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NOTE

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| from : | German delegation |
| to : | External Frontiers Working Party |
| Subject : | Comments on the initiative of the French Republic with a view to the adoption of a Council Directive concerning the harmonisation of financial penalties imposed on carriers transporting into the territory of the Member States third-country nationals not in possession of the documents necessary for admission (10701/00 FRONT 42 COMIX 589) |

The German delegation welcomes the initiative of the French Republic which, following on from the obligations arising out of Article 26 of the Schengen Convention, will harmonise and thereby strengthen the fight against illegal immigration by setting a minimum standard of penalties against carriers transporting third-country nationals not in possession of the necessary documents. On the basis of the draft in the version of 4 September 2000 (10701/00 FRONT 42 COMIX 589) and taking into account the outcome of discussions to date in the Working Party on Frontiers, Germany wishes to draw attention to the following points, which it regards as important:

1. Germany's view that the Community currently has no powers in the area of criminal law is well-known. Such provisions are reserved for the instruments of the Third Pillar. Moreover, under German law legal persons cannot be held criminally liable. Where necessary, the obligation of carriers not to transport to Germany aliens who do not have the necessary documents is enforced by imposition of a penalty payment.

As stated in the explanatory memorandum to the initiative (10701/00 ADD 1 FRONT 42 COMIX 589), the instrument of a Directive is designed to ensure that the common goal can be implemented in accordance with the respective legal orders. For Germany it is therefore important that the title of the Directive, the recitals (1) and individual articles (paragraph 1 of Articles 1 and 4) do not refer specifically to "financial penalties", but more generally to "penalties".

2. The definition of a carrier in Article 2(2) is less satisfactory than the general definition contained in the Schengen Convention (Article 1); this could give rise to confusion. For the sake of conceptual unity, we propose that the definition in Article 1 of the Schengen Convention be adopted, and the restrictions under Article 26(3) regulated separately, as in the Convention.
3. Article 3 of the draft governs the obligations of a carrier in the event that a third-country national it has transported is refused entry. It is therefore suggested that "gehalten" is replaced by "verpflichtet" in the German version of Article 3(1). (Does not affect English version).

Furthermore, Article 3(1) limits the obligation to return a third-country national, unlike Article 26(1)(a) of the Schengen Convention. Germany would like the unconditional, general obligation to return, which has applied hitherto, to remain and not to be restricted to those cases where the third-country national is not in possession of the necessary documents.

The "Herkunftsstaat" ("State of origin") used in Article 3(1)(a) of the German version to convey the destination of the return does not actually mean the country from which the person concerned was transported. We therefore propose referring to the third country from which the person concerned was transported as the destination, in accordance with the wording of the Schengen Convention (Article 26(1)(a)).

Moreover, the first sentence of paragraph 3 of the same Article lays down the carriers' obligation to find means of onward transportation immediately if they are unable to effect it themselves. This absolute obligation, which goes beyond the provision in the Schengen Convention, may entail the risk of delaying a return which has been instigated by a State. Furthermore, it is not clear where the person is to stay during this time. Accordingly, where a third-country national has been refused entry to the territory of a Member State by the competent authorities, the carrier should be obliged only to transport him or her out of the country immediately, in accordance with the alternatives in paragraph 1. If this is not done, the carrier must bear the resulting costs in accordance with the relevant national rules.

4. The minimum amount for penalties, namely EUR 2 000 for each person carried, as provided for in Article 4(2), requires further examination. German aliens' law currently specifies a penalty payment of a minimum of DM 500 (EUR 255), or a minimum of DM 2 000 (EUR 1 022) in the case of transport by air or sea. Consideration should be given to whether an increase in the minimum amount is justified, in particular with regard to the principle of proportionality.

Germany cannot agree to the provision contained in Article 4(3), whereby penalties are not applied if the third-country national lodges an application for asylum. Unlawful transport must be judged separately from the asylum application. A distinction must be made between, on the one hand, an individual who lodges an application for asylum and is then granted a provisional right to remain until a decision has been taken on the application, and, on the other, possible measures penalising carriers which fail to comply with their legal obligations.

There is a risk that the proposed regulation could make penalties for carriers ineffective and increase asylum applications.

Consideration should be given to the possible inclusion of a provision whereby penalties against carriers which transport third-country nationals who are not in possession of the necessary documents and who then lodge an application for asylum, may be suspended until the decision on the asylum application is taken. A maximum period for the suspension should, however, be considered. In addition, a reservation in respect of obligations arising out of the Geneva Convention should be included, following the formula used in Article 26(1) of the Schengen Convention.

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