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**NOTE**

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from: General Secretariat  
to: Delegations

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

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Delegations will find attached a revised version of the above-mentioned draft Council Directive, resulting from the discussions at the meeting of the Strategic Committee on Immigration, Frontiers and Asylum, held on 10 December 2003.

**DRAFT**  
**COUNCIL DIRECTIVE 2003/ /EC**  
**of**

on the obligation of carriers to communicate  
passenger data<sup>1</sup>

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<sup>2</sup>,

Having regard to the Opinion of the European Parliament<sup>3</sup>,

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<sup>1</sup> UK, NL maintained their parliamentary reservation and S maintained its reservation on the whole text.

<sup>2</sup> OJ C

<sup>3</sup> OJ C

Whereas:

- (1) In order to combat illegal immigration effectively, it is essential that all Member States introduce provisions laying down obligations of carriers transporting third country nationals 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) This measure forms part of the general provisions aimed at curbing migratory flows, combating illegal immigration. The control at the external borders is one of the Union's priorities. It is therefore in the common interest of all Member States to introduce additional swift and practical measures to prevent the illegal crossing of the external borders of the European Union.
- (3) The freedom of the Member States to retain or introduce additional measures or penalties for carriers, whether referred to in this Directive or not, should not be affected.
- (4) 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.
- (5) 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.

- (6) 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<sup>1</sup> should be taken into account in the framework of arrangements fixing the obligations of airline carriers towards the border control authorities. Member States should provide for a system of sanctions to be applied in the event of use contrary to the purpose of the future arrangements.
- (7) 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 participating in the adoption of this Directive, and is therefore not bound by it or subject to its application. Given that this instrument aims to build upon the Schengen acquis under the provisions of Title IV of the Treaty establishing the European Community, in accordance with Article 5 of the above-mentioned Protocol, Denmark will decide within a period of 6 months after the Council has adopted this Directive whether it will implement it in its national law.
- (8) As regards the Republic of Iceland and the Kingdom of Norway, this Directive constitutes a development of the Schengen acquis within the meaning of the Agreement concluded on 18 May 1999 by the Council of the European Union and those two States concerning the association of those States with the implementation, application and development of the Schengen acquis,
- (9) y (10) Recitals concerning U.K. and Ireland participation (pending the Legal Service's examination)

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<sup>1</sup> OJ L 281, 23.11.1995, p. 31.

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 passengers transport [...]<sup>1</sup>.
- b) "external borders" shall mean the external borders of the Member States with third countries<sup>2</sup>.
- c) "third country national" shall mean any person other than a citizen of the European Union<sup>3</sup>.
- d) "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.

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<sup>1</sup> **FIN and S** maintained a scrutiny reservation on deleting the reference to transport *by air*. **B, F and D** also preferred to limit the scope of the directive, in its first phase, to air carriers. The **Cion** pointed out that this limitation could lead to a distortion of competition between air carriers and other carriers.

<sup>2</sup> **UK** entered a reservation on adding "with third countries" as it prefers receiving also information on flights from other Member States. **Cion** entered a scrutiny reservation.

<sup>3</sup> **Cion** asked for clarification regarding the position of family members who are not EU nationals and third country nationals with EU residence permits, in particular with regard to Art 3 (4) of the Directive.

**ISL** entered a scrutiny reservation

- e) "border crossing point" shall mean any crossing point authorised by the competent authorities for crossing external borders.
- f) "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<sup>1</sup>

#### 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 at the end of the boarding checks<sup>2</sup>, information concerning the passengers they will carry to an authorised border crossing point through which these persons will enter Member States' territory. The request of the national authorities responsible for carrying out checks on persons at external borders shall be based on risk assessment<sup>3</sup>.
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<sup>4</sup>,
  - code of transport ,
  - departure and arrival time of the transportation,
  - total number of passengers carried on that transport,

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<sup>1</sup> **F, NL, UK, S and Cion** entered a scrutiny reservation on Article 3.

<sup>2</sup> **UK, NL** entered a reservation. They preferred to refer to "at the end of the check-in" which would allow to deny access to the plane.

**B and F** voiced concerns about possible legal disputes which carriers might enter.

<sup>3</sup> **UK** entered a reservation and pointed out that, in accordance with its national legislation, information can be asked on all passengers.

**B and F** voiced concerns about possible legal disputes which carriers might enter.

<sup>4</sup> **NL** suggested adding "biometric identifiers, where available". **B, D, F, LUX and FIN** did not agree with the Netherlands' suggestion

- the initial point of embarkation<sup>1</sup>.
3. In any case the transmission of the above mentioned data does not discharge the obligations and responsibilities laid down in Article 26 of the Schengen Convention for carriers.
  4. Member States may establish, in accordance with their national legislation, an obligation for carriers to transmit, at the request of the competent authorities, information on third country nationals carried by them to the territory of the Member States and who, on the date stipulated on the travel ticket, have not returned to their country of origin or have not continued their journey to a third country. This information must be transmitted at the latest within forty-eight hours from the time of the request of the competent authorities. This information shall comprise:
    - full names,
    - the border crossing point of exit from the Member States' territory,
    - code of transport,
    - date and departure time of the transportation.<sup>2</sup>

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<sup>1</sup> IRL proposed adding "details of any transit arrangements to any other Member State". D, F, NL, S entered a scrutiny reservation on the Irish proposal.

<sup>2</sup> D and UK suggested alternative wordings for paragraph 4:

- **D:** "Member States may establish, in accordance with their national legislation, an obligation for carriers to transmit **in particular cases** at the request of the **authorities responsible for combating illegal immigration**, information on third country nationals carried by them to the territory of the Member States and who, on the date stipulated on the travel ticket, have not returned to their country of origin or have not continued their journey to a third country. **The request of the national authorities responsible for combating illegal immigration shall be based on a national risk assessment. The request shall be transmitted to the carrier within 24 hours after the end of boarding. The information on third country nationals** shall comprise:
  - full names,
  - the border crossing point of exit from the Member States' territory,
  - code of transport,
  - date and departure time of the transportation."
- **UK:** "Member States may establish, in accordance with their national legislation, an obligation for carriers to transmit, at the request of the competent authorities, in advance of departure, information on passengers they will transport from the territory of the Member State. This information shall comprise:
  - full name,
  - date of birth,
  - nationality,
  - number and type of travel document used,
  - code of transport,
  - date and departure time of the transportation.
  - the border crossing point of exit from the Member State's territory."

**Cion** stated that Art 3 (4) should be in accordance with the provisions of the Directive 95/46/EC of 24 October 1995.

## Article 4

### Sanctions

1. Member States shall impose sanctions on carriers which, as a result of fault, have not transmitted data or have transmitted incomplete or false data. These sanctions shall be 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.
  - (c) the maximum amount of the penalty imposed as a lump sum for each infringement is not less than EUR 500.000 or than the equivalent national currency at the rate of exchange published in the Official Journal on....., irrespective of the number of persons carried.
  
2. Member States may adopt or retain, 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 carriers against which proceedings are brought with a view to imposing penalties have effective rights of defence and appeal.

Article 6<sup>1</sup>  
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 for the sole purpose of facilitating the performance of such checks. These data are collected by the carriers and transmitted electronically or, in case of failure, by any other appropriate mean to the authorities responsible for carrying out border checks at the first authorised border crossing point through which the third country national will enter Member States' territory. The authorities responsible for carrying out checks on persons at external borders save the data in a temporary file. After passengers have entered, these authorities shall immediately delete the data transmitted by the carrier. Within 24 hours after the arrival of the mean of transportation pursuant to Article 3 (1), the carrier shall delete the personal data it has collected and transmitted to the border authorities<sup>2</sup>.

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<sup>1</sup> **UK** entered a general and scrutiny reservation on the new text of Art. 6. **FIN**, **IRL** and **NL** also entered a scrutiny reservation.

**IRL** suggested adding a new paragraph as follows: "Member States may make arrangements for the exchange between authorities responsible for carrying out border checks of data concerning transit arrangements from one Member State to another."

<sup>2</sup> **ISL** entered a reservation. The Council Legal Service pointed out that sentences which directly address carriers should be reviewed.

2. The personal data referred to in Article 3.4 shall be communicated to the authorities responsible for combating illegal immigration for the sole purpose of combating illegal immigration. These data are collected by the carriers and transmitted electronically or, in case of failure, by any other appropriate mean to the competent authorities. The carrier shall delete the personal data it has collected and transmitted to the authorities responsible for combating illegal immigration immediately after transmission. The authorities responsible for combating illegal immigration save the data in a temporary file. These authorities shall delete the data 24 hours after transmission unless the data are needed further on for criminal prosecution or execution of measures to end illegal stays in the territory of the Member States<sup>1</sup>.
3. The carriers will be obliged to inform the passengers in accordance with the provisions laid down in Directive 95/46/EC. This shall comprise the information referred to in Article 10. c and Article 11. c of Directive 95/46/EC.

#### Article 7

#### Transposal

1. Member States shall take the necessary measures to comply with this Directive not later than ..... 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.

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<sup>1</sup> **Cion** entered a reservation.

Article 8

Entry into force

This Directive shall enter into force on the day of 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 Brussels.....

For the Council  
The President

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