



**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 5 July 2001

10075/01

**DROIPEN 54
MIGR 51
COMIX 457**

NOTE

from : The General Secretariat
to : Working Party on Substantive Criminal Law

No. prev. doc. : 8632/01 DROIPEN 44 MIGR 42 COMIX 340 + ADD 1 REV 1
9403/01 DROIPEN 51 MIGR 50 COMIX 423

Subject : Draft Council Directive defining the facilitation of unauthorised entry, transit and residence
Draft Council Framework Decision on the strengthening of the penal framework to prevent the facilitation of unauthorised entry and residence

Delegations will find attached in Annex I a revised text of the draft Directive defining the facilitation of unauthorised entry, transit and residence and in Annex II a revised text of the draft Framework Decision on the strengthening of the penal framework to prevent the facilitation of unauthorised entry and residence.

The texts have been based on the results of the meeting of the Mixed Committee at Ministerial level on 29 May 2001 (documents 8632/01 DROIPEN 44 MIGR 42 COMIX 340 + ADD 1 REV 1 and 9403/01 DROIPEN 51 MIGR 50 COMIX 423).

Certain linguistic changes have been made regarding Articles 2 (liability of legal persons) and 3 (penalties for legal persons) of the draft Framework Decision to bring those Articles in line with the wording of the corresponding provisions of the 1997 Second Protocol to the 1995 Convention on the protection of the European Communities' financial interests.

Certain minor amendments have been introduced in the recitals to the Directive and to the Framework Decision in collaboration with the Legal Service.

The texts will be edited by the legal linguists with a view to their adoption by the Council. It is noted that at this stage the two draft instruments are subject to parliamentary scrutiny reservations by the Swedish and United Kingdom delegations and that the draft Framework Decision in addition is subject to a parliamentary scrutiny reservation by the Danish delegation. Certain draft declarations are set out in Annex III.

COUNCIL DIRECTIVE 2000/ /EC

of

defining the facilitation of unauthorised entry, transit
and residence

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 61(a) and 63(3)(b) thereof,

Having regard to the initiative of the French Republic¹,

Having regard to the opinion of the European Parliament,

Whereas:

(1) (...)

(2) One of the objectives of the European Union is the gradual creation of an area of freedom, security and justice, which means, inter alia, that illegal immigration must be combated.

(3) Consequently measures should be taken to combat the aiding of illegal immigration, not only in connection with unauthorised crossing of the border in the strict sense, but also when committed for the purpose of sustaining networks that exploit human beings.

¹ OJ C 253, 4.9.2000, p.1.

(4) To that end it is essential to approximate existing legal provisions, in particular, on the one hand, the precise definition of the infringement in question and the cases of exemption, which is the subject of this Directive and, on the other hand, minimum rules for penalties, liability of legal persons and jurisdiction, which is the subject of Council Framework Decision .../.../JHA on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence¹.

(5) The purpose of this Directive is to provide a definition of the facilitation of illegal immigration and consequently to render more effective the implementation of the Framework Decision .../.../JHA on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence, in order to prevent that offence.

(6) This Directive supplements other instruments adopted in order to combat illegal immigration, illegal employment, trafficking in human beings and the sexual exploitation of children.

(7) This Directive constitutes a development of the Schengen acquis that is covered by Article 1 of Council Decision 1999/437/EC of 17 May 1999 on certain arrangements for the application 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 acquis²;

(8) In accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland annexed to the Treaty on European Union and the Treaty establishing the European Community, the United Kingdom gave notice, by letter of 30 October 2000, of its wish to take part in the adoption and application of this Directive;

¹ A reference to the OJ has to be inserted concerning the Framework Decision.

² OJ L176 of 10.7.1999, p. 31.

(9) In accordance with Articles 1 and 2 of the Protocol on the position of Denmark annexed to the Treaty on European Union and to the Treaty establishing the European Community, Denmark does not take part in the adoption of this instrument, and is therefore not bound by it or subject to its application. Given that this instrument builds upon the Schengen acquis under the provisions of Title IV of the Treaty establishing the European Community, in accordance with Article 5 of the said Protocol, Denmark shall decide within a period of six months after the Council has adopted this instrument whether it will implement it in its national law;

HAS ADOPTED THIS DIRECTIVE:

Article 1

General infringement

1. Each Member State shall adopt appropriate sanctions on:
 - (a) Any person who intentionally assists a person who is not a national of a Member State to enter, or transit across, the territory of a Member State in breach of the laws of the State concerned on the entry or transit of aliens;
 - (b) Any person who, for financial gain, intentionally assists a person who is not a national of a Member State to reside within the territory of a Member State in breach of the laws of the State concerned on the residence of aliens.
2. Any Member State may decide not to impose sanctions in regard of the behaviour defined in paragraph 1(a) by applying its national law and practice for cases where the aim of the behaviour is to provide humanitarian assistance to the person concerned.

Article 2

Participation, instigation

Each Member State shall take the measures necessary to ensure that the sanctions referred to in Article 1 are also applicable to any person who:

- (a) is the instigator of, or
- (b) is an accomplice in, or
- (c) attempts to commit any conduct as referred to in Article 1(1)(a) or (b).

Article 3

Sanctions

Each Member State shall take the measures necessary to ensure that the conduct referred to in Articles 1 and 2 is subject to effective, proportionate and dissuasive sanctions.

Article 4

Implementation

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive before [...].¹ 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 a reference shall be laid down by the Member States.

¹ The date to be inserted should be 2 years after the adoption of the instrument.

2. Member States shall communicate to the Commission the main provisions of their national law which they adopt in the field covered by this Directive together with a table showing how the provisions of this Directive correspond to the national provisions adopted. The Commission shall inform the other Member States thereof.

Article 5

Repeal

The provision of Article 27 (1) of the 1990 Schengen Convention shall be repealed as from [...] ¹. Where a Member State implements this Directive pursuant to Article 4(1) in advance of that date, the said provision shall cease to apply to that Member State from the date of the implementation.

Article 6

Entry into force

This Directive shall apply from the day of its publication in the Official Journal of the European Communities.

¹ The date to be inserted should be the same as that in Article 4(1).

Article 7
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

COUNCIL FRAMEWORK DECISION .../.../JHA

of

on the strengthening of the penal framework to prevent
the facilitation of unauthorised entry, transit and residence

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on European Union, and in particular Articles 29, 31(e) and 34(2)(b) thereof,

Having regard to the initiative of the French Republic¹,

Having regard to the opinion of the European Parliament,

Whereas:

(1) One of the objectives of the European Union is to provide citizens with a high level of safety within an area of freedom, security and justice by developing common action among the member States in the fields of police and judicial cooperation in criminal matters;

(2) In this framework, measures should be taken to combat the aiding of illegal immigration, not only in connection with unauthorised crossing of the border in the strict sense, but also when committed for the purpose of sustaining networks that exploit human beings;

¹ OJ C 253, 4.9.2000, p.6.

(3) To that end it is essential to approximate existing legal provisions, in particular, on the one hand, the precise definition of the infringement in question and the cases of exemption, which is the subject of Directive 2000/.../EC defining the facilitation of unauthorised entry, transit and residence and, on the other hand, minimum rules for penalties, liability of legal persons and jurisdiction, which is the subject of this Framework Decision ¹;

(4) It is likewise essential not to confine possible actions to natural persons only but to provide for measures relating to the liability of legal persons;

(5) This Framework Decision supplements other instruments adopted in order to combat illegal immigration, illegal employment, trafficking in human beings and the sexual exploitation of children.

(6) This Framework Decision constitutes a development of the Schengen acquis that is covered by Article 1 of Council Decision 1999/437/EC of 17 May 1999 on certain arrangements for the application 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 acquis ²;

HAS ADOPTED THIS FRAMEWORK DECISION:

Article 1

Penalties

1. Each Member State shall take the measures necessary to ensure that the conduct defined in Articles 1 and 2 of Directive 2000/.../EC is punishable by effective, proportionate and dissuasive criminal penalties which may entail extradition.

¹ A reference to the OJ concerning the Directive has to be inserted.

² OJ L176 of 10.7.1999, p. 31.

2. Where appropriate, the penalties covered in paragraph 1 may be accompanied by the following measures:

- confiscation of the means of transport used to commit the offence;
- a prohibition on practising directly or through an intermediary the occupational activity in the exercise of which the offence was committed;
- deportation.

3. Each Member State shall take the measures necessary to ensure that, when committed for financial gain, the conduct defined in Article 1(1)(a), and, to the extent relevant, Article 2(a), of Directive 2000/.../EC, is punishable by custodial sentences, with a maximum sentence of not less than [8 years], where they are committed in any of the following circumstances:

- the offence was committed as an activity of a criminal organisation as defined in the Joint Action of 21 December 1998, adopted by the Council on the basis of Article K.3 of the Treaty ¹;
- the offence was committed while endangering the lives of the persons who are the subject of the offence.

4. If imperative to preserve the coherence of the national penalty system, the actions defined in paragraph 3 shall be punishable by custodial sentences with a maximum sentence of not less than 6 years, provided that it is among the most severe maximum sentences available for crimes of comparable gravity.

¹ OJ L351 of 29.12.1998, p. 1.

Article 2

Liability of legal persons

1. Each Member State shall take the measures necessary to ensure that legal persons can be held liable for the conduct to be sanctioned in accordance with Articles 1 and 2 of Directive 2000/.../EC and committed for their benefit by any person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person, based on:

- a power of representation of the legal person, or
- an authority to take decisions on behalf of the legal person, or
- an authority to exercise control within the legal person,

2. Apart from the cases already provided for in paragraph 1, each Member State shall take the necessary measures to ensure that a legal person can be held liable where the lack of supervision or control by a person referred to in paragraph 1 has made possible the commission of the conduct to be sanctioned in accordance with Articles 1 and 2 of Directive 2000/.../EC (...) for the benefit of that legal person by a person under its authority.

3. Liability of a legal person for the conduct to be sanctioned in accordance with Articles 1 and 2 of Directive 2000/.../EC shall not exclude criminal proceedings against natural persons who are (...) perpetrators, instigators or accessories in the offences referred to in paragraph 1.

Article 3

Penalties for legal persons

1. Each Member State shall take the measures necessary to ensure that a legal person held liable pursuant to Article 2(1) is punishable by effective, proportionate and dissuasive sanctions, which shall include criminal or non-criminal fines and may include other sanctions such as:

- (a) exclusion from entitlement to public benefits or aid;

- (b) temporary or permanent disqualification from the practice of commercial activities;
- (c) placing under judicial supervision;
- (d) a judicial winding-up order.

2. Each Member State shall take the measures necessary to ensure that a legal person held liable pursuant to Article 2(2) is punishable by effective, proportionate and dissuasive sanctions or measures.

Article 4 Jurisdiction

1. Each Member State shall take the measures necessary to establish its jurisdiction with regard to the conduct to be sanctioned in accordance with Articles 1 and 2 of Directive 2000/.../EC and committed

- (a) in whole or in part within its territory; or
- (b) by one of its nationals; or
- (c) for the benefit of a legal person established in the territory of that Member State.

2. Subject to the provisions of Article 4 a, any Member State may decide that it will not apply, or that it will apply only in specific cases or circumstances, the jurisdiction rule set out in:

- paragraph 1(b);
- paragraph 1(c).

3. Each Member State shall inform the Secretary-General of the Council in writing if it decides to apply paragraph 2, where appropriate with an indication of the specific circumstances or conditions in which its decision applies.

Article 4 a
Extradition and prosecution

1. (a) Any Member State which, under its law, does not extradite its own nationals shall take the necessary measures to establish its jurisdiction over the conduct to be sanctioned in accordance with Articles 1 and 2 of the Directive 2000/.../EC when committed by its own nationals outside its territory.

 - (b) Each Member State shall, when one of its nationals is alleged to have committed in another Member State the conduct defined by Directive 2000/.../EC, and it does not extradite that person to that other Member State solely on the ground of his nationality, submit the case to its competent authorities for the purpose of prosecution if appropriate. In order to enable prosecution to take place, the files, information and exhibits relating to the offence shall be transmitted in accordance with the procedures laid down in Article 6(2) of the European Convention on Extradition. The requesting Member State shall be informed of the prosecution initiated and of its outcome.
2. For the purpose of this Article, a "national" of a Member State shall be construed in accordance with any declaration made by that State under Article 6(1)(b) and (c) of the European Convention on Extradition of 13 December 1957, where appropriate as amended by the declarations made with respect to the Convention drawn up on the basis of Article K.3 of the Treaty on European Union, relating to extradition between the Member States of the European Union¹.

Article 5
International law on refugees

This Framework Decision shall apply without prejudice to the protection afforded refugees and asylum seekers in accordance with international law on refugees or other international instruments relating to human rights, in particular Member States' compliance with their international obligations pursuant to Articles 31 and 33 of the 1951 Convention on refugee status as amended by the protocol of New York of 1957.

¹ OJ C 313, 23.10.1996, p. 12.

Article 6

Communication of information between the Member States

1. If a Member State is informed of conduct to be sanctioned in accordance with Articles 1 and 2 of the Directive defining the facilitation of unauthorised entry, transit and residence, which are in breach of the law on the entry and residence of aliens of another Member State, it shall inform the latter accordingly.

2. Any Member State which requests another Member State to prosecute, on the grounds of a breach of its own laws on the entry and residence of aliens, conduct to be sanctioned in accordance with Articles 1 and 2 of the Directive defining the facilitation of unauthorised entry, transit and residence must specify, by means of an official report or a certificate from the competent authorities, the provisions of law that have been breached.

Article 7

Implementation

1. Member States shall adopt the measures necessary to comply with the provisions of this Framework Decision before [...].¹

2. By the same date, Member States shall communicate to the General Secretariat of the Council and to the Commission the texts of the provisions transposing into their national law the obligations imposed on them by this Framework Decision. On the basis of that information and a written report of the Commission, the Council will, no later than [...]², assess the extent to which Member States have complied with this Framework Decision.

¹ The date to be inserted should be 2 years after the adoption of the instrument.

² The date to be inserted should be six months after the date referred to I paragraph 1.

Article 8

Repeal

The provisions of Article 27(2) and (3) of the Schengen Convention shall be repealed as from [...]¹. Where a Member State implements this Framework Decision pursuant to Article 7(1) in advance of that date, the said provisions shall cease to apply to that Member State from the date of the implementation.

Article 9

Entry into force

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

Done at

For the Council

The President

¹ The date to be inserted should be the same as that in Article 7(1).

Draft declarations for entry in the minutes of the Council at the adoption of the draft Directive and Framework Decision

- A. "The Council has approved the texts of the Council Directive and Framework Decision on the penal framework to prevent the facilitation of unauthorised entry and residence of aliens.

Facilitation nowadays takes the serious form of illegal immigration networks which deceive those who have recourse to them and place them in very dangerous situations, as was dramatically demonstrated by the deaths in Dover in June 2000. Such networks are now inextricably linked with organised crime.

Taking into account the fact that Member States always have the option of applying a more severe penalty than is specified in the texts adopted and aware that the leaders of illegal immigration networks are criminals who cause serious harm to others, [the undersigned Member States] undertake to implement measures in their national law laying down, for the conduct referred to in Article 1(3) of the Framework Decision, a maximum penalty of ten years' imprisonment."

- B. "The Council agrees on the importance of taking strong and immediate action against the facilitation of unauthorised entry, movement and residence of aliens, and has therefore decided on the level of penalties for this kind of infringements in the present Framework Decision. The Council recognises that the question of approximation of sanctions in general merits further discussion in order to explore how best to implement conclusion N° 48 of the European Council in Tampere on this subject and instructs the relevant bodies of the Council to begin, during the Swedish Presidency, detailed discussions on this subject."
