



**COUNCIL OF
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OUTCOME OF PROCEEDINGS

from : Working Party on Migration and Expulsion

on : 3- 4 March 2003

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Subject: Initiative of the Federal Republic of Germany for a Council Directive on assistance in cases of transit for the purposes of removal by air

I

At its meetings on 3 and 4 March 2003 the Working Party on Migration and Expulsion continued the examination of the above draft Council Directive.

Delegations will find in Section II below, the text of the Articles of the draft Directive, with comments of the delegations in footnotes.

COUNCIL DIRECTIVE 2003/ /EC

of

on assistance in cases of transit for the purposes
of removal by air

THE COUNCIL OF THE EUROPEAN UNION,

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

Having regard to the initiative of the Federal Republic of Germany,

Having regard to the Opinion of the European Parliament,

Whereas:

- (1) Having regard to the Council Recommendation of 22 December 1995 on concerted action and co-operation in carrying out removal measures ¹ and to the Decision of the Schengen Executive Committee of 21 April 1998 on co-operation between the contracting parties in returning third-country nationals by air.
- (2) Mutual assistance for the purposes of removal takes into consideration the common objective of ending the illegal residence of third-country nationals who are the subject of removal orders. Rules binding on all the Member States contribute furthermore to legal certainty and standardisation of procedures.
- (3) Removal by air is increasingly gaining in importance for the purpose of terminating the residence of third-country nationals. Despite the efforts of the Member States to give priority to using direct flights, it may be necessary, from an economic viewpoint or insufficient availability of direct flights, to use flight connections via airports of transit of other Member States.

¹ OJ C 5, 10.1.1996, p. 3.

- (4) The sovereignty of the Member States – particularly with regard to the use of direct force against aliens resisting removal – are to remain unaffected.
- (5) The Convention of 14 September 1963 on Offences and Certain Other Acts committed on board Aircraft (Tokyo Convention) – particularly with regard to the on-board powers of the pilot responsible and matters of liability – are to remain unaffected.
- (6) With regard to the briefing of airlines as to how to conduct unescorted and escorted removals, reference is made to Annex 9 to the Convention of the International Civil Aviation Organisation (ICAO) of 7 December 1944.
- (7) Member States are to implement this Directive with due respect for human rights and fundamental freedoms. In accordance with the applicable international obligations transit by air will not take place if in the State of destination or another third - country transit State the third-country national faces the threat of inhumane or humiliating treatment, torture or the death penalty, or if his life or liberty would be at risk by reason of his race, religion, nationality, membership of a particular social group or political conviction¹.
- (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 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 is to decide within a period of 6 months after the Council has adopted this Directive, whether it will implement it in its national law or not.
- (9) 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. As a result of the procedures laid down in the agreement, the rights and obligations arising from this Directive

¹ The second sentence of recital 7 is based on a clause which was originally inserted in Article 3 (3) as point a. **F** and **UK** maintained a reservation on this sentence.

are also to apply to those two States and in relations between those two States and the Member States of the European Community to which this Directive is addressed,

HAS ADOPTED THIS DIRECTIVE:

Article 1

This Directive aims at defining measures on assistance among the competent authorities at Member State airports of transit with regard to unescorted and escorted removals by air.

Article 2¹

For the purposes of this Directive:

- (a) "third-country national" shall mean any person who is not a national of a Member State of the European Union, the Republic of Iceland or the Kingdom of Norway;
- (b) "requesting Member State" shall mean the State which enforces a removal order in respect of a third-country national and requests transit via the airport of transit of another Member State;
- (c) "requested Member State" or "transit Member State" shall mean the Member State via whose airport of transit the transit is to be effected.
- (d) "escort" shall mean all persons from the requesting Member State responsible for accompanying the third-country national, including persons responsible for medical care and interpreters;
- (e) "transit by air" shall mean the passage of the third-country national and, if necessary, the escort through the area of the airport of the requested Member State for the purposes of removal by air;

¹ I suggested adding a definition of the term "expulsion".

Article 3

- 1 A Member State wishing to return a person by air shall examine whether it is possible to use a direct flight to the country of destination.
2. If a Member State wishing to return a person cannot for reasonable practical circumstances use a direct flight to the country of destination, it can request transit by air via an airport of transit of another Member State. An application for transit by air shall in principle not be made if the removal measure requires a change of airport on the territory of the requested Member State.
3. The requested Member State may refuse transit by air if¹:
 - (a) the third-country national under national legislation in the requested Member State shall be charged with criminal offences or is wanted for the carrying out of a sentence;
 - b) transit through other States or admission by the State of destination is not feasible;
 - c) the removal measure requires a change of airport on the territory of the requested Member State;
 - d) the requested assistance is impossible at a particular moment for practical reasons, or

¹ See footnote 1 in page 3.

- (e) the third-country national will be a threat to public policy, public security, or public health of the requested Member State.¹
4. In the case of paragraph 3(d), the requested Member State shall as quickly as possible inform the requesting Member State of a date as close as possible to the originally requested date on which transit by air may be assisted, insofar as the other conditions are complied with.
5. Authorisations for transit by air which have already been issued may be revoked by the requested Member State if circumstances within the meaning of paragraph 3 subsequently come to light, justifying a refusal of the transit.
6. The requested Member State shall inform the requesting Member State forthwith of the refusal or revocation of a transit by air authorisation under paragraphs 3 or 5 or of any other reason why the transit is not possible, and shall provide an explanation of the reasons.

Article 4 (former Article 6)

1. The request for escorted or unescorted transit by air and the associated assistance measures under Article 5(1) shall be made in writing by the requesting Member State. It shall reach the requested Member State as early as possible, and in any case no later than two days before the transit. This time limit may be waived in particularly urgent and duly justified cases.

¹ E suggested introducing the words *threat to the international relations of the Member State of transit* which appears in the Council Recommendation of 22 December 1995 (OJ C5, 10.11996) on concerted action and co-operation in carrying out expulsion measures. The Pres noted that the same wording appears in Article 5 (e) of the Schengen Convention.

2. The requested Member State shall inform the requesting Member State forthwith of its decision. Transit by air may not be commenced without the approval of the requested Member State¹.
3. For the purposes of dealing with the request under paragraph 1, the information on the form to be used for requesting and authorising transit by air in accordance with the Annex shall be forwarded to the requested Member State.
4. With respect to any request for transit, the requesting Member State shall provide the requested Member State with the details as provided for in the Annex²³.
5. The Member States shall each appoint a central authority to which requests under paragraph 1 are to be sent.

The central authorities shall appoint contact points for all the relevant airports of transit who can be contacted throughout the transit operations.

¹ **P** maintained a reservation on the second sentence of paragraph 2.

The **Pres** submitted the following compromise suggestion for a new clause which should replace the current draft of the second sentence of paragraph 2:

In principle, transit by air may not be commenced without the approval of the requested Member State. However, in cases of escorted removals for which no assistance measures under Article 5(1) are required, a notification of the transit operations may be sufficient, unless there are reasons for refusal on the basis of Article 3(3).

This compromise suggestion was supported by **FIN, IRL, ISL, I, N, P** and **S**. Pointing out that this provision should not contain any exception to the principle of the approval of transit operations by the authorities of the requested Member State, **D, E, F** and **A** opposed this compromise suggestion and preferred the current text of the provision.

² In the framework of the examination of this provision, **B** wondered whether a committee whose task would be to determine all practical arrangements, which are necessary for the implementation of the Directive.

³ The **Pres** took note of the **B** suggestion and said that this issue needs to be further considered.

Most delegations as well as and the **Cion** supported the proposal of the **Pres** for the deletion of this paragraph: *Any transit authorisation issued shall at the same time confer exemption from visa requirements* insofar as no transit visa is required for the transit operations of this Directive. **B, D** and **F** maintained their scrutiny reservation on the deletion of the provision.

Article 5¹

1. The requesting Member State shall take appropriate arrangements to ensure that the transit operation takes place in the shortest possible time.

The transit operation shall take place at maximum within twenty – four hours.

2. The requested Member State, subject to mutual consultations with the requesting Member State, within available means and in compliance with relevant international standards, shall provide all the assistance measures necessary from landing and the opening of the aircraft doors until it is ensured that the third-country national has left². This relates to the following assistance measures in particular:

¹ **NL** and **UK** maintained reservations on the whole Article 5. According to these delegations this provision should allow Member States more flexibility as regards the necessary assistance measures.

NL suggested the following alternative text:

Article 5

1. The requested Member State, subject to mutual consultations and in compliance with relevant international standards, shall, within available means, assist in the transit operation. The competent authorities of the requested Member State with whom responsibility for the assistance lies shall decide the nature and extent of the assistance afforded.

2. Assistance, as referred to in paragraph 1, may relate to the following measures, each of them as far as necessary to ensure the departure of the third-country national from the territory of the Member States and in accordance with the national law of the requested Member state:

(a) meeting the third-country national subject to removal at the aircraft and escorting him within the confines of the transit airport, in particular to his connecting flight;

(b) providing emergency medical care to the third-country national and, if necessary, his escort;

(c) providing sustenance for the third-country national and, if necessary, his escort;

[(d) receiving, keeping and forwarding travel documents, particularly in the case of unescorted removals;]

(e) informing the requesting State of the place and time of departure of an unescorted third-country national from the territory of the Member States;

(f) informing the requesting Member State of serious incidents that took place during the transit of the third-country national;

(g) place and accommodate the third-country national in a secure facility;

(h) use legitimate force to end any attempt by the third-country national to resist the transit.

² **D** entered a reservation and **B** entered a scrutiny reservation on paragraph 2 and, in particular, on the words *within available means*.

- (a) meeting the third-country national subject to removal at the aircraft and escorting him/her within the confines of the transit airport, in particular to his/her connecting flight;
- (b) providing emergency medical care to the third-country national and, if necessary, his/her escort¹;
- (c) providing sustenance for the third-country national and, if necessary, his/her escort;
- (d) receiving, keeping and forwarding travel documents, particularly in the case of unescorted removals;
- (e) in cases of unescorted transit, informing the requesting State of the place and time of departure of the third-country national from the territory of the Member States.
- (f) informing the requesting Member State if any serious incidents took place during the transit of the third-country national.

¹ F entered a reservation on this provision, which is linked in particular, with the question of the costs resulting from medical care administered to the concerned persons.

3. The requested Member State may, in accordance with its national law¹:
 - (a) place and accommodate the third-country nationals in a secure facility;
 - (b) use legitimate means to prevent or end any attempt by the third-country national to resist the transit.

4. Without prejudice to the provisions of Article 6(1), in cases where the completion of transit operations cannot be ensured, despite the assistance provided for in accordance with paragraphs 1 and 2, the requested Member State may, upon request by and in consultation with the requesting Member State, take all the necessary assistance measures to continue the transit operation.²

In such cases, the time – limit referred to in paragraph 1 may be extended up to a maximum of forty-eight hours.

5. The competent authorities of the requested Member State with whom responsibility for the measure lies shall decide the nature and extent of the assistance afforded under paragraphs 2 to 4³.

¹ **NL** maintained a scrutiny reservation on point (b) of this provision and, in particular, on the words *to prevent*.

D maintained a reservation on paragraph 3 and, in particular, on the words *in accordance with its national law*, which appear in the introductory sentence of the paragraph. Furthermore, it maintained a linguistic reservation as regards the translation of the words *legitimate means*, which appear in point b) (it suggested using the word *Hoheitsgewalt*).

² **NL** maintained a scrutiny reservation on this provision.

³ **NL** maintained a scrutiny reservation on this provision.

6. The costs of services provided under paragraph 1(b) and (c) and paragraph 3 shall be borne by the requesting Member State. The remaining costs shall be borne by the requested Member State.¹

Article 6 (former Article 4)

1. The requesting Member State shall undertake to readmit the third-country national forthwith if:
- (a) the transit by air authorisation was refused or revoked under Article 3, paragraphs 3 or 5;
 - (b) the third-country national entered the requested Member State without authorisation during the transit,
 - (c) removal of the third-country national to another transit State or to the State of destination, or boarding of the onward flight, was unsuccessful, or
 - (d) transit by air is not possible for another reason.

¹ **NL** entered a reservation on this provision. In particular, this delegation raised the question of determining whether the remaining costs (and especially the costs concerning remuneration of staff employed by the requested Member State for the transit operation) shall be covered by the requesting or the requested Member State. In this context **D** took the view that the costs regarding the use of staff of the requested Member State as well as the relevant administrative charges should be borne by the requesting Member State. According to **E**, all the costs related to the use of staff employed as escorts in the transit airports should be borne by the requesting Member State. **F** and **D**, which maintained reservations on this provision, suggested deleting the reference to paragraph 3. The **Pres** favoured maintaining the reference to paragraph 3, since in such cases there may be additional costs linked with the prolonged presence of the returnee and his/her escorts in the territory of the requested Member State.

2. The requested Member State shall assist with the readmission of the third-country national to the requesting Member State in the cases referred to in paragraph 1. The requesting Member State shall bear the costs incurred in returning the third-country national.

Article 6a

1. When carrying out the transit operation the powers of the escorts shall be limited to self-defence. In addition, in the absence of law - enforcement officers from the transit Member State or for the purpose of supporting the law - enforcement officers, the escorts may use reasonable and proportionate action in response to an immediate and serious risk to prevent the returnee from escaping, causing injury to himself or to a third party, or damage to property¹².
2. Escorts shall not carry weapons during transit by air and shall wear civilian clothes. They shall provide means of appropriate identification, including the transit authorisation delivered by the Member State of transit, at the request of the requested Member State³.

¹ NL entered a scrutiny reservation on this provision.

² E preferred adding in the text of Article 6a the following clause, whose introduction was originally suggested by the Pres but not supported by a majority of the delegations: *Without prejudice to any rules applicable under private international law, for any injury or damage occurred during the transit operation, the criminal and/or civil liability and the entitlement for compensation of the escorts shall be determined in accordance with the applicable legislation of the Member State of transit.*

³ D, E, F, and UK supported the current wording of the provision, whereas FIN, IRL, P and S suggested the words *if required* after the sentence *including the transit authorisation delivered by the Member State of transit.*

The Pres noted that this issue is linked with the question of the need for a prior authorisation referred to in Article 4 (2) which needs to be further considered.

Article 7

This Directive shall be without prejudice to the obligations arising 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, from international conventions on human rights and fundamental freedoms and from international conventions on the extradition of persons.

Article 8

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive before 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 9

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

Article 10

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

I. Transit request for the purposes of removal by air
 (in accordance with Article 4 of Council Directive 2003/ /EC of on assistance in cases
 of transit for the purposes of removal by air (OJ L of , p.))

(Requesting unit)	Place/Date:
Authority:	_____
Address:	Telephone/Fax:
_____	_____
_____	Name of officer:

	Signature:

(Requested unit)
Authority:

Address:

General information on person whom the transit request concerns

Request No	Surname	First name	m/f	Date of birth	Place of birth	Nationality	Travel document No/Type/Validity	Number of visa delivered by a third state (if required)
1								
2								

Flight details

Flight No	From	Departure date	Time	To	Arrival date	Time

Particular information:

Is the returnee accompanied by an escort?	<input type="checkbox"/> yes	<input type="checkbox"/> no	Names and functions: _____ _____
Is the presence of a police escort at the airport recommended?	<input type="checkbox"/> yes	<input type="checkbox"/> no	
Is medical care required?	<input type="checkbox"/> yes	<input type="checkbox"/> no	If so, specify: _____ _____ _____
Contagious identifiable diseases?	<input type="checkbox"/> yes	<input type="checkbox"/> no	If so, specify: _____ _____ _____
Previous unsuccessful attempts at removal?	<input type="checkbox"/> yes	<input type="checkbox"/> no	If so, state reasons: _____ _____ _____

Further comments

_____ _____ _____

NB: At the time the request was made, no grounds for refusal under Article 3(3) and (5) of Directive 2003/ /EC of were known.

Decision of the requested unit

The request is granted	<input type="checkbox"/>
The request is not granted	<input type="checkbox"/>
<u>Grounds</u> : _____ _____	
_____ (Name / Signature / Date)	