



**COUNCIL OF  
THE EUROPEAN UNION**

**Brussels, 29 November 2000 (30.11)  
(OR. fr)**

**14074/00**

**LIMITE**

**FRONT 67  
COMIX 868**

**NOTE**

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to :	Council
No. Initiative doc :	10701/00 FRONT 42 COMIX 589
Subject :	<b>Draft Council Directive concerning the harmonisation of penalties imposed on carriers transporting into the territory of the Member States third-country nationals lacking the documents necessary for admission</b>

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1. By letter dated 16 June 2000, the French Republic forwarded to the General Secretariat of the Council an initiative for the adoption of a Council Directive concerning the harmonisation of penalties imposed on carriers transporting into the territory of the Member States third-country nationals lacking the documents necessary for admission, based on Article 61(a) and Article 63(3)(b) of the Treaty establishing the European Community.

At its meeting on 6 September 2000, the **Permanent Representatives Committee** decided, in accordance with Article 17(2)(a) of the Council's Rules of Procedure, to publish this initiative in the C series of the Official Journal. It also decided in accordance with Article 19(5)(h) of the Council's Rules of Procedure to consult the European Parliament.

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 to the Treaty establishing the European Community, the United Kingdom, by letter dated 25 October 2000, gave notice of its wish to take part in the adoption and application of this draft Directive.

2. Delegations will find:

- in Annex I: the text of the draft Directive;
- in Annex II: a draft statement to be included in the minutes of the meeting at which the Council adopts the Directive;
- in Annex III: a draft statement by the **Swedish delegation** to be included in the minutes for the meeting at which the Council reaches an agreement in principle on the current draft as they stand following the discussions conducted in the **Permanent Representatives Committee** on 29 November 2000.

3. The **Swedish delegation** entered a general reservation on the draft Directive. The **Belgian, Netherlands and Swedish delegations** entered reservations set out in the footnotes to this document.

4. The **Council** is asked to consider the questions outstanding.

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**DRAFT**  
**COUNCIL DIRECTIVE (EC) No /2000**  
**of**

concerning the harmonisation of penalties imposed on carriers transporting  
into the territory of the Member States third-country nationals  
lacking the documents necessary for admission

THE COUNCIL OF THE EUROPEAN UNION,

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

Having regard to the initiative of the French Republic <sup>1</sup>,

Having regard to the Opinion of the European Parliament <sup>2</sup>,

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<sup>1</sup> OJ C 269, 20.9.2000, p. 8.

<sup>2</sup> OJ C ... .

Whereas:

- (1) In order to combat illegal immigration effectively, it is essential that all the Member States introduce provisions laying down the obligations of carriers transporting foreign nationals into the territory of the Member States. In addition, in order to ensure the full effectiveness of this objective, the penalties currently provided for by the Member States should be harmonised by establishing a minimum amount for cases where carriers fail to meet their control obligations.
- (2) This measure is among the general provisions aimed at curbing migratory flows and combating illegal immigration.
- (3) Application of this Directive is without prejudice to the obligations resulting from the Geneva Convention relating to the Status of Refugees of 28 July 1951, as amended by the New York Protocol of 31 January 1967.<sup>1</sup>
- (4) The freedom of the Member States to retain or introduce additional obligations for carriers, whether referred to in this Directive or not, should not be affected.
- (5) As soon as it decides to reintroduce checks at its borders, under the conditions laid down in Article 2(2) of the Convention implementing the Schengen Agreement of 14 June 1985, signed at Schengen on 19 June 1990<sup>2</sup>, a Member State should be able to make the measures adopted under this Directive applicable at its internal borders.
- (6) It must be possible to exercise effectively the right of appeal against decisions taken in implementation of this Directive.

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<sup>1</sup> **B** and **S** considered that the enacting terms of the draft Directive should include a reference to Member States' practice when the person carried submitted an application for asylum or was allowed to enter the territory of a Member State.

<sup>2</sup> OJ L 239, 22.9.2000, p. 1.

- (7) This Directive builds on the Schengen acquis, in accordance with the Protocol integrating it into the framework of the European Union as laid down by Annex A to Council Decision 1999/435/EC of 20 May 1999 concerning the definition of the Schengen acquis for the purpose of determining, in conformity with the relevant provisions of the Treaty establishing the European Community and the Treaty on European Union, the legal basis for each of the provisions or decisions which constitute the acquis <sup>1</sup>.
- (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 25 October 2000, of its wish to take part in the adoption and application of this Directive.
- (9) 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 abovementioned Protocol, Denmark shall decide within a period of 6 months after the Council has adopted this Directive whether it will implement it in its national law.
- (10) 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 <sup>2</sup>. As a result of the procedures laid down in the Agreement, the rights and obligations arising from this Directive shall also apply to those two States and in relations between those two States and the Member States participating in this Directive,

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<sup>1</sup> OJ L 176, 10.7.1999, p. 1.

<sup>2</sup> OJ L 176, 10.7.1999, p. 31.

HAS ADOPTED THIS DIRECTIVE:

Article 1

The aim of this Directive is to supplement Article 26 of the Agreement implementing the Schengen Convention of 14 June 1985, signed at Schengen on 19 June 1990 and to define the implementing conditions thereof.

Article 2

1. Member States shall take the necessary steps to ensure that the obligation to return provided for in Article 26(1)(a) of the Schengen Convention shall also apply when entry is refused to a third-country national in transit if:

- (a) the carrier who was to take him to his country of destination refuses to take him on board;
- (b) or the authorities of the State of destination have refused him entry and have sent him back to the State through which he transited.

2. If the carrier is unable to effect the return of the third-country national in question, he shall be obliged to find means of onward transportation immediately and to bear the cost thereof.

Furthermore, if immediate onward transportation is not possible, the carrier shall take charge of the third-country national who has been refused entry.

### Article 3<sup>1</sup>

Member States shall take the necessary measures to ensure that the penalties imposed on carriers under Article 26(2) and (3) of the Schengen Convention are dissuasive, effective and proportionate and that:

- (a) either the maximum amount of the financial penalties thus imposed is not less than EUR 5 000 for each person carried,
- (b) or the minimum amount of these penalties is not less than EUR 3 000 for each person carried,
- (c) or the maximum amount of the penalty imposed as a lump sum for each infringement is not less than EUR 500 000.

### Article 4

This Directive shall not prevent Member States from adopting or retaining, for carriers who do not comply with the obligations arising from Article 26(2) and (3) of the Schengen Convention, other measures involving penalties of another kind such as immobilisation, seizure or confiscation of the means of transport, or temporary suspension or withdrawal of the operating licence.

### Article 5

As soon as it decides to apply the provisions of Article 2(2) of the Convention implementing the Schengen Agreement of 14 June 1985, signed at Schengen on 19 June 1990, a Member State may make the measures adopted under this Directive applicable to the crossing of its internal borders to which that decision applies.

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<sup>1</sup> Scrutiny reservation by NL. ES, FIN favourably disposed.

## Article 6

Member States shall ensure that their laws, regulations and administrative provisions stipulate that carriers to which penalties are applied have effective rights of defence and appeal.

## Article 7

1. Member States shall take the necessary measures to comply with this Directive not later than .....\*. They shall forthwith inform the Commission thereof.
2. 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.
3. 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

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

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\* 18 months after the date of its entry into force.



Article 9

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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Draft statement to be entered in the Council minutes

"For the purpose of applying this Directive, **the Council** has agreed that using an obvious forgery or obvious usurpation is equivalent to the absence of a travel document.

Each Member State shall determine, in accordance with its procedures, to what extent forgeries or usurpations of travel documents are detectable."

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Draft statement by the Swedish delegation

"The **Swedish Government**, which has instructed a committee of inquiry to review Swedish legislation on the obligations imposed on carriers in order to comply with the second paragraph of Article 26 of the Convention implementing the Schengen Agreement, intends to submit appropriate proposals to the Swedish Parliament as soon as possible.

The Swedish Government confirms the incoming Swedish Presidency's intention to continue the negotiations currently being conducted in the Council with a view to reaching agreement on the draft Council Directive concerning the harmonisation of penalties imposed on carriers transporting into the territory of the Member States third-country nationals lacking the documents necessary for admission." <sup>1</sup>

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<sup>1</sup> In the event of the issues still unresolved being settled, a number of delegations considered that the following wording would be preferable for the second paragraph:  
"The Swedish Government confirms the incoming Swedish Presidency's intention to continue with the procedure currently in progress in the Council with a view to adopting the Directive concerning...."