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NOTE

from : the Presidency

to : the Migration Working Party (Admission)

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Subject : Council resolution relating to limitations on the admission of third-country nationals to the territory of the Member States for the purpose of pursuing activities as self-employed persons

This draft resolution attached was last discussed by the Migration Working Party (Admission) on 20 October 1994. The comments and amendments resulting from the Working Party's discussions are annexed to the present note.

DRAFT COUNCIL RESOLUTION

relating to the admission of third-country nationals
to the territory of the Member States for the purpose
of pursuing activities as self-employed persons

A. GENERAL CONSIDERATIONS ON POLICY

1. The Council recalls that, in the report on immigration and asylum policy by the Ministers responsible for immigration adopted by the European Council held in Maastricht in 1991, priority was given to the harmonization of policies on admission for the purposes of pursuing self-employed occupation. In principle, these policies are restrictive. In any case developments for example in GATT, GATS and OECD must be taken into account.
2. The Council notes that the 1994 programme of priority work in the field of justice and home affairs, adopted by the Council at its meeting in Brussels on 29 and 30 November 1993, included, as a priority measure, a decision to conclude work in the field of the admission of self-employed persons.
3. The Council welcomes the progress achieved as a result of the signing of the final act and agreements under the Uruguay Round in Marrakesh on 15 April 1994 towards free international trade for the promotion of investment and the creation of jobs.
4. The Council takes the view that to a certain extent the question of the admission of persons for the purposes of pursuing a salaried activity and that of the admission of self-employed persons can be treated distinctly. The admission for the purpose of an independent economy activity which adds value (investment, innovation, transfer of technology, job creation) to the economy of the host country is of benefit.

Observations

Re point 4

The French delegation has proposed the following wording .

“... adds value (investment, innovation, transfer of technology, job creation, cultural activities of artists exercising a true independent activity) ...”

5. The Council considers that third-country nationals should not be admitted to a Member State for the purposes of pursuing a self-employed occupation when the latter is of no economic benefit to that State or any of its regions or contributes no cultural enrichment.
6. The Council considers it necessary to ensure that persons who are attempting to find employment in a dependent working relationship are not admitted as self-employed persons.
7. The Council also considers that it is necessary to avoid persons establishing themselves and embarking on a self-employed occupation without having the appropriate qualifications and/or financial means and to avoid their entering into a dependent working relationship.
8. The Council agrees not to address in this resolution the question of third-country nationals legally resident on a permanent basis on the territory of a Member State although they do not have the right to admission or residence in another Member State. It agrees to examine this question at a later date.
9. The Council accordingly agrees that the principles set out below shall govern Member States' internal policies towards third-country nationals seeking admission to or permission to remain in their territories in order to engage in a self-employed occupation. The Council agrees that the principles set out below may not be relaxed by Member States in their national legislation. It agrees to have regard to these principles in any proposals for the revision of national legislation. The Member States will further endeavour to seek to ensure by 1 January 1996 that national legislation is in conformity with them. The principles are not legally binding on member States and do not afford a ground for action by individuals.
10. The Council agrees that there shall be a regular review of the transposition of this resolution and of the need for amendments to it.
- (11 The Council also confirms that the application of these principles is no bar to the application of national rules on law and order, public health and national security.)

Observations

Re point 5

Germany : reservation on the cultural field.

B. PERSONS TO WHOM THIS RESOLUTION DOES NOT APPLY

The harmonization principles do not apply to :

- persons who have right of free movement under Community law, i.e. nationals of Member States, nationals of EFTA countries parties to the Agreement on the European Economic Area and members of their families ;
- third-country nationals who have been allowed admission for the purpose of family reunification to join nationals of a Member State or a third country resident in the Member State concerned ;
- third-country nationals whose access to employment is covered by rights stemming from agreements concluded with third countries which are governed by Community law and by bilateral and multilateral Agreements, such as GATT, GATS or OECD agreements ;
- third-country nationals entering the Member States in order to engage in paid employment. Such persons are covered by the principles set out in the Resolution on limitations on admissions of third-country nationals to the Member States for employment adopted by the Council on 20 and 21 June 1994 ;
- third-country nationals entering the Member States for study purposes. Such persons are covered by the principles to be set out in the Resolution on the admission of third-country nationals to the Member States for study purposes.

Observations

C. GENERAL PRINCIPLES

Point 1

- (1) This resolution only concerns individuals and does not affect the setting up of firms.
- (2) "Activity as a self-employed person" means any activity carried out in a personal capacity or in the legal form of a company or firm within the meaning of the second paragraph of Article 58 of the EC Treaty without being answerable to an employer in either case.
- (3) Only those associates actively involved and whose presence is necessary in pursuing the company's or firm's aims and in its management may be authorized to establish themselves in the host Member State's territory. In cases where those associates do not have a majority or substantial share holding in the company or firm Member States may reserve the right not to admit them except with a work permit.

Point 2

- (1) Member States may allow third-country nationals wishing to pursue activities as self-employed persons to enter their territory where it has been duly established that that activity meets the needs as defined in section A(4) and that general legal provisions governing entry and residence have been complied with.
- (2) The admission procedure should ensure that persons who quite obviously wish to engage in paid employment or whose partnership or directorship are disguised as paid employment are not admitted as self employed persons. Once admitted, the admission to activities as a self-employed person does not extend to looking for or accepting a job on the labour market.

Observations

Re point 1

The Presidency suggests that the question of key personnel and their relationship to the notion of answerability vis-à-vis an employer requires further examination.

D/DK/E : scrutiny reservation on the final sentence of (3).

Re point 2(1)

E : reservation relating to the inclusion of cultural activities (see A.4).

Point 3

- (1) Requests for admission must be submitted to the authorities of the host Member State which are competent under national law through an appropriate national authority or through that State's consular or diplomatic representation in the home country or the country of origin of the person seeking admission to pursue activities as a self-employed person.
- (2) They must be accompanied by information which can be used to assess whether the planned activity meets the preconditions referred to under point 2, and also by documentary evidence that the activity will be carried out in accordance with the relevant national legislation.
- (3) The following could for example be required for assessing the preconditions referred to under point 2 in accordance with national legislation :
 - documents indicating the nature, scale and duration of the activity the person wishes to engage in ;
 - documents indicating the number of staff likely to be required ;
 - a description of the premises where the activity will be carried out, which should be appropriate for it ;evidence of the funds available for the intended purpose.

Observations

(4) The following could for example be required for assessing compliance with legislation in force, in accordance with national legislation :

- proof that the self employed person meets the conditions of the host Member State regarding professional qualifications and access to the occupation and is of good moral standing ;
- in the case of companies or firms, the instrument of incorporation, evidence of publication or registration thereof, and the names of the directors and managerial staff and of the associates authorized to act on their behalf.
- proof such as police documentation or similar documents, showing the integrity and moral standing of the person concerned.

Point 4

- (1) Authorization to engage in a self-employed occupation will be granted in accordance with the provisions of national aliens legislation and in writing, for example in the form of a passport stamp or other document. Such authorization will be personal and non-transferable.
- (2) The validity of the initial authorization may be limited in time. Upon application it may be extended for a further period and/or be of unlimited validity, if the conditions for access continue to obtain as provided for in national legislation.

Point 5

- (1) All requests for renewal must, where so required under Member States' national legislation, be accompanied by documentary evidence that the self-employed person offers guarantees for the continued orderly pursuit of his occupation.
- (2) At least at the time when any renewal application referred to under point 4(2) is submitted, a check may be made on the bona fide nature of the activity engaged in, whether it still corresponds to the activity for which authorization was given, the ability of the person concerned to support himself by the income from that activity and its continuing compliance with the preconditions referred to under point 2(1).

Observations

Point 3(4)

B/F : scrutiny reservation

- (3) Any further checks which Member States may make thereafter could in principle be limited.

Point 6

- (1) Under the conditions laid down by national law, Member States may grant third-country nationals wishing to provide a service leave to enter their territory for the time strictly necessary for the performance of the service.
- (2) "Service provider" means a self-employed person (residing abroad) whose services are sought by a person residing in a Member State in order to carry out, against remuneration, a specific task over a specific period.

Point 7

Persons already present in the territory of a Member State as students, trainees, seasonal workers, service providers, contract workers or for other reasons will not as a general rule be permitted to extend their stay for the purpose of establishing themselves as self-employed persons. Such persons must leave the country once the purpose of stay on the basis of which they were given leave to enter the country has ceased to apply.

Point 8

- (1) In principle care must be taken to ensure that persons admitted to pursue activities as self-employed persons do not eventually enter into a paid employment relationship.
- (2) Member States may allow self-employed persons who have acquired the right to long-term/permanent residence to seek where appropriate a work permit in order to obtain paid employment.

Observations

E : Reservation on Point 5(3).

Point 9

The spouse and unmarried children under a maximum age, varying between 16 and 18 years depending on the Member State concerned, of a self-employed person will in principle be admitted to join that person, subject to the conditions set out in the Resolution concerning family reunification adopted by the Ministers responsible for immigration questions of the European Community on 1 June 1993.

Point 10

- (1) Member States' arrangements enabling them to refuse admission on grounds of public security and public order shall not be affected by this Resolution.
- (2) The provisions of this Resolution shall not affect Member States' provisions governing trades and professions or arrangements concerning the mutual recognition of vocational qualifications.

Point 11

Subject to the terms and conditions which they may apply, Member States reserve the right to admit to a Member State third country nationals who make very substantial investments in the commerce and industry of that Member State on the basis that the scale of those investments are of such economic benefit that the provisions in these principles on the scope and nature of business activities of third country nationals and the personal contribution they make to a business need not be applied.

In keeping with the principle that the policies of Member States are restrictive, such investments should be significantly in excess of the level of investment normally required by a Member State of a person wishing to pursue activities as a self employed person in its territory.

Observations

Point 11

B/E : Scrutiny reservation.
