



**COUNCIL OF
THE EUROPEAN UNION**

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NOTE

from : General Secretariat
to: Delegations

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Subject : Draft Council Directive on the obligation of carriers to communicate
passenger data

Delegations will find attached the text of the above-mentioned draft Council Directive on which the Mixed Committee at Ministerial Level, at its meeting on 30 March 2004, reached a common approach pending the opinion of the European Parliament and lifting of the Netherlands and United Kingdom Parliamentary reservations.

Delegations will also find attached two declarations to be adopted at the time of adoption of the draft Council Directive.

DRAFT COUNCIL DIRECTIVE 2003/ /EC

of

on the obligation of carriers to communicate
passenger data

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 62(2)(a) and Article 63(3)(b) thereof,

Having regard to the initiative of the Kingdom of Spain,

Having regard to the opinion of the European Parliament,

Whereas:

- (1) In order to combat illegal immigration effectively and to improve border control, it is essential that all Member States introduce provisions laying down obligations of air carriers transporting passengers into the territory of the Member States. In addition, in order to ensure the greater effectiveness of this objective, the financial penalties currently provided for by the Member States for cases where carriers fail to meet their obligations should be harmonised to the extent possible, taking into account the differences in legal systems and practices between the Member States.
- (2) The obligations to be imposed on carriers by virtue of this Directive are complementary to those established pursuant to the provisions of Article 26 of the 1990 Schengen Convention implementing the Schengen Agreement of 14 June 1985, as supplemented by Council Directive 2001/51/EC of 28 June 2001¹, the two types of obligation serving the same objective of curbing migratory flows and combating illegal immigration.
- (3) Without prejudice to the provisions of Directive 95/46/EC², the freedom of the Member States to retain or introduce additional obligations for air carriers or some categories of other carriers, including information or data in relation to return tickets, whether referred to in this Directive or not, should not be affected.
- (4) In order to combat illegal immigration more effectively and in order to ensure the greater effectiveness of this objective, it is essential that, without prejudice to the provisions of Directive 95/46/EC, account be taken at the earliest opportunity of any technological innovation, especially with reference to the integration and use of biometric features in the information to be provided by the carriers.
- (5) Member States should ensure that in any proceedings brought against carriers which may result in the application of penalties, the rights of defence and the right of appeal against such decisions can be exercised effectively.

¹ OJ L 187, 10.7.2001, p. 45.

² OJ L 281, 23.11.1995, p. 31.

- (6) These measures take up the control options set out in the Decision of the Executive Committee of Schengen (SCH/Com-ex (94) 17-rev. 4), aimed at enabling border checks to be increased and providing for sufficient time to enable detailed and comprehensive checks to be carried out on all passengers through the transmission of passenger data to the authorities responsible for carrying out such controls.
- (7) The Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data applies with regard to the processing of personal data by the authorities of the Member States. This means, that whereas it would be legitimate to process the passenger data transmitted for the performance of border checks also for the purposes of allowing their use as evidence in proceedings aiming at the enforcement of the laws and regulations on entry and immigration, including their provisions on the protection of public policy ("ordre public") and national security, any further processing in a way incompatible with those purposes would run counter to the principle set out in Article 6(1)(b) of Directive 95/46/EC. Member States should provide for a system of sanctions to be applied in the event of use contrary to the purpose of the present Directive.
- (8) In accordance with Articles 1 and 2 of the Protocol on the position of Denmark annexed to the Treaty on European Union and the Treaty establishing the European Community, Denmark is not taking part in the adoption of this Directive, and is not bound by it or subject to its application. Given that this Directive builds upon the Schengen acquis under the provisions of Title IV of Part Three of the Treaty establishing the European Community, Denmark shall, in accordance with Article 5 of the said Protocol, decide within a period of six months after the Council has adopted this Directive whether it will implement it in its national law.

- (9) As regards Iceland and Norway, this Directive constitutes a development of the provisions of the Schengen acquis within the meaning of the Agreement concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the association of those two States with the implementation, application and development of the Schengen acquis¹, which fall within the area referred to in Article 1, point E, of Council Decision 1999/437/EC of 17 May 1999 on certain arrangements for the application of that Agreement².
- (10) The United Kingdom is taking part in this Directive in accordance with Article 5 of the Protocol integrating the Schengen acquis into the framework of the European Union annexed to the Treaty on European Union and to the Treaty establishing the European Community, and Article 8(2) of Council Decision 2000/365/EC of 29 May 2000 concerning the request of the United Kingdom of Great Britain and Northern Ireland to take part in some of the provisions of the Schengen acquis³
- (11) Ireland is taking part in this Directive in accordance with Article 5 of the Protocol integrating the Schengen acquis into the framework of the European Union annexed to the Treaty on European Union and the Treaty establishing the European Community, and Article 6(2) of Council Decision 2002/192/EC of 28 February 2002 concerning Ireland's request to take part in some of the provisions of the Schengen acquis⁴.
- (12) This Directive constitutes an act building upon the Schengen acquis or otherwise related to it within the meaning of Article 3(1) of the Act of Accession.

¹ OJ L 176, 10.7.1999, p. 36.

² OJ L 176, 10.7.1999, p. 31.

³ OJ L 131, 1.6.2000, p. 43.

⁴ OJ L 64, 7.3.2002, p. 20.

HAS ADOPTED THIS DIRECTIVE:

Article 1

Objective

This directive aims at improving border controls and combating illegal immigration by the transmission of advance passengers data by carriers to the competent national authorities.

Article 2

Definitions

For the purpose of this directive:

- a) "carrier" shall mean any natural or legal person whose occupation it is to provide passenger transport by air.
- b) "external borders" shall mean the external borders of the Member States with third countries.
- c) "border control" shall mean a check carried out at a border in response exclusively to an intention to cross that border, regardless of any other consideration.
- d) "border crossing point" shall mean any crossing point authorised by the competent authorities for crossing external borders.
- e) "personal data", " processing of personal data" and "personal data filing system" shall have the meaning as stipulated under Article 2 of Directive 95/46/EC of 24 October 1995.

Article 3

Data transmission

1. Member States shall take the necessary steps to establish an obligation for carriers to transmit at the request of the authorities responsible for carrying out checks on persons at external borders, by the end of check-in, information concerning the passengers they will carry to an authorised border crossing point through which these persons will enter the territory of a Member State.

2. The information referred to above shall comprise:
 - the number and type of travel document used,
 - nationality,
 - full names,
 - the date of birth,
 - the border crossing point of entry into the territory of the Member States,
 - code of transport ,
 - departure and arrival time of the transportation,
 - total number of passengers carried on that transport,
 - the initial point of embarkation.

3. In any case the transmission of the above mentioned data does not discharge the obligations and responsibilities laid down in the provisions of Article 26 of the Schengen Convention for carriers, as supplemented by Council Directive 2001/51/EC of 28 June 2001.

Article 4

Sanctions

1. Member States shall take the necessary measures to impose sanctions on carriers which, as a result of fault, have not transmitted data or have transmitted incomplete or false data. Member States shall take the necessary measures to ensure that sanctions are dissuasive, effective and proportionate and that either:
 - (a) the maximum amount of such sanctions is not less than EUR 5 000, or than the equivalent national currency at the rate of exchange published in the Official Journal on for each journey for which passenger data were not communicated or were communicated incorrectly.
 - (b) the minimum amount of such sanctions is not less than EUR 3 000, or than the equivalent national currency at the rate of exchange published in the Official Journal on for each journey for which passenger data were not communicated or were communicated incorrectly.

2. This Directive shall not prevent Member States from adopting or retaining, for carriers which infringe very seriously the obligations arising from the provisions of this Directive, other sanctions, such as immobilisation, seizure and confiscation of the means of transport, or temporary suspension or withdrawal of the operating licence.

Article 5
Proceedings

Member States shall ensure that their laws, regulations and administrative provisions stipulate that carriers against which proceedings are brought with a view to imposing penalties have effective rights of defence and appeal.

Article 6
Data processing

1. The personal data referred to in Article 3.1 shall be communicated to the authorities responsible for carrying out checks on persons at external borders through which the passenger will enter the territory of a Member State, for the purpose of facilitating the performance of such checks with the objective of combating illegal immigration more effectively.

Member States shall ensure that these data are collected by the carriers and transmitted electronically or, in case of failure, by any other appropriate means to the authorities responsible for carrying out border checks at the authorised border crossing point through which the passenger will enter the territory of a Member State. The authorities responsible for carrying out checks on persons at external borders shall save the data in a temporary file.

After passengers have entered, these authorities shall delete the data, within 24 hours after transmission, unless the data are needed later for the purposes of exercising the statutory functions of the authorities responsible for carrying out checks on persons at external borders in accordance with national law and subject to data protection provisions under Directive 95/46/EC.

Member States shall take the necessary measures to oblige carriers to delete, within 24 hours of the arrival of the means of transportation pursuant to Article 3.1, the personal data they have collected and transmitted to the border authorities for the purposes of this Directive.

In accordance with their national law and subject to data protection provisions under Directive 95/46/EC, Member States may also use the personal data referred to in Article 3(1) for law enforcement purposes.

2. Member States shall take the necessary measures to oblige the carriers to inform the passengers in accordance with the provisions laid down in the Directive 95/46/EC. This shall also comprise the information referred to in Article 10.c and Article 11.1.c of the Directive 95/46/EC.

Article 7

Transposal

1. Member States shall take the necessary measures to comply with this Directive not later than twenty-four months after the date of entry into force of this Directive. They shall forthwith inform the Commission thereof.

When Member States adopt these measures, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

2. Member States shall communicate the main provisions of national law which they adopt in the field covered by this Directive to the Commission.

Article 8

Entry into force

This Directive shall enter into force 30 days after its publication in the Official Journal of the European Union.

Article 9

Addressees

This Directive is addressed to the Member States in accordance with the Treaty establishing the European Community.

Done at.....

For the Council

The President

DECLARATION BY THE COUNCIL

"The Council, having taken note of the intention of the Commission to bring forward in the near future a proposal for a common EU approach to the use of passenger data for border and aviation security and other law enforcement purposes, intends to reassess, if necessary, the provisions on data security of this Directive in the framework of its deliberations on the proposal of the Commission."

DECLARATION BY THE EUROPEAN COMMISSION

The Commission considers that the draft Council Directive on the obligation of carriers to communicate passenger data must be interpreted in the light of its stated purposes, namely "to combat illegal immigration effectively and to improve border control".

As already announced, the Commission intends to propose by June 2004 a comprehensive legislative measure on data protection and exchanges of information between "law enforcement" authorities. The Commission would have preferred to await that measure before dealing piecemeal with law enforcement issues in this context.
