

These rules must conform to the principle laid down in Title VI of the Treaty: a two-thirds majority is the rule, while unanimity is the exception. The scope of such exceptions must be expressly stated in the Convention. Consequently except where provision is made for some other procedure, reference to "measures in implementation" implies recourse to the procedure laid down in the second subparagraph of Article K.3(2)(c) (which applies unless a convention provides otherwise). This involves adoption within the Council by a majority of two thirds. For practicality's sake, the same rule should apply for all implementing measures provided for under the Convention. Realistically, to safeguard the interests of the Member States it is reasonable to make provision for recourse to unanimity for measures not expressly provided for in the Convention. Article 26 is now worded accordingly.

18. As regards the territorial extent of the Convention, the Gibraltar issue that blocked progress in 1991 remains unresolved, so the Commission feels unable to take a position. A solution can only come from the bilateral negotiations that have been under way since 1991. The Commission therefore proposes that the relevant article be left blank for the time being so that negotiations can proceed undisturbed. This will enable the Council to go ahead with considering the text straight away and to incorporate whatever emerges from the parties' efforts when the time comes.

19. The Convention is now established by the Union and should not therefore include a Final Act. The Member States could, however, submit declarations to be recorded in the Council minutes.

(iii) Substantive amendments reflecting transfers of powers and secondary legislation

20. Under Article 100c of the EC Treaty the Community is now responsible for certain aspects of visa policy: determining which countries' nationals are subject to visa requirements and deciding on a uniform format for visas. This transfer of powers means that the Council will have to adopt Community legislation. To ensure consistency with the Treaty and any future Community decisions, the provisions in the old text of the Convention that now fall within the scope of Article 100c have to be deleted. The relevant passages in Articles 17, 18, 19(3) and 21 have therefore been removed and the rest of the text amended accordingly. Likewise there needs to be a definition of "uniform visa"; this is added by the new Article 1(f).

21. Article K.1 clearly states that Title VI applies "without prejudice to the powers of the European Community", and therefore allowance has to be made for the fact that Community law already deals to some extent with the crossing of frontiers, although no distinction is made between internal and external frontiers. The Convention cannot undermine this division of responsibilities and therefore applies primarily to persons not entitled under Community law. This is spelled out in the new paragraph 2 of Article 1, making it possible thereafter to refer simply to "persons". Nevertheless common rules applicable to all travellers are still necessary. It is essential to be able to distinguish between persons entitled under Community law and other travellers. These are the only controls that apply to all travellers regardless of their situation. The Convention can make this distinction because these provisions are not contrary to Community law. The principle is stated in the second recital. The arrangements governing such controls are laid down in Article 2.

22. The July 1991 version of the Convention was drawn up before the adoption of the legislation on goods transport and so does not reflect those provisions. Firstly, the title of the Convention itself needs to be amended to make clear that it relates only to controls on persons. Secondly, since Articles 5(5) and 6(2) deal *inter alia* with controls on baggage, they now also state that such controls are to be effected without prejudice to Community provisions.³

³ In particular this means Council Regulation N° 3925/91 of 19 December 1991 concerning the elimination of controls and formalities applicable to the cabin and hold baggage of persons taking an intra-Community flight and the baggage of persons making an intra-Community sea crossing and Commission Regulation N° 1823/92 of 3 July 1992 implementing the Council Regulation.

(iv) Substantive amendments reflecting the new legal framework laid down by Title VI

23. Article K.3 of the Treaty states that "[s]uch conventions may stipulate that the Court of Justice shall have jurisdiction to interpret their provisions and to rule on any disputes regarding their application, in accordance with such arrangements as they may lay down." The Commission considers that recourse to this provision is warranted both to ensure the uniform interpretation of the Convention, given the link between the subject of the Convention and matters falling under the EC Treaty, and to resolve any differences that may arise over its implementation. Such a provision also serves to meet the concerns of the European Parliament and non-governmental organizations.

Provision for uniform interpretation is made through the preliminary ruling procedure in accordance with Article 177 of the EC Treaty. The Court of Justice will also be able to rule on any dispute regarding the implementation of the Convention on application by a Member State or the Commission. That is the purpose of the new Article 29.

(b) Amendments required by the future European Economic Area

24. Once it enters into force the Agreement of 2 May 1992 establishing the European Economic Area will allow nationals of the EFTA member countries covered by the Agreement to be treated in the same way as nationals of Community countries for the purposes of entry controls and residence. The Commission considers that this development can best be catered for by replacing the term "national of a Member State" by "person entitled under Community law", newly defined at (a) of Article 1 to include not only Union citizens but also third-country nationals who, by agreement between the European Community and such countries, have identical rights of entry and residence.

This approach also makes it possible to stipulate that the family members, as defined in Article 10 of Council Regulation N° 1612/68 of 15 October 1968, of a national of a Member State who have third-country nationality may not be subjected, under the terms of Directives 68/360, 73/148, 90/364, 90/365 and 93/... on entry and residence, to controls beyond those applied to nationals of Member States, with the sole exception of an entry visa requirement (this exception is contained in the second sentence of Article 5(2)).

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25. These, then, are the amendments to the draft Convention required by legal developments since July 1991. The resulting text reflects the endeavour to conform to the conclusions adopted by the Ministers responsible for immigration on 1 June 1993 and, above all, not to reopen negotiations on a text already agreed in substance, the swift adoption of which is a top political priority in order to secure the free movement of persons.

**PROPOSAL FOR A COUNCIL DECISION
ESTABLISHING A CONVENTION ON
CONTROLS ON PERSONS CROSSING
EXTERNAL FRONTIERS**

PROPOSAL FOR COUNCIL DECISION N°
of

establishing a Convention
on Controls on Persons Crossing
External Frontiers

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on European Union, and in particular Article K.3(2) thereof,

Having regard to the proposal from the Commission,¹

Having regard to the opinion of the European Parliament,

Whereas the rules governing crossings by persons at the external frontiers of the Member States and the exercise of controls on such crossings are, by virtue of Article K.1 of the Treaty on European Union and without prejudice to the powers of the European Community, matters of common interest which may be the subject of cooperation under Title VI;

Whereas the rules governing crossings at the external frontiers of the Member States by citizens of the Union and other persons entitled under Community law fall within the scope of the Treaty establishing the European Community; whereas this Convention primarily defines the rules applicable to persons not entitled under Community law; whereas controls on crossings at external frontiers must cover all persons arriving at a frontier to the extent necessary to distinguish those entitled under Community law from other persons;

Whereas Article 7a of the Treaty establishing the European Community sets the common objective of an area without internal frontiers in which the free movement of persons is ensured;

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Whereas attainment of this objective requires effective controls, in line with common criteria, on persons at the external frontiers of those States and closer cooperation on implementing a common visa policy;

Whereas the controls on persons conducted by each Member State at its external frontiers must be carried out according to rules which should be adopted in common, with due regard for the interests of all Member States;

Whereas the aim of such controls is to enable threats to public policy and public security to be eliminated in the Member States of the European Union and to combat illegal immigration, while preserving the openness of those States to the rest of the world and their intensive exchanges with other countries, particularly in the cultural, scientific and economic spheres;

Whereas the introduction of a system of controls at external frontiers requires that particular attention be paid to the questions of infrastructure and frontier surveillance on the part of countries which, because of their geographical position and configuration, are exposed to increased migratory pressure;

Whereas the Member States intend to conduct these controls in compliance with their common international commitments, in particular the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 and the Geneva Convention of 28 July 1951, as amended by the New York Protocol of 31 January 1967, relating to the Status of Refugees as well as with more favourable constitutional provisions on asylum,

HAS DECIDED AS FOLLOWS:

Article 1

1. It is recommended that the Member States adopt the Convention on Controls on Persons Crossing External Frontiers established by this Decision, the text of which is annexed hereto, in accordance with their respective constitutional requirements by 31 December 1994.
2. The Member States shall notify the General Secretariat of the Council of the instruments attesting completion of the procedures for the adoption of the Convention in accordance with their respective constitutional requirements, and deposit them with it.

Article 2

1. The Convention shall enter into force on the first day of the second month following the deposit of the instrument of adoption with the General Secretariat of the Council by the last Member State to take that step.

The provisions concerning the adoption of measures in implementation of the Convention shall apply from the date of its entry into force. The other provisions shall apply from the first day of the third month following that date.

2. The Secretary-General of the Council shall inform the Member States of the date of entry into force of this Convention.

Article 3

This Decision shall enter into force on the day of its publication in the *Official Journal of the European Communities*.

Done at Brussels,

For the Council

The President

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**CONVENTION
ON CONTROLS ON PERSONS
CROSSING EXTERNAL FRONTIERS**

TITLE I

GENERAL

ARTICLE 1

Definitions

1. For the purposes of this Convention:
 - (a) 'persons entitled under Community law' means:
 - (i) citizens of the Union within the meaning of Article 8(1) of the Treaty establishing the European Community;
 - (ii) members of the family of such 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;
 - (iii) nationals of third States who, by agreement between the European Community and its Member States and such countries, have rights of entry and residence in a Member State which are identical with those enjoyed by citizens of the Union, and members of the family of such persons who are nationals of a third State and have the right of entry and residence in a Member State under any such agreement.
 - (b) 'residence permit' means any authorization issued by the authorities of a Member State authorizing a person not entitled under Community law to stay in its territory, with the exception of visas and the provisional residence permit referred to in Articles 8 and 15;
 - (c) 'entry visa' means authorization or decision by a Member State, given in accordance with decisions adopted under Article 100c of the Treaty establishing the European Community, to enable a person to enter its territory who is required to hold a visa to do so, subject to other entry conditions being fulfilled;

