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COMIX 678**

NOTE

from: General Secretariat
to: Strategic Committee on Immigration, Frontiers and Asylum

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**Subject: Initiative of the Kingdom of Spain with a view to adopting a Council
Directive on the obligation of carriers to communicate passenger data**

Delegations will find attached a revised version of the Spanish initiative on the obligation of carriers to communicate passenger data, resulting from the discussions at the meeting of the Frontiers Working Party, held on 10 November 2003.

COUNCIL DIRECTIVE 2003/ /EC

of

on the obligation of carriers to communicate
passenger data¹

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 Spain²,

Having regard to the Opinion of the European Parliament³,

¹ UK entered a parliamentary reservation on the whole text.

² OJ C

³ 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 data¹ 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)

¹ 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 immigration¹ 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 [...]².
- b) "external borders" shall mean the external borders of the Member States
- c) "third country national" shall mean any person other than a citizen of the European Union³.
- 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.

¹ **NL** recalled its doubts on how this directive could contribute to combating illegal immigration.

² **FIN and S** entered a scrutiny reservation on deleting the reference to transport *by air*. **B and F** indicated that extending the scope of the directive to all carriers represented a substantive change of the directive. They queried the proportionality of this change looking at the purpose of the directive and the increased workload it would represent.

³ **N** suggested adding citizen of the European Union, *EEA and CH*. The **Legal Service** pointed out this is already covered by the Agreement between the Council of the European Union and the Kingdom of Norway and the Republic of Iceland, concluded on 18 May 1999. The **Cion** asked for clarification regarding the position of family members who are not EU nationals and third country nationals with EU residence permits. **D** suggested deleting point c.

- 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

Data transmission

1. Member States shall take the necessary steps to establish an obligation for carriers to transmit at the request¹ of the authorities responsible for carrying out checks on persons at external borders:
 - (a) in advance of departure, information concerning the passengers they will carry to an authorised border crossing point through which these persons will enter Member States' territory².

¹ **F** pointed out that incoherence in border controls should be avoided between Member States requesting the information and other Member States not requesting the information. It recalled the principle of proportionality for this data transmission.

² **IRL** suggested redrafting this paragraph as follows: "at the end of the boarding checks, information concerning the foreign nationals they will carry to an authorized border crossing point or point of transit through which these persons will enter Member States' territory, or transit to another Member State".

(b) 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 authorities¹.

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 States²,
- code of transport ,
- departure and arrival time of the transportation,
- total number of passengers carried on that transport^{3 4}.

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.

¹ **D, F, NL, A, S, UK, N as well as the Commission** voiced serious concerns regarding Art. 3.1.(b) and suggested deleting this paragraph.

² **NL** suggested adding the point of departure and to consider including the exchange of biometrics.

³ **IRL** proposed adding "the initial point of embarkation" and "details of any transit arrangements to any other Member State".

⁴ **P** suggested adding a new paragraph laying down a period of six months during which carriers should keep the available passenger data.

Article 4¹

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

(b) the minimum amount of such sanctions is not less than EUR 3 000, ²

or than the equivalent national currency at the rate of exchange published in the Official Journal on, for each journey³ for which passenger data were not communicated or were communicated incorrectly.

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.

¹ **D and FIN** entered a scrutiny reservation.

² **FIN** suggested adding a new point c similar to point c of Article 4 of the Council Directive supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985: "(c) the maximum amount of the penalty imposed as a lump sum for each infringement is not less than EUR 500 000 or equivalent national currency at the rate of exchange published in the Official Journal on^{*}, irrespective of the number of persons carried."

³ **UK** suggested "for each passenger".

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
Data processing¹

1. The personal data referred to in Article 3.1.a² 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. The personal data referred to in Article 3.1.b. shall be communicated to the authorities responsible for combating illegal immigration.³
2. 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 foreign national will enter Member States' territory.
The above-mentioned authorities save the data in a temporary file, only for the duration necessary for the controls⁴.

¹ **IRL** suggested adding a new paragraph as follows: "where a third country national is transiting through a Member State to another Member State, the information received in respect of that passenger referred to in Article 1 shall be transmitted by the authorities responsible for carrying out border checks on persons in the first Member State to the Member State of final destination and all other transit Member States".

² **FIN** suggested deleting the reference to "a".

³ **FIN** suggested deleting the last sentence and adding at the end of the first sentence "and combating of illegal immigration at the external borders".

⁴ **FIN** suggested adding at the end of the sentence the words "and no longer than 48 hours".

3. After passengers have entered, the authorities responsible for carrying out border checks shall immediately delete the data transmitted by the carrier¹.
4. Within 24 hours of the arrival of the mean of transportation pursuant to article 3.1.a, the carrier shall delete the personal data it has collected and transmitted to the border authorities².
5. In accordance with the provisions laid down in the Directive 95/46/EC, the carriers will be obliged to inform the passengers on³:
 - the fact that their personal data will be collected by the carrier in order to send them to the authorities responsible for carrying out border controls in the country of destination;
 - their right to access to their personal data stored in the carrier's and border control authorities' data bases;
 - their right to request the rectification of any incorrect stored personal data.

Article 7⁴

Transposal

1. Member States shall take the necessary measures to comply with this Directive not later than They shall forthwith inform the Commission thereof.

¹ **UK, IRL and ISL** preferred all provisions referring to deleting information to be removed from the Directive. Also **FIN** suggested deleting this paragraph.

² **UK, IRL and ISL** preferred all provisions referring to deleting information to be removed from the Directive. **NL** felt that there was an inconsistency with the provisions of Art. 3 1 b.

³ **F** entered a linguistic reservation. **D, FIN, S and N** entered a scrutiny reservation on paragraph 5.

⁴ **EE** asked to clarify how this Directive will apply to the borders of the Acceding States when they become new Member States not yet applying the Schengen Convention.

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 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