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NOTE

from : Spanish delegation

to : Customs Cooperation Working Party

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23.6.1998, p. 3; DOCE L 326, 24.11.1990, p. 56.

Subject : Fight against illicit drug trafficking by sea

1. INTRODUCTION

The fight against drug trafficking is one of the EU Member States major concerns.

Conventions and other acts have been adopted within the Community Institutions in order to curb the growth in narcotics trafficking. Among the measures taken, the efforts to raise the efficiency of investigations and the operations to combat illicit trafficking are of particular importance, as they enable customs administrations to act in a coordinated manner.

The maritime route is often used by smuggling organisations to introduce drugs – mainly cocaine and cannabis – into the European Union market.

The analysis of drugs seizures carried out by the Member States' customs administrations reveals that the vast majority of drugs seized (71% of the total in 1999) were the result of operations at sea. Table 1.1 below shows that, although a large number of seizures, in terms of quantities, were carried out in the case of other forms of transport such as air, road and the postal system, most were made at sea.

Customs administrations must take rapid and concerted action to curb this growing threat.

Table 1.1: Drugs seizures carried out by customs administrations in 1999
(in percentage and weight)

	Total		Heroin		Cocaine		Cannabis		Synthetic drugs	
	No	Wght	No	Wght	No	Wght	No	Wght	No	Wght
	%	%	%	%	%	%	%	%	%	%
Maritime	10%	71%	2%	11%	4%	73%	24%	72%	4%	11%
Air	41%	2%	25%	8%	69%	20%	7%	1%	10%	7%
Road	28%	25%	35%	74%	6%	2%	56%	26%	53%	73%
Rail	6%	0%	12%	2%	3%	0%	4%	0%	19%	3%
Postal system	13%	1%	18%	2%	16%	5%	6%	1%	9%	5%
Other/Unknown	2%	1%	8%	3%	2%	0%	3%	0%	5%	1%
Total	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%

Source: Council document 8937/01 ENFOCUSTOM 26

2. CURRENT COOPERATION INSTRUMENTS

The organisation of Joint Customs Operations and the experiences of the individual Member States in law enforcement have highlighted the difficulties of seizing a ship flying the flag of another State on the high seas.

In these cases, use should be made of the mechanisms established in the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, signed in Vienna on 20 December 1988 (known as the Vienna Convention).

In addition, Title IV of the Convention drawn up on the basis of Article K.3 of the Treaty on European Union on mutual assistance and cooperation between customs administrations, better known as the Naples II Convention, establishes special forms of cooperation which allow for aggressive action in implementing possibilities for cross-border pursuit within the full meaning of the word "border" and covering both land and sea.

In operations at sea various scenarios may arise, the three most predictable of which as far as the possible seizure of a vessel by a Member State is concerned are the following:

- (a) The suspect ship is flying the same flag as the operating State, in which case action is taken in accordance with national legislation.
- (b) If flying a foreign flag, the ship is pursued from the jurisdictional waters of one Member State and continues to be pursued either on the high seas or in the waters of another other Member State:
 - (b.1) In the first case, pursuit may continue and result in the ship's being seized pursuant to Article 111 of the United Nations Convention [of 10 December 1982] on the Law of the Sea.

- (b.2) Likewise in the second case, by extension, when the Naples II Convention enters into force on .
- (c) When the ship is tracked down or pursued on the high seas, the only possibility for seizure at present is by authorisation of the flag State, pursuant to the Vienna Convention.

The procedure for obtaining prior authorisation to take action on the high seas against a ship flying the flag of another State is laid down in Article 17 of the abovementioned Vienna Convention.

Article 17: Illicit Traffic by Sea

(only some of the 11 paragraphs have been reproduced)

- "1. The Parties shall cooperate to the fullest extent possible to suppress illicit traffic by sea, in conformity with the international law of the sea.*
- 2. A Party which has reasonable grounds to suspect that a vessel flying its flag or not displaying a flag or marks of registry is engaged in illicit traffic may request the assistance of other Parties in suppressing its use for that purpose. The Parties so requested shall render such assistance with the means available to them.*
- 3. A Party which has reasonable grounds to suspect that a vessel exercising freedom of navigation in accordance with international law and flying the flag or displaying marks of registry of another Party is engaged in illicit traffic may so notify the flag State, request confirmation of registration and, if confirmed, request authorisation from the flag State to take appropriate measures in regard to that vessel.*

4. *In accordance with paragraph 3 or in accordance with the treaties in force between them or in accordance with any agreement or arrangement otherwise reached between those Parties, the flag State may authorise the requesting State to, inter alia:*
- (a) Board the vessel:*
 - (b) Search the vessel:*
 - (c) If evidence of involvement in illicit traffic is found, take appropriate action with respect to the vessel, persons and cargo on board.*
7. *For the purposes of paragraphs 3 and 4 of this article, a Party shall respond expeditiously to a request from another Party to determine whether the vessel that is flying its flag is entitled to do so, and to request for authorisation made pursuant to paragraph 3. At the time of becoming a Party to this Convention, each Party shall designate an authority or, when necessary, authorities to receive and respond to such requests. Such designation shall be notified through the Secretary-General to all other Parties within one month of the designation.*
9. *The Parties shall consider entering into bilateral or regional agreements or arrangements to carry out, or to enhance the effectiveness of, the provisions of this article."*

Depending on the authority or authorities designated in each country and on their internal organisation, obtaining the authorisation to board a ship flying the flag of another State on the high seas can take a long time. Since operations to combat drug trafficking by sea are normally carried out at night (or at weekends), delays in obtaining the authorisation can cause the operation to fail.

In order to prevent this from happening, Article 17(9) of the abovementioned Convention establishes the possibility of concluding bilateral or regional agreements to carry out and to enhance the effectiveness of, the provisions of Article 17.

The special cooperation between the Member States of the European Union is governed both on land and in the respective territorial water, by rules allowing the officials of one Member State to operate on the territory of another, in some cases without prior authorisation.

It is therefore conceivable that in the near future the paradoxical situation may arise whereby a ship from one Member State can board a ship flying the flag of another Member State specifically in the latter's territorial water (pursuant to the Naples II Convention), but cannot board it on the high seas, which from the point of view of sovereignty would be a less aggressive action.

3. EXPERIENCE OF THE SPANISH CUSTOMS

In performing their duty to combat smuggling and protect the external border of Community customs territory, the Spanish customs authorities have made a considerable effort in the maritime area. They have significant sea resources, backed up by air resources, for carrying out their work.

As a result of this effort, numerous seizures of narcotic drugs have been carried out. The results for the last few years are as follows:

Table 3.1.: Quantities of narcotic drugs seized in the last five years by the Department of Customs and Excise:

YEAR	QUANTITY (Kg)	
	CANNABIS (*)	COCAINE
1997	92 555	3 685
1998	117 630	3 443
1999	117 355	7 851
2000	145 609	2 662
2001**	97 761	13 901

(*) Includes cannabis, cannabis resin, cannabis oil and marijuana

(**) Data up to 31.08.01

With regard to the seizures of narcotics carried out by Spanish customs, it is interesting to note that during the reference years many of these were in the maritime area. The table below shows this in greater detail:

Table 3.2.: Percentages of narcotic substances seized by the Department of Customs and Excise in the maritime area in the last five years:

YEAR	% MARITIME AREA	
	CANNABIS (*)	COCAINE
1997	97	95
1998	93	85
1999	94	97
2000	74	0
2001 **	87	64

(*) Includes cannabis, cannabis resin, cannabis oil and marijuana

(**) Data up to 31.08.01

These operations in the maritime area were carried out in both Spanish territorial water and international waters; where operations were carried out in the territorial water of another Member State, there was close cooperation with the latter.

The prior authorisation of the State the flag of which is flown by the suspect ship must be obtained for operations carried out in international waters, pursuant to the abovementioned Vienna Convention.

Since 1996, Spanish customs have obtained the authorisation provided for in Article 17 of the Convention on 30 occasions, 15 of which had a positive outcome (i.e. resulting in the seizure of narcotic drugs).

Apart from these cases, there have been occasions where measures could have been taken against suspect ships on the high seas, but where, owing to circumstances of weather, darkness, distance, etc., there was not enough time to obtain the relevant authorisation, so that the operation could not take place.

The countries from which Spanish customs have requested this authorisation have included (in the last five years) the United Kingdom (16 times), France (2), Germany (1), Sweden (1), the Netherlands (1) and Portugal (1), as well as various third countries such as Honduras, Antigua, Brazil, Belize and South Africa.

The threat posed by cocaine trafficking deserves special mention: cocaine comes from South America and is transported by sea to the European Union. Spanish customs intend to combat this threat by organising operations in international waters in mid-Atlantic to seize ships before they approach the European coasts.

The ships involved in trafficking of this kind usually transport large quantities of cocaine, varying between 3 000 and 4 000 kg on merchant ships and up to approximately 500 kg on pleasure boats. This year, pursuant to the Vienna Convention, Spanish customs have seized five ships in the Atlantic carrying a total of 9 641 kg of cocaine intended for the European Union market.

– **Bilateral conventions in the maritime area**

Furthermore, with the aim of promoting cooperation in this area, Spain and Italy concluded a bilateral treaty on the suppression of unlawful traffic at sea in March 1990, which entered into force in May 1994, supplementing the Vienna Convention.

This bilateral treaty grants the parties the right, in representation of the other party, to seize ships flying the flag of the other Member State on the high seas and suspected of carrying out illicit drug trafficking operations, without the need to obtain the prior authorisation laid down in the Vienna Convention.

The treaty, considered to be of major importance, has been applied on various occasions, most notably when Spanish customs seized the ship "MISTER T" on the high seas in 1998; the ship was flying the Italian flag and transporting 930 kg cannabis.

In the light of the usefulness of this type of bilateral convention, Spain also concluded a similar convention with Portugal in March 1998, which will shortly enter into force.

4. PROPOSAL

By means of this document, the Spanish delegation, convinced as it is of the advisability of and need to intensify cooperation in this area and to provide the legal instruments to that end is aiming to encourage a comprehensive study of the situation.

With the aim of moving forward in this direction, the Spanish delegation will propose the adoption of a new Convention on the suppression by customs administrations of illicit drug trafficking on the high seas on the basis of Article 34 of the Treaty on European Union. This new instrument will supplement the possibilities for cooperation under the Naples II Convention in the area of combating drug smuggling by sea.

The abovementioned Naples II Convention facilitates special cooperation between the Member States of the European Union, both on land and in the respective territorial waters, by allowing the officials of one Member State to operate on the territory of another Member State, in some cases without prior authorisation.

The new Convention would aim to strengthen cooperation between customs administrations in the European Union in the fight against drug trafficking by extending the possibilities for the patrol boats of the competent authority of one Member State to take immediate action, without prior authorisation, against the ships of another Member State in a high seas emergency; at present this requires prior authorisation.

The Spanish delegation will soon be in a position to present a draft Convention which could be used as a working document.

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