



**COUNCIL OF
THE EUROPEAN UNION**

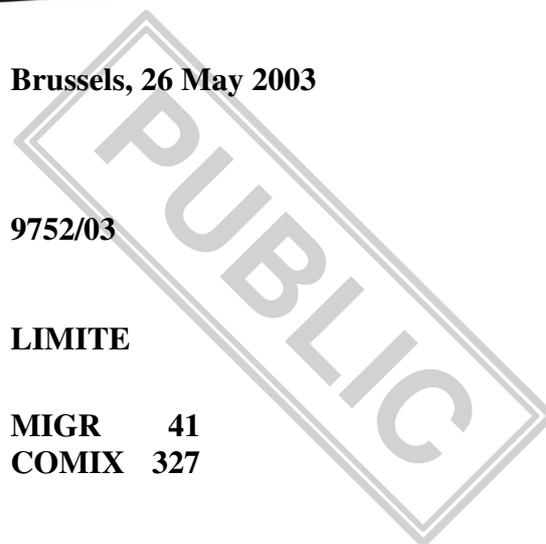
Brussels, 26 May 2003

**Interinstitutional File:
2003/0801 (CNS)**

9752/03

LIMITE

**MIGR 41
COMIX 327**



NOTE

from : Presidency

on : delegations

Subject: Draft Council Directive on assistance in cases of transit for the purposes of
removal by air

Delegations will find attached the text of the above draft Directive.

COUNCIL DIRECTIVE 2003/ /EC¹

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) 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.
- (2) 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 **NL** maintained a parliamentary scrutiny reservation on the whole directive.

- (3) 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, already address the need for cooperation between Member States in the field of removal by air of third country nationals.
- (4) The sovereignty of the Member States, particularly with regard to the use of direct force against third-country nationals resisting removal remains 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 remains 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 particular the Geneva Convention and the European Convention for Human Rights. In accordance with the applicable international obligations transit by air will be neither requested nor granted 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 conviction.

¹ OJ C 5, 10.1.1996, p. 3.

- (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 Directive aims to build upon the Schengen acquis under the provisions of Title IV of the Treaty establishing the European Community to the extent that it applies to third-country nationals who do not fulfil or who no longer fulfil the conditions for a short stay applicable within the territory of a Member State by virtue of the provisions of the Schengen acquis, 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 the Republic of Iceland and the Kingdom of Norway concerning the association of these two States with the implementation, application and development of the Schengen acquis, to the extent that it applies to third-country nationals who do not fulfil or who no longer fulfil the conditions for a short stay applicable within the territory of a Member State by virtue of the provisions of the Schengen acquis, which fall within the area referred to in Article 1, point C, of Council Decision 1999/437/EC of 17 May 1999 on certain arrangements for the application of that Agreement.
- (10) 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.
- (11) This Directive constitutes an act building on the Schengen acquis or otherwise related to it within the meaning of Article 3(1) of the Act of Accession,

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 2

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;

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. Without prejudice to the obligations of Article 8, the requested Member State may refuse transit by air if:
 - (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
 - (e) the third-country national will be a threat to public policy, public security, public health or to the international relations of the requested Member State.
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

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.
2. The requested Member State shall inform the requesting Member State forthwith of its decision within two days. This time-limit may be extended in duly justified cases up to a maximum of forty eight hours. Transit by air shall not be commenced without the approval of the requested Member State¹.

In case no reply is provided by the requested Member State within the deadline referred to in the first sub-paragraph the transit operations may be commenced 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 commenced 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 third sub-paragraph. The Commission will regularly report to the Council on these agreements and arrangements.

¹ It has been agreed to insert in the Council minutes the following Council statement in connection with Article 4(2):
The Council welcomes the commitment of the Commission to table one year after the implementation of this Directive a report on the basis of the information provided by the Member States. This report will deal with the mechanisms as set out in this Directive and in particular will focus on the agreements and arrangements as foreseen in Article 4(2) and on the experience with respect to notifications of transit operations. Following this report, the Council may, if necessary, consider a review of the mechanism set out in Article 4(2).

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.

The measures necessary for the update and the adjustment of the transit request as set out in the Annex as well as the methods of its transmission shall be taken in accordance with the regulatory procedure according Articles 5 and 7 of Decision 1999/468/EC.

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 Annex.
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.

Article 5

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, with the exception of point (b), 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 left. This relates to the following assistance measures in particular:

- (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 escort;
 - (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.
3. The requested Member State may, in accordance with its national law:
- (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.

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 4.
6. The costs of the services provided according to paragraph 2(b) and (c) shall be borne by the requesting Member State.

The remaining costs shall also be borne by the requesting Member State to the extent that they are actual and quantifiable.

Member States shall provide appropriate information with regard to the criteria of quantification of the costs referred to in the second sub-paragraph.

Article 6

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.

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 7

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/herself or to a third party, or damage to property.

Under all circumstances escorts must comply with the legislation of the requested Member State.

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, or where applicable, the notification referred to in Article 4 (2), at the request of the requested Member State.

Article 8

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 9

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive before¹ 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 10

The Decision of the Schengen Executive Committee set up for the purposes of implementing the 1990 Convention implementing the Schengen Agreement of 14 June 1985 on the gradual abolition of checks at common borders, of 21 April 1998 on cooperation between the Contracting Parties in returning foreign nationals by air (SCH/Com-ex (98)10) is repealed.

Article 11

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

¹ 24 months from the date of adoption of the Directive.

Article 12

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) Authority: _____ Address: _____ _____ _____	Place/Date: _____ Telephone/Fax/e-mail: _____ Name of officer: _____ Signature: _____
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(Requested unit) Authority: _____ Address: _____ _____ _____
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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

_____ _____

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

Decision of the requested unit

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

* This information shall be provided in accordance with the applicable national or international law.