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SECOND REPORT

on the initiative by the Federal Republic of Germany with a view to adopting a Council Directive on assistance in cases of transit for the purposes of removal by air
(14848/2002 – C5-0011/2003 – 2003/0801(CNS))

Committee on Citizens' Freedoms and Rights, Justice and Home Affairs

Rapporteur: Timothy Kirkhope

Symbols for procedures

- * Consultation procedure
majority of the votes cast
- **I Cooperation procedure (first reading)
majority of the votes cast
- **II Cooperation procedure (second reading)
*majority of the votes cast, to approve the common position
majority of Parliament's component Members, to reject or amend
the common position*
- *** Assent procedure
*majority of Parliament's component Members except in cases
covered by Articles 105, 107, 161 and 300 of the EC Treaty and
Article 7 of the EU Treaty*
- ***I Codecision procedure (first reading)
majority of the votes cast
- ***II Codecision procedure (second reading)
*majority of the votes cast, to approve the common position
majority of Parliament's component Members, to reject or amend
the common position*
- ***III Codecision procedure (third reading)
majority of the votes cast, to approve the joint text

(The type of procedure depends on the legal basis proposed by the Commission)

Amendments to a legislative text

In amendments by Parliament, amended text is highlighted in ***bold italics***. Highlighting in *normal italics* is an indication for the relevant departments showing parts of the legislative text for which a correction is proposed, to assist preparation of the final text (for instance, obvious errors or omissions in a given language version). These suggested corrections are subject to the agreement of the departments concerned.

CONTENTS

	Page
PROCEDURAL PAGE.....	4
DRAFT EUROPEAN PARLIAMENT LEGISLATIVE RESOLUTION.....	6
MINORITY OPINION	9
OPINION OF THE COMMITTEE ON LEGAL AFFAIRS AND THE INTERNAL MARKET ON THE LEGAL BASIS.....	10

PROCEDURAL PAGE

By letter of 20 January 2003 the Council consulted Parliament, pursuant to Article 67 of the EC Treaty, on the initiative by the Federal Republic of Germany with a view to adopting a Council Directive on assistance in cases of transit for the purposes of removal by air (14848/2002 – 2003/0801(CNS)).

At the sitting of 29 January 2003 the President of Parliament announced that he had referred the initiative to the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs as the committee responsible (C5-0011/2003).

The Committee on Citizens' Freedoms and Rights, Justice and Home Affairs appointed Timothy Kirkhope rapporteur at its meeting of 18 February 2003.

It considered the initiative by the Federal Republic of Germany and draft report at its meetings of 18 February 2003, 19 March 2003 and 25 March 2003.

At the latter meeting it adopted the draft legislative resolution by 21 votes to 10.

The following were present for the vote: Jorge Salvador Hernández Mollar (chairman), Johanna L.A. Boogerd-Quaak and Giacomo Santini (vice-chairmen), Timothy Kirkhope (rapporteur), Mary Elizabeth Banotti, Christian Ulrik von Boetticher, Alima Boumediene-Thiery, Kathalijne Maria Buitenweg (for Pierre Jonckheer), Mogens N.J. Camre (for Roberta Angelilli), Marco Cappato (for Mario Borghesio), Charlotte Cederschiöld, Carmen Cerdeira Morterero, Ozan Ceyhun, Carlos Coelho, Thierry Cornillet, Gérard M.J. Deprez, Giuseppe Di Lello Finuoli, Margot Keßler, Eva Klamt, Alain Krivine (for Ole Krarup), Lucio Manisco (for Fodé Sylla), Claude Moraes (for Sérgio Sousa Pinto), Marcelino Oreja Arburúa, Elena Ornella Paciotti, Paolo Pastorelli (for Hubert Pirker), Martine Roure, Heide Rühle, Olle Schmidt (for Baroness Sarah Ludford), Ilka Schröder, Patsy Sörensen, Joke Swiebel, Anna Terrón i Cusí and Maurizio Turco.

The report was tabled on 26 March 2003.

At the sitting of 10 April 2003 the report was referred back to committee pursuant to Rule 68(3) of the Rules of Procedure.

At its meeting of 23 April 2003 the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs confirmed the appointment of Timothy Kirkhope as rapporteur.

By letter of 27 May 2003 the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs requested the opinion of the Committee on Legal Affairs and the Internal Market on the proposal's legal basis pursuant to Rule 63(2).

The committee examined the draft second report at its meetings of 11 June 2003, 10 July 2003 and 9 September 2003.

At the last meeting it adopted the draft legislative resolution by 26 votes to 10.

The following were present for the vote: Jorge Salvador Hernández Mollar (chairman), Johanna L.A. Boogerd-Quaak (vice-chairman), Timothy Kirkhope (rapporteur), Niall Andrews, Christian Ulrik von Boetticher, Mario Borghezio, Alima Boumediene-Thiery, Kathalijne Maria Buitenweg (for Patsy Sørensen), Marco Cappato (for Koenraad Dillen), Charlotte Cederschiöld, Carmen Cerdeira Morterero, Ozan Ceyhun, Thierry Cornillet, Gérard M.J. Deprez, Giuseppe Di Lello Finuoli, Rosa M. Díez González (for Sérgio Sousa Pinto), Evelyne Gebhardt (for Margot Keßler), Marie-Thérèse Hermange (for Mary Elizabeth Banotti), Eva Klamt, Ole Krarup, Alain Krivine (for Fodé Sylla), Baroness Ludford, Manuel Medina Ortega (for Michael Cashman), Marcelino Oreja Arburúa, Elena Ornella Paciotti, Hubert Pirker, Bernd Posselt, Martine Roure, Heide Rühle, Francesco Rutelli, Ingo Schmitt (for Hartmut Nassauer), Ilka Schröder, Ole Sørensen (for Bill Newton Dunn), Joke Swiebel, Anna Terrón i Cusí and Maurizio Turco.

The opinion of the Committee on Legal Affairs and the Internal Market on the proposal's legal basis is attached.

The second report was tabled on 9 September 2003.

DRAFT EUROPEAN PARLIAMENT LEGISLATIVE RESOLUTION

on the initiative by the Federal Republic of Germany with a view to adopting a Council Directive on assistance in cases of transit for the purposes of removal by air (14848/2002 – C5-0011/2003 – 2003/0801(CNS))

(Consultation procedure)

The European Parliament,

- having regard to the initiative by the Federal Republic of Germany (14848/2002)¹,
 - having regard to Article 63(3)(b) of the EC Treaty,
 - having regard to Article 67 of the EC Treaty, pursuant to which the Council consulted Parliament (C5-0011/2003),
 - having regard to Rules 67 and 63 of its Rules of Procedure,
 - having regard to the opinion of the Committee on Legal Affairs and the Internal Market on the proposal's legal basis,
 - having regard to the report of the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs (A5-0104/2003),
 - having regard to the second report of the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs (A5-0291/2003),
1. Approves the initiative by the Federal Republic of Germany as amended;
 2. Calls on the Council to amend the text accordingly;
 3. Calls on the Council to notify Parliament if it intends to depart from the text approved by Parliament;
 4. Calls on the Council to consult Parliament again if it intends to amend the initiative by the Federal Republic of Germany substantially;
 5. Instructs its President to forward its position to the Council and Commission and to the Government of the Federal Republic of Germany.

¹ OJ C 4 E, 9.1.2003, p. 4.

Amendment 1
Recital 4

(4) The sovereignty of the Member States – particularly with regard to the use of direct force against *aliens* resisting removal – are to remain unaffected.

(4) The sovereignty of the Member States – particularly with regard to the use of direct force against ***unlawfully resident third-country nationals*** resisting removal – are to remain unaffected.

Justification

It is not appropriate to refer to third-country nationals as ‘aliens’.

Amendment 2
Article 5, paragraph 1, point f)

(f) receiving, keeping and forwarding travel documents, particularly in the case of unescorted removals, and

(f) receiving, keeping *secure* and forwarding ***to the competent authorities in the country of destination*** travel documents, particularly in the case of unescorted removals, and

Justification

This amendment seeks to clarify the role of the requested Member State.

Amendment 3
Article 5, paragraph 1, point h) (new)

(h) informing the airline departing from the requested Member State.

Justification

Information should also be provided to the airline concerned.

Amendment 4
Article 5, paragraph 3

3. Escorts shall have no sovereign powers on the territory of the requested Member State. ***Measures taken in the context of the general rights to self-defence and to emergency action in accordance with the legislation of the requested Member State shall remain unaffected.*** Escorts shall not carry weapons during transit and shall identify themselves by means of service passports at the request of the requested Member State.

3. Escorts shall have no sovereign powers on the territory of the requested Member State. ***Escorts may take measures necessary for*** self-defence and emergency action in accordance with the legislation of the requested Member State. Escorts shall not carry weapons during transit and shall identify themselves by means of service passports at the request of the requested Member State.

Justification

This amendment seeks to make the text clearer.

Amendment 5
Article 7 a (new)

7a. Pursuant to Article 4 of Protocol No 4 to the European Convention on Human Rights and Fundamental Freedoms and to Article 19, first paragraph, of the Charter of Fundamental Rights, the requested Member State shall not provide assistance in connection with collective expulsions and expulsions to countries where fundamental political, social or cultural rights are not respected.

Justification

The European Convention on Human Rights and Fundamental Freedoms and the Charter of Fundamental Rights prohibit collective expulsions.

MINORITY OPINION

pursuant to Rule 161(3) of the Rules of Procedure
Ilka Schröder, Alain Krivine, Lucio Manisco, Giuseppe Di Lello Finuoli, Ole Krarup, Alima
Boumediene-Thiery, Maurizio Turco, Marco Cappato

In memory of Aamir Ageeb, Khaled Abuzarifa, Marcus Omofuma, Sémira Adamu, Ricardo Barrientos and all the other victims of 'Fortress Europe'.

Now that 'Fortress Europe' has largely closed its external borders, the EU increasingly attacks migrants living inside the EU. The efficient deportation of people criminalised as 'illegal', where possible without resistance, is the real objective of this initiative. A large majority in the European Parliament is in favour of this project, even though it is no secret that deportations are taking place from Europe to countries where murder, torture and inhuman treatment are not just a threat but bitter reality. It is also no secret that, again and again, people being deported die because of the actions of security staff. Introducing a human rights clause as suggested by one amendment will not change a reality that is de facto - and not just de jure - violating the human rights of migrants. Organising the machinery of deportation even more efficiently is nothing other than the pure cynicism of a racist policy which places state interests above people's interests in a better life.

We do not support this majority. Instead, we are demanding a total halt to deportations, the immediate release of all people being detained pending deportation and a permanent right to remain for all people in Europe.

OPINION OF THE COMMITTEE ON LEGAL AFFAIRS AND THE INTERNAL MARKET ON THE LEGAL BASIS

The Chairman

Mr Jorge Salvador Hernández Mollar
Chairman
Committee on Citizens' Freedoms and Rights, Justice and Home Affairs
BRUSSELS

Subject: Verification of the legal basis for the initiative by the Federal Republic of Germany with a view to adopting a Council directive on assistance in cases of transit for the purposes of removal by air.
(14848/2002 - C5-0011/2003 - 2003/0801(CNS))

Dear Mr Hernández Mollar,

By letter of 27 May 2003 the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs requested verification of the legal basis for the above mentioned initiative.

The initiative by Germany is based on Article 63(3)(b) of the Treaty establishing the European Community. However, Mr Kirkhope, rapporteur for the committee responsible, is concerned as to whether Article 63(3) provides an adequate legal basis for the proposal for a decision in question.

Background to the verification of the legal basis

In 2000 the Nassauer report (A5-0394/2000) rejected an initiative by the French Republic with a view to adopting a Council directive on mutual recognition of decisions on the expulsion of third-country nationals, on the grounds that the EC Treaty did not provide a legal basis. The proposal for a directive was based on Article 63(3) of the EC Treaty.

In 2001 a second Nassauer report (A5-0065/2001) rejected an initiative of the French Republic with a view to adopting a Council directive on mutual recognition of decisions on the expulsion of third country nationals, again on the grounds that there was no legal basis in the EC Treaty. The proposal for a directive was based on Article 63(3) of the EC Treaty.

The directive in question was adopted (Directive 2001/40/EC of 28 May 2001¹) and makes provision in Article 7 for a mechanism to compensate for any financial imbalances which may result from the mutual recognition of expulsion decisions.

¹ OJ L 149, 2.6.2001, p. 34.

We are now facing a question similar to that raised in the report by Mr Oreja Arburúa on the proposal for a Council decision setting out the criteria and practical arrangements for the compensation of the financial imbalances resulting from the application of Council Directive 2001/40/EC on the mutual recognition of decisions on the expulsion of third country nationals (COM(2003) 49 – C5-0050/2003 – 2003/0019(CNS)). On 12 May 2003 the Committee on Legal Affairs and the Internal Market decided that Article 63(3) of the EC Treaty was the appropriate legal basis for the adoption of this proposal for a decision.

Scope of Article 63(3) of the EC Treaty

This provision stipulates that the Council shall adopt:

'3. measures on immigration policy within the following areas:

(a) conditions of entry and residence, and standards on procedures for the issue by Member States of long-term visas and residence permits, including those for the purpose of family reunion;

(b) illegal immigration and illegal residence, including repatriation of illegal residents;'

According to an initial interpretation of the provision, Article 63(3) of the EC Treaty would provide an appropriate legal basis, as regards both substantive and procedural law, for measures relating to immigration policy.

According to a second interpretation, however, Article 63(3) of the EC Treaty would be an appropriate legal basis only as regards substantive law and not as regards questions of procedure such as those relating to mutual recognition. This interpretation takes into account the distinction between substantive law and procedure. Substantive competence would concern the conditions under which a third-country national may be expelled or sent back to his place of origin, as opposed to merely procedural matters relating to mutual recognition of expulsion decisions.

Aim and content of the proposal for a decision

According to settled case law, in the context of the organisation of the powers of the Community, the choice of the legal basis for a measure must be based on objective factors which are amenable to judicial review. Those factors include in particular the aim and content of the measure¹.

The initiative lays down measures that may be taken by the competent authorities at European Union airports of transits to assist with unescorted and escorted removals (Article 1). In brief, it constitutes mutual assistance for the purposes of removal by air (second recital).

Its aim is to end the illegal residence of third-country nationals who are the subject of removal orders and to contribute to legal certainty and standardisation of procedures by means of rules binding on all the Member States (second recital).

¹ See in particular the judgment of 23 February 1999, *Parliament v. Council*, Case C-42/97, point 36.

With this in view, the requested Member State provides assistance with the transit of third-country nationals to be removed (Article 3(1)). The requesting Member State gives priority to examining whether removal to the state of destination using a direct flight is possible (Article 3(2)).

Article 3(3) and (4) lays down the conditions under which transit may be refused, i.e. where the third-country national faces the threat of humane 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 conviction; transit may also be refused if criminal charges would have to be brought against the third-country national in the requested state or if assistance is impossible for organisational reasons.

Provision is also made for assistance in the event of readmission where the removal operation is unsuccessful in a transit state or the state of destination (Article 1(2) and Article 4).

Article 5 describes the assistance measures which may be taken, while Article 6 sets out the conditions to be met when submitting a request for transit.

Article 7 stipulates that the proposal for a directive is without prejudice to the obligations arising from the Geneva Convention of 28 July 1951 on the status of refugees, as amended by the New York Protocol of 31 January 1967, from the Convention Determining the State Responsible for Examining Applications for Asylum Lodged in one of the Member States of the European Communities and from international conventions on the extradition of persons.

Conclusions

The initiative by the Federal Republic of Germany includes provisions relating to both substantive and procedural law.

Accordingly, Article 63(3)(b) of the EC Treaty is the appropriate legal basis for adopting this initiative.

At its meeting of 8 July 2003, the Committee on Legal Affairs and the Internal Market decided, in the light of the above considerations, that the proposed legal basis should be retained.¹

(sgd) Giuseppe Gargani

¹ The following were present at the time of the vote: Giuseppe Gargani (chairman), Ioannis Koukiadis (vice-chairman), José María Gil-Robles Gil-Delgado (draftsman), Ulla Maija Aaltonen, Paolo Bartolozzi, Ward Beysen, Michel J.M. Dary, Bert Doorn, Francesco Fiori, Janelly Fourtou, Marie-Françoise Garaud, Evelyne Gebhardt, Malcolm Harbour, Lord Inglewood, Hans Karlsson, Kurt Lechner, Klaus-Heiner Lehne, Sir Neil MacCormick, Toine Manders, Manuel Medina Ortega, Angelika Niebler, Anne-Marie Schaffner and Marianne L.P. Thyssen.