NOTE

from: General Secretariat

to: Migration Working Party (Expulsion)

Nos prev. docs: 9506/95 ASIM 233, 9506/95 ADD 1, 9506/95 ADD 2, 9506/95 ADD 3, 9506/95 ADD 4

Subject: Draft Council Recommendation on combating the illegal employment of third-country nationals

Delegations will find attached a version of the text on combating the illegal employment of third-country nationals, as amended following the meeting of the Migration Working Party (Expulsion) on 12 February 1996.

Additions to the previous version are underlined and omissions indicated by bracketed dots. Delegations’ comments and reservations are given in the footnotes.
DRAFT COUNCIL RECOMMENDATION
ON COMBATING THE ILLEGAL EMPLOYMENT OF THIRD-COUNTRY NATIONALS

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Council Recommendation of 22 December 1995 on harmonizing means of combating illegal immigration and illegal employment and improving the relevant means of control (1),

Having regard to the Resolution adopted by the Council on 20 June 1994 on limitation of admission of non-EC nationals to the Member States for employment,

Whereas Article K.1(3)(c) of the Treaty on European Union lays down that combating unauthorized immigration, residence and work by nationals of third countries on the territory of Member States constitutes a matter of common interest;

Whereas measures to combat the illegal employment and exploitation of third-country nationals should be complemented by (...) measures to promote the integration of foreign workers lawfully established and legally employed in the territory of the Member States, guaranteeing them appropriate conditions of access to vocational training;

(...) Whereas illegal employment may distort the conditions of free competition in the internal market by reducing social costs or offering other advantages for employers and by lowering levels of social protection;

Whereas this Recommendation is aimed at strengthening cooperation between Member States on immigration policies in relation to third countries;

Whereas this Recommendation is without prejudice to Community law (...); (2)

(2) The Council Legal Service recommends deleting this Recital. The Commission considers that, while not legally necessary, it is politically useful.

RECOMMENDS THAT THE GOVERNMENTS OF THE MEMBER STATES apply the principles set out below with a view to combating illegal employment of third-country nationals:

I. Scope

This Recommendation shall apply to third-country nationals, with the exception of:

– members of the families of citizens of the European Union exercising their right to free movement;

– nationals of Member States of the European Free Trade Association party to the Agreement on the European Economic Area and members of their families exercising their right to free movement;

– third-country nationals where they are in a situation covered by Community law.

This Recommendation shall be without prejudice to the rights of third-country nationals whose status is covered by agreements concluded with third States by the European Community, by the European Community and its Member States or by one or more Member States, where such agreements contain more favourable provisions relating to employment.

II. Authorization to work

1. Third-country nationals wishing to work in the territory of a Member State should be in possession of the authorizations to reside and to work required by the legislation of the Member State concerned.

(1) The Council Legal Service recommends deleting this recital.
2. The activity carried out, the post and its location and duration should, where applicable, effectively correspond to the content of the authorization granted by the Member State concerned.

III. Penalties for employing persons without authorization (\(^1\))

1. (...) The employment of third-country nationals who do not possess the necessary authorization (...) should constitute an offence.

2. Such (...) an offence should give rise to the imposition of (...) criminal and/or administrative penalties in accordance with the provisions of the law of the Member State concerned. (\(^5\))

3. Such penalties should be imposed upon (...) those who employ illegal workers and those who encourage, facilitate or promote illegal employment.

4. (...) Illegal trafficking in labour organized by persons acting on their own or in networks should constitute a criminal offence. (\(^6\))

5. The (...) procedures for punishing the (...) employment of workers without the necessary authorization could:

   - (...) meet the requirements of the rule of law, (...) particularly as regards appropriate mechanisms and procedures for judicial control;

   - allow the (...) application of penalties which are effective, dissuasive, appropriate and proportionate to the seriousness of the offences committed;

\(^1\) The United Kingdom delegation entered a scrutiny reservation and placed a parliamentary reservation on the whole of section III as UK legislation did not provide for any penalties for employers of third-country nationals in an illegal situation, although such provisions were currently under consideration in the United Kingdom.

\(^5\) The Austrian delegation entered a scrutiny reservation on paragraph 2.

\(^6\) The German delegation entered a scrutiny reservation on paragraph 4.
– permit the elimination of added profits or other advantages obtained by employers as a result of the offences committed and reparation for any damage caused by them to the workers concerned. (7)

IV. Coordination of enforcement agencies

Member States should adopt the measures necessary to coordinate the activities of the competent services or authorities with the aim of combating the illegal employment and the exploitation of third-country nationals, given that the specialization in separate areas of control necessary for systematic and organized enforcement operations should be supplemented by the necessary collaboration and coordination in the activities of those services.

This could be put into practice through the preparation of joint actions to be defined by sectors of productive activity, geographical areas and periods of time in which non-compliance with the rules on the employment of third-country nationals appears to be concentrated and investigation of which is entrusted to the competent services.

Such assistance might take the form of:

– support, at the request of one of the competent services, for preventive action, such as inspection visits to places of work where there is hard evidence that the activities of those services could be obstructed or nullified or could involve any type of risk;

– support during inspections where the work of the competent services is seriously impeded in their investigations into the hidden economy;

– prompt support where assistance is requested by the competent services in emergency situations.

(7) The German and Swedish delegations entered scrutiny reservations on the third indent of paragraph 5.
V. Exchange of information

Member States should exchange information (...), both bilaterally and within the Council, regarding the fight against the illegal employment of third-country nationals and organized networks trafficking in labour.

VI. Monitoring of compliance with the Recommendation

The Council shall examine the progress of compliance with the principles of this Recommendation periodically, and for the first time one year after its adoption.