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LIMITE

**MIGR 61
COMIX 412**

NOTE

from : Presidency
to : Working Party on Migration and Expulsion
Subject : Draft initiative of the Italian Republic for a Council Directive on assistance in cases of transit by land in the context of removal measures taken by Member States against third-country nationals

1. Introduction

This initiative has been drawn up:

- with reference to the Council Recommendation of 22 December 1995 on concerted action and cooperation in carrying out removal measures;
- having regard to the provisions of the Return Action Programme, in particular as regards "transit arrangements", which advocates, both under the Comprehensive Plan to combat illegal immigration and trafficking in human beings and under the Plan for the management of the external borders, that an agreement be established between the Member States on mutual support and assistance in implementing return and readmission measures in cases of transit (by air, sea or land);

- taking account of the initiative already taken with the Council Directive on assistance in cases of transit for the purposes of removal by air.

The aim of this proposal, in other words, is to supplement and complete the legal framework concerning the improvement of transit possibilities for third-country nationals in the broader context of establishing "common minimum rules" on the removal of such persons.

In the light of the above, we propose the following draft Council Directive.

INITIATIVE FOR A COUNCIL DIRECTIVE

of

on assistance in cases of transit by land in the context of
removal measures taken by Member States
against third-country nationals

THE COUNCIL OF THE EUROPEAN UNION,

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

Having regard to the initiative of the Italian Republic,

Having regard to the Opinion of the European Parliament,

Whereas:

- (1) The Council Recommendation of 22 December 1995 on concerted action and cooperation in carrying out removal measures emphasised the need for effective cooperation between the Member States' competent authorities in the field of removal by air of third-country nationals. Specific rules on the matter have been laid down in Council Directive 2003/ /EC on assistance in cases of transit for the purposes of removal by air.
- (2) There is a need to terminate the illegal residence of third-country nationals subject to final orders for removal from national territory, using direct and mutual-assistance procedures, in the field of removal, between the Member States.

- (3) It is necessary to reach agreement among the Member States on mutual support and assistance in implementing return and readmission measures in cases of transit by air, sea and land in accordance with the Comprehensive Plan to combat illegal immigration and trafficking in human beings in the European Union, approved by the Council on 28 February 2002, and the Council's Plan for the management of the external borders of the European Union, approved by the Council on 13 June 2002, which were confirmed by the Return Action Programme approved by the Council on 28 November 2002.
- (4) The sovereignty of the Member States, particularly with regard to the use of direct force against third-country nationals resisting removal orders, remains unaffected.
- (5) Member States are to implement this Directive with full respect for human rights and fundamental freedoms, with particular reference to the Geneva Convention and the European Convention on Human Rights. Transit of third-country nationals will be neither requested nor granted if in the third country of destination or in another third country of transit 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 or membership of a particular social group or political conviction.
- (6) Member States are to implement this Directive having regard to human rights and fundamental freedoms and, in particular, the European Convention on Human Rights of 4 November 1950; the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984; the Geneva Convention relating to the Status of Refugees of 28 July 1951 and the New York Protocol thereto of 31 January 1967; the Convention on the Rights of the Child of 20 November 1989; and the Charter of Fundamental Rights of 13-14 October 2000.

- (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 Directive 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 abovementioned Protocol Denmark is to decide within a period of six months after the adoption of this Council Directive whether it will implement it in its national law or not.
- (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 between 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 will also 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.
- (9) In accordance with Articles 1 and 2 of the Protocol on the position of the United Kingdom and Ireland annexed to the Treaty on the European Union and to the Treaty establishing the European Community, these Member States are not taking part in the adoption of this Directive and therefore, subject to Article 4 of that Protocol, are not bound by it or subject to its application,

HAS ADOPTED THIS DIRECTIVE:

Article 1
Objective

The purpose of this Directive is to define measures on assistance between the competent authorities of the Member States in cases of escorted transit by land of third-country nationals who are the subject of removal orders by a Member State.

Article 2

Definitions

For the purposes of this Directive:

- (a) "third-country national" means 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" means the Member State which implements a removal order in respect of a third-country national and requests transit by land through another Member State;
- (c) "requested Member State" or "transit Member State" means the Member State through whose territory the escorted removal of third-country nationals who are the subject of removal orders by a Member State is to be effected;
- (d) "transit by land" means the territory of a Member State through which third-country nationals are removed;
- (e) "carrier" means a natural or legal person that transports, on a professional basis or in an official capacity, third-country nationals who are the subject of removal orders by the Member States;
- (f) "escort" means the requesting or requested Member State's personnel responsible for accompanying the third-country national, including persons responsible for medical care, and interpreters.

Article 3
General principles

1. Before removing third-country nationals by land, Member States shall first examine whether it is possible to use direct air or sea links with the State of origin or destination of the said nationals.
2. The decision to remove a third-country national by land shall be taken on the basis of practical considerations such as the geographical proximity to another Member State of the third-country national's country of origin or destination.
3. To this end, the receiving State may avail itself of the procedures provided for in any readmission agreements entered into bilaterally with the third-country national's country of origin or destination and between the Member States, or, in the latter case, agreement on entry for transit purposes.
4. The requested Member States(s) may refuse transit by land if:
 - (a) in accordance with existing legislation, the third-country national is subject to criminal proceedings in the requested Member State or has been condemned to serve a prison sentence in that State;
 - (b) transit by land through other Member States or entry to the third country of final destination is not possible for any reason;
 - (c) the request for assistance cannot be granted for practical reasons or the third-country national is a threat to national security and public policy, to international relations or to public health in the requested Member State;
 - (d) the third country of origin or final destination has a border with the requesting Member State;

- (e) in the country of origin or destination the third-country national faces the threat of, or may be subject to, inhumane or humiliating treatment, torture or the death penalty, or if his life or liberty may be jeopardised by reason of his race, religion, nationality or membership of a particular social, political or religious group.
5. In the case referred to in paragraph 4(c), the requested Member State(s) shall promptly notify the requesting Member State of the impossibility of providing the requested assistance and state the reasons therefor.
 6. Authorisations already issued for transit by land may be withdrawn by the requested Member State(s) if the circumstances that may justify refusal of assistance during transit as referred to in Article 3(4) arise after the authorisations were granted.
 7. Also in the case referred to in paragraph 6, the requested Member State shall immediately notify the requesting Member State and state the reasons for the withdrawal of the authorisation.
 8. The above procedures and requirements shall apply in the same way in the case of transit by land through several Member States in succession.

Article 4

Request for transit

1. The request for transit by land for the purpose of removing third-country nationals and the related assistance measures shall be communicated in writing by the requesting Member State to the requested Member State(s) as soon as possible and in any case not later than two days before the day of actual transit.
2. In the case of transit through several Member States, the requesting Member State shall at the same time communicate in writing the request for the actual transit and the related assistance measures in accordance with the procedures laid down in paragraph 1.

3. Likewise, the requesting Member State shall notify the requested State or Member States in writing of the withdrawal of any request for transit.
4. Within two days of the request for transit by land, the requested Member State(s) shall notify the requesting State of the acceptance or refusal of assistance; in the latter case, it shall be given reasons for the refusal. Transit by land may in no event take place without the approval of the requested Member State(s). The above time-limit may be extended in duly justified cases.
5. Where no reply is provided by the requested Member State(s) within the time-limit referred to in paragraph 4, the transit operations may be started by means of a notification by the requesting Member State.

Member States may provide on the basis of bilateral or multilateral agreements or arrangements that the transit operations may be started by means of a notification by the requesting Member State.

Member States shall notify the Commission regarding the agreements or arrangements referred to in the second subparagraph. The Commission shall regularly report to the Council on such agreements and arrangements.

Article 5

Transit arrangements

1. The arrangements for transit by land shall be communicated using the attached form, which must be transmitted to the requested State or Member States. The necessary measures for adjusting and amending that form, as well as the methods of transmission, shall be taken in accordance with Articles 5 and 7 of Decision 1999/468/EC.
2. The Member States shall designate a central authority to be responsible for forwarding and receiving requests for assistance in cases of transit.

3. On the basis of bilateral or multilateral agreements the Member States may establish the land border posts through which third-country nationals who are the subject of removal orders are allowed to enter their territory in transit, making use of all existing opportunities for cooperation and, where provided for, of any common cross-border cooperation offices that may be set up at internal borders.
4. The requesting Member State shall indicate in the application form for transit by land the crossing point through which the alien will enter the requested Member State(s), the crossing point located at the border with another Member State in the case of transit through several Member States, and the Member State's exit crossing point with the country of origin or destination of the third-country national who is being removed.

Article 6

Carriers used

1. For the purposes of transit by land, use may be made of public carriers such as scheduled buses, trains or unmarked police cars.
2. Where police cars are used it may be agreed that transit through the territory of certain requested Member States shall be provided by police cars from those Member States.

Article 7

Facilities

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

As a general rule, the transit operation shall take place within 36 hours.

2. The requested Member State(s) shall provide the requesting State with all possible assistance during transit.

In particular, such assistance shall involve:

- the competent personnel of the requested Member State(s) making direct contact with the third-country national and the escort upon entry into national territory;
 - emergency medical assistance for the third-country national and escort personnel;
 - providing the third-country national and, if necessary, escort personnel with assistance to ensure that the transit operation is completed successfully;
 - communicating the details concerning the time and place of the transit operation and giving notice that the third-country national has been finally removed from the territory of the Member States;
 - assistance in the event of incidents while the third-country national is in transit.
3. In accordance with the national legislation in force, the requested Member State(s) may:
 - arrange accommodation for escort personnel and the third-country national, with an appropriately secure facility for the latter;
 - use any possible legitimate "measure" to prevent or terminate acts of resistance offered by the third-country national when trying to evade the transit escort.
 4. The requested Member State(s) may adopt any further measure, upon request or after consulting the requesting State, to ensure the continuation of the transit operation.

In this case the competent authorities of the requested Member State(s) which have responsibility for adopting further security measures shall determine the nature of such further assistance measures and the arrangements for applying them.

The costs of such assistance shall be borne by the requesting Member State. Where the requested Member State considers it necessary unilaterally to adopt further assistance measures for the security of the transit operation, the costs arising from the adoption of such measures shall be agreed with the requesting Member State for the purposes of any reimbursement.

Article 8

Readmission by the requesting State

1. The requesting Member State shall readmit the removed third-country national to its territory if:
 - transit by land has been refused or withdrawn for the reasons set out in Article 3(4) and (6);
 - the removal of the third-country national to the country of origin or destination has not proved possible;
 - transit by land cannot continue for any other reason.
2. In the course of such operations as well (readmission of the third-country national to the requesting Member State), the requested Member State(s) shall assist the requesting Member State, which shall bear the costs incurred in the operation.

Article 9
(Escorts)

1. Removals in transit through the territory of one or more Member States shall take place with an escort.

2. The powers of escort personnel during the transit operation shall be limited to legitimate defence. In the absence of police from the requested Member State, or for the purpose of law enforcement, escort personnel may take reasonable and proportionate action to deal with a serious and immediate risk so as to prevent the third-country national from escaping or from causing injury to himself or to others or damage to property.

Under all circumstances escort personnel must comply with the existing legislation of the requested Member State.

3. Escort personnel shall not carry weapons during transit and shall wear civilian clothes. They shall have appropriate identification together with the transit authorisation issued by the Member States concerned or, where appropriate, the notification referred to in Article 4, at the request of the requested Member State.

Article 10
Safeguard clause concerning asylum

This Directive shall be without prejudice to the obligations arising from the Geneva Convention relating to the status of refugees of 28 July 1951 and 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.

Article 11
(Final clause)

1. Member States shall adopt the laws, regulations and administrative provisions necessary to comply with this Directive before _____. They shall forthwith inform the Commission thereof.
2. The provisions adopted by the Member States in order to comply with this Directive shall contain an explicit reference to the act whereby this Directive was officially published.
3. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in order to implement this Directive.

Article 12
(Entry into force)

This Directive shall enter into force on the thirtieth day following that of its publication in the Official Journal of the European Union.

Article 13
(Addressees)

This Directive is addressed to the Member States in accordance with the Treaty establishing the European Community.

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