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**NOTE**

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from : General Secretariat of the Council  
to : Strategic Committee on Immigration, Frontiers and Asylum

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No. prev. docs: 11905/96 ASIM 164, 6756/97 ASIM 53 + ADD 1 and 2

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Subject : **Monitoring the implementation of instruments adopted by the Council concerning illegal immigration, re-admission, the unlawful employment of third-country nationals and co-operation in the implementation of expulsion orders**  
- **Summary report of the Member States' replies to the questionnaire launched in 1998**

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On 16 December 1996 the Council adopted a decision on monitoring the implementation of instruments adopted concerning illegal immigration, re-admission, the unlawful employment of third-country nationals and co-operation in the implementation of expulsion orders<sup>1</sup>, in order to "reveal the practical effect of the Council's work in this matter and provide useful lessons for its future work".

In accordance with Article 3 of this decision, a request for an update to the information supplied in 6765/97 ASIM 53 + ADD 1 and 2 was sent by the General Secretariat of the Council to the Member States Council (telex No. 1650 of 8 April 1998). This relates to the following instruments:

- I Council recommendation of 30 November 1994 concerning the adoption of a standard travel document for the expulsion of third-country nationals (OJ No C 274, 19.9.1996, p. 18);
- II Council recommendation of 30 November 1994 concerning a specimen bilateral re-admission agreement between a Member State and a third country (OJ No C 274, 19.9.1996, p. 20);

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<sup>1</sup> OJ No L 342, 31.12.1996, p. 5.

III Council recommendation of 24 July 1995 on the guiding principles to be followed in drawing up protocols on the implementation of re-admission agreements (OJ No C 274, 19.9.1996, p. 25);

IV Council recommendation of 22 December 1995 on harmonising means of combating illegal immigration and illegal employment and improving the relevant means of control (OJ No C 5, 10.1.1996, p. 1);

V Council recommendation of 22 December 1995 on concerted action and co-operation in carrying out expulsion measures (OJ No C 5, 10.1.1996, p. 2);

VI Council conclusions of 4 March 1996 on clauses to be inserted in future mixed agreements (4272/96 ASIM 6 and 5457/96 ASIM 37); and

VII Council recommendation of 27 September 1996 on combating the illegal employment of third-country nationals (OJ No C 304, 14.10.1996, p. 1).

In conformity with Article 3 of the Council decision, the General Secretariat of the Council:

- translated the information notes transmitted by Member States on the basis of the request for information; a compilation of those information notes is contained in 10804/98 ASIM 192 MIGR 12,
- prepared a summary report based on the information notes which is attached in annex to this document<sup>1</sup>.

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<sup>1</sup> It is pointed out that, despite repeated reminders addressed to them, the French and Luxembourg delegations have not yet replied. The General Secretariat has waited a reasonable time before bringing this summary report. Due to this delay, some of the information received may no longer be up-to-date. Wherever possible, minor adjustments have been made to this information (e.g. as regards entry into force of legislation). This revised report contains information submitted by the Irish and Italian delegations.

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**COUNCIL RECOMMENDATION OF 30 NOVEMBER 1994 CONCERNING THE  
ADOPTION OF A STANDARD TRAVEL DOCUMENT FOR THE EXPULSION OF  
THIRD-COUNTRY NATIONALS<sup>1</sup>**

(OJ No C 274, 19.9.1996, p. 18)

**1. Did you adopt in 1997 provisions in any of the areas covered by the instrument (particularly provisions which are not already reflected in 6765/97 ASIM 53 + ADD 1 and 2)? If so, please state what those measures are and give a brief résumé of their objectives and substance.**

1.1 Three Member States (GR, P and FIN) mentioned specific changes in the adoption of the EU standard travel document since the last questionnaire<sup>2</sup>:

Greece: a standard travel document has been prepared but has not been used; it was incorporated into Greek law by Presidential Decree 124/1997, which was published in the Greek Official Gazette (No. A 112 of 3 June 1997);

Portugal: following the incorporation of the EU standard travel document in 1995<sup>3</sup>, the document has been used for the expulsion of third-country nationals since the second half of 1997;

Finland: the Council recommendation was annexed to the directive drafted by the Ministry of the Interior on the implementation of returns and expulsions, which was expected to come into effect by 15 June 1998.

1.2 Two Member States (NL and S) specifically stated that they had not recently adopted any provisions under this instrument.

**2. Did you encounter difficulties in adopting such provisions? If so, please state what type of problems and how you resolved them.**

2.1 No Member State stated that it had encountered any problems in adopting the provisions of the Council recommendation.

**3. Do you envisage adopting measures in the areas in question in the near future? If so, what kind of measure, in which areas and with what proposed timescale?**

3.1 No Member State mentioned any intention to adopt further measures relating to the EU standard travel document in the near future.

<sup>1</sup> Information on the implementation of this Council recommendation has also been taken from the responses to Telex No. 1065 of 9 March 1998, as set out in 7757/98 ASIM 104 + ADD 1, Migration Working Party discussions and the United Kingdom delegation's presentation in that Working Party (see 8433/98 ASIM 126, 11867/98 ASIM 213 MIGR 18, and 12649/98 ASIM 231 MIGR 25).

<sup>2</sup> Portugal referred to provisions enacted since the adoption of the Recommendation, as it had not replied to the first questionnaire (11905/96 ASIM 164).

<sup>3</sup> Approved by Ministerial Decree No. 1086/95 of 5 September 1995.

#### 4. How do you apply in practice the instrument and your provisions?

4.1 Of the Member States that replied, there has been widely differing experiences as to the effectiveness of the EU standard travel document. However most Member States stated that they had used the standard travel document successfully on at least one occasion. Only Germany expressed serious concerns as to the implementation of the document. Furthermore, Italy indicated that it did not use such a standard travel document in any expulsion procedure.

4.2 There has similarly been a wide difference in the usage rates of the EU standard travel document. For example, although no central statistical data is kept in the United Kingdom, in one central London enforcement office the document was used on 670 occasions in 1997<sup>1</sup>. Meanwhile, although the standard travel document has been prepared in Greece, to date it has not proved possible to be used. Similarly, Spain used the standard travel document 138 times in 1997, while Austria used the document on only one occasion in 1997<sup>2</sup>.

1.3 Four Member States (IRL, P, FIN and S) expressly stated that they have not encountered any practical problems in the implementation of the EU standard travel document:

- Ireland: the EU standard travel document is used when appropriate, and returns using the document were successful on all but one occasion, to Morocco, when a Court Order prevented the removal<sup>3</sup>. Otherwise, Ireland has not yet returned persons to those countries which, as reported by other Member States, do not always accept the travel document;

- Portugal: since the second half of 1997 the standard travel document has been used in 31 cases, in general without any problems of re-admission. The EU standard travel document is used only when foreign nationals without valid travel documents cannot obtain new documents from their authorities either because their country has no diplomatic or consular representation in Portugal, or their country's embassy or consulate refuses to issue a travel document. The document is issued on the basis of the individual's nationality documents, the originals or copies of which are attached to the standard travel document;

- Finland: although no statistical data is kept, the EU standard travel document was used around 15 times in 1997 with no refusals. This success has been aided by careful preparatory work and the use of escorts, as well as the ability to give reasons for the return and to explain on what basis identity has been established;

- Sweden: the document was used in 42 cases between January 1997 and March 1998. It was unsuccessful in just one case relating to the Federal Republic of Yugoslavia. Therefore, Sweden's experience in the use of the standard travel document has so far been positive. Furthermore, the National Police Board has arranged for the production of a Swedish version of the EU standard

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<sup>1</sup> United Kingdom: this rate of usage does not appear to be exceptional in the United Kingdom, and this was reflected in offices in other parts of the country.

<sup>2</sup> Austria: at the Austrian authorities' request, the Jordanian embassy provided confirmation of Jordanian nationality but declined to provide a repatriation certificate on the grounds that the individual concerned must in any case have been in possession of a passport since he was a genuine Jordanian national. The confirmation provided by the embassy was submitted to the Jordanian border officials together with the standard travel document.

<sup>3</sup> Ireland: the EU standard travel document was used successfully 10 times during 1998, and once unsuccessfully.

travel document, and has subsequently notified all police authorities that such a document exists and in the cases in which it is intended to be used.

4.4 Although in general the acceptance rate of the standard travel document was high, several Member States have faced practical problems of third countries not accepting the standard travel document. Three Member States (E<sup>1</sup>, NL<sup>2</sup> and UK) stated that while the document had been accepted by some third countries, it had not been accepted in others. Certain third countries, such as Bangladesh, China, India, Morocco and Nigeria, appear to accept the standard travel document in relatively few cases. In such cases the reasons given for refusal mainly relate to a lack of identification or to doubts about the individual's nationality or identification.

4.5 Belgium stated that the EU standard travel document had been used successfully in both voluntary and forced repatriations. The United Kingdom stated that the greatest problem in obtaining acceptance by the authorities of the third country appears to be in cases of forced repatriations. Voluntary repatriations do not give rise to such problems, irrespective of the quality of the supporting documentation.

4.6 In Denmark the EU standard travel document was used on 32 occasions in 1997. These were cases where the alien had no travel document, when there was no possibility of obtaining a travel document from the authorities of the third country or where the authorities of the third country allow their nationals to enter the country on the basis of some other documentary evidence of their identity. The standard travel document is also issued on more slender evidence of identity for journeys made under escort, with the agreement of the authorities in the country of destination.

4.7 The United Kingdom has had by far the greatest experience of using the EU standard travel document. It is the general practice to issue the standard travel document when removing undocumented third-country nationals, and in the enforcement context the document is used in about half of all removals.

The EU standard travel document is used in the United Kingdom only where there is no other travel document available and removal is imminent. An essential requirement is that the nationality of the person must not be in doubt, and this has helped to build confidence amongst receiving States. Therefore, the use of supporting documentation, such as national identification cards or drivers licences, is important. To this end, a documentation unit is being established in the Immigration Service Headquarters to address some of the difficulties experienced in the use of the document.

In the opinion of the United Kingdom, the proper preparation of the document is a key factor in its acceptance. As much information as possible must be set out in the document, such as full names, date of birth, place of birth, the individual's address or home region, as well as family details like the father's name and address. The presentation of the document is also a major contributing factor, for example the use of high quality paper and recent photographs.

In cases where the document is not accepted by a third country, a direct approach is made to the relevant embassy for an emergency travel document.

4.8 In general it appears that the use of escorts may influence the acceptance of the EU standard travel document. Two Member States (FIN and UK) said that normally the use of escorts facilitates the acceptance of the standard travel document, although the United Kingdom pointed out that

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<sup>1</sup> Spain: the EU standard travel document was used successfully 138 times in 1997.

<sup>2</sup> Netherlands: in 1997 the EU standard travel document was used in 10 cases.

Nigeria seems to take a negative view of escorts and this has led to the refusal of the standard travel document in many cases.

Two Member States (E and NL) stated that in their experience the use of escorts had no influence in the acceptance or refusal of the standard travel document, while in Sweden an escort is provided only when it is regarded as necessary for the expulsion to be carried out.

4.9 Only Germany has had a consistently negative experience with the standard travel document. Use of the standard travel document has been attempted to effect removals to Bangladesh, Burkina Faso, Egypt, Eritrea, Ethiopia, Ghana, Guinea, India, Pakistan, Sierra Leone, South Africa, Sudan, and Togo. However the arrangements failed to work successfully with any of these states. Therefore, Germany does not use the EU standard travel document at present.



## II

### COUNCIL RECOMMENDATION OF 30 NOVEMBER 1994 CONCERNING A SPECIMEN BILATERAL RE-ADMISSION AGREEMENT BETWEEN A MEMBER STATE AND A THIRD COUNTRY<sup>1</sup>

(OJ No C 274, 19.9.1996, p. 20)

**1. Did you adopt in 1997 provisions in any of the areas covered by the instrument (particularly provisions which are not already reflected in 6765/97 ASIM 53 + ADD 1 and 2)? If so, please state what those measures are and give a brief résumé of their objectives and substance.**

1.1 The vast majority of Member States (B, DK, D, GR, E, I, NL, A, P, FIN and S) stated that they have used the EU specimen bilateral re-admission agreement, either in whole or in part, or used it as a guide for the conclusion of agreements with third countries.

1.2 Ireland and the United Kingdom have not used the EU specimen bilateral re-admission agreement as they have not signed any re-admission agreements.

**2. Did you encounter difficulties in adopting such provisions? If so, please state what type of problems and how you resolved them.**

2.1 No Member State mentioned any particular problems it had encountered in the negotiation or implementation of the specimen bilateral re-admission agreement.

**3. Do you envisage adopting measures in the area in question in the near future? If so, what kind of measure, in which areas and with what proposed timescale?**

3.1 Ireland stated that it has received proposals for re-admission agreements from Romania and Bulgaria and these are currently under consideration, having due regard to the recommendation.

3.2 As the United Kingdom has not signed any re-admission agreements, a Working Party has been set up to look into the question of whether it would now be advisable for the UK to conclude re-admission agreements with third countries. The United Kingdom acknowledges that re-admission agreements may have a significant role to play in affecting removals to those countries who do not currently accept the EU standard travel document.

3.3 No other Member State mentioned any intention to adopt further measures on the specimen bilateral re-admission agreement in the near future.

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<sup>1</sup> Information on the implementation of this Council recommendation has also been taken from the responses to Telex No. 1066 of 9 March 1998, as set out in 7756/98 ASIM 103 + ADD 1. In this connection, see also 7424/98 ASIM 91.

#### 4. How do you apply in practice the instrument and your provisions?

4.1 Member States mostly use the EU specimen bilateral agreement only as a basis for bilateral re-admission agreements, and adapt its text depending on the specific third country concerned.

4.2 Belgium stated that the EU specimen was used as a working basis for the agreement with Bulgaria. However, during negotiations a number of amendments were made to the specimen agreement, so it was not reproduced in the strict sense of the word. The Benelux specimen bilateral re-admission agreement is also based largely on the provisions and guiding principles of the EU specimen agreement<sup>1</sup>.

4.3 Germany stated that the EU specimen and guiding principles have formed the basis for all the re-admission agreements concluded by Germany, for example the re-admission protocol signed with Morocco in April 1998.

4.4 Greece stated that it was already applying at national level, without any particular problems, the measures relating to the use of the EU specimen bilateral re-admission agreements when such agreements are concluded with other States. For example, use was made of the EU specimen in the signing of re-admission agreements with Bulgaria and Croatia.

4.5 Spain said that its re-admission agreements generally corresponded to the EU specimen, although those agreements did not cover the re-admission of third-country nationals, so related only to nationals of States which were parties to the agreement. Transit for the expulsion of third-country nationals is included.

4.6 While Denmark has used the EU specimen either in whole or in part, Portugal has included the EU specimen completely in recent re-admission agreements; for example the re-admission agreement concluded with Bulgaria in October 1997<sup>2</sup> includes the EU specimen.

4.7 In the Netherlands use is made of the Benelux specimen bilateral re-admission agreement, which is largely based on the provisions and guiding principles of the EU specimen. Depending on the situation, the Benelux specimen is supplemented by features from the EU specimen.

4.8 In Austria the re-admission agreement and the relevant implementation protocols signed with Bulgaria and Croatia in 1998 are based on the EU specimen<sup>3</sup>.

4.9 In Finland bilateral re-admission agreements are drawn up in accordance with the principles set out in the Council recommendation; as a matter of basic principle, the recommendation is taken into account in the implementation of re-admission agreements, for example the re-admission agreements with Bulgaria<sup>4</sup>, Estonia, Latvia, and Lithuania.

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<sup>1</sup> Belgium: stated that the Benelux specimen re-admission agreement had been proposed during the negotiations with Armenia and the three Baltic States. At the time of reply, all of these agreements had been initialled.

<sup>2</sup> Portugal: adopted by Decree No. 6/98 of 18 February 1998.

<sup>3</sup> Austria: a re-admission agreement with the Federal Republic of Yugoslavia has been initialled but no date has been set for its signature. Talks have begun with Lithuania on the conclusion of a re-admission agreement, and with Switzerland on the conclusion of a new re-admission agreement.

<sup>4</sup> Finland: the re-admission agreement concluded with Bulgaria was expected to enter into force in autumn 1998.



4.10 In Sweden the EU specimen has served as a guide for the conclusion of agreements with third countries, for example the agreements signed between Sweden and the Baltic States in 1997. However agreements concluded before the Council recommendation, for example with Germany, have not been amended so are not in line with the EU specimen.

### III

## COUNCIL RECOMMENDATION OF 24 JULY 1995 ON THE GUIDING PRINCIPLES TO BE FOLLOWED IN DRAWING UP PROTOCOLS ON THE IMPLEMENTATION OF RE-ADMISSION AGREEMENTS

(OJ No C 274, 19.9.1996, p. 25)

**1. Did you adopt in 1997 provisions in any of the areas covered by the instrument (particularly provisions which are not already reflected in 6765/97 ASIM 53 + ADD 1 and 2)? If so, please state what those measures are and give a brief résumé of their objectives and substance.**

1.1 Eight Member States (B, D, I, NL, A, P, FIN and S) stated that the Council recommendation either formed the basis of re-admission agreements concluded with third countries, or such re-admission agreements are largely based on the Council recommendation.

**2. Did you encounter difficulties in adopting such provisions? If so, please state what type of problems and how you resolved them.**

2.1 No Member State mentioned any difficulties in adopting the provisions of the Council recommendation.

**3. Do you envisage adopting any measures in the areas in question in the near future? If so, what kind of measure, in which areas and with what proposed timescale?**

3.1 Ireland stated that it has received proposals for re-admission agreements from Romania and Bulgaria and these are currently under consideration, having due regard to the recommendation.

3.2 No Member State mentioned any proposals for adopting new measures in relation to the guiding principles in the near future.

**4. How do you apply in practice the instrument and your provisions?**

4.1 Three Member States (A, P and FIN) mentioned specific measures relating to the Council recommendation:

Austria: the re-admission agreement between Austria and Bulgaria of 26.6.98 and the relevant implementation protocols were based on the principles set out in the Council recommendation;

Portugal: the re-admission agreement between Portugal and Bulgaria of 20.10.97 includes some of the principles set out in the Council recommendation;

Finland: for the re-admission agreements drawn up with Bulgaria, Estonia, Latvia and Lithuania, guidelines regarding the allocation of powers between the Finnish authorities have been drawn up in accordance with the principles of the Council recommendation. The recommendation has also been taken into account of in the directive on return and expulsion prepared by the Ministry of the Interior, which was to come into force not later than 15.6.98.



4.2 Three other Member States (B, D, and S) stated that the guiding principles can be used as a basis for re-admission agreements drawn up with third countries.

4.3 The Netherlands mentioned that in drawing up re-admission agreements it is above all the guiding principles for drawing up implementing protocols which are used, as they contain many useful provisions which have been used in practice to provide guidance for negotiations.

## IV

### COUNCIL RECOMMENDATION OF 22 DECEMBER 1995 ON HARMONISING MEANS OF COMBATING ILLEGAL IMMIGRATION AND ILLEGAL EMPLOYMENT AND IMPROVING THE RELEVANT MEANS OF CONTROL

(OJ No C 5, 10.1.1996, p. 1)

1. Did you adopt in 1997 provisions in any of the areas covered by the instrument (particularly provisions which are not already reflected in 6765/97 ASIM 53 + ADD 1 and 2)? If so, please state what those measures are and give a brief résumé of their objectives and substance.

1.1 Four Member States (E, IRL, NL<sup>1</sup>, and UK) expressly stated or implied that they had not recently adopted any provisions relating to the Council recommendation on harmonising means of combating illegal immigration and improving the relevant means of control.

1.2 Two Member States (B and GR) did not specifically mention this instrument.

1.3 Seven Member States (DK, D, I, A, P, FIN<sup>2</sup> and S) have adopted measures, or updated old measures, under various sections of the Council recommendation. These new or updated measures are set out below:

#### Point 2 of the recommendation states that:

*Where an identity check is carried out on a foreigner in accordance with national law, at least where a person appears to be residing in the country unlawfully, his residence situation should be verified. This may apply in particular in the following cases:*

- *identity checks in connection with the investigation or prosecution of offences,*
- *identity checks to ward off threats to public order or security,*
- *identity checks in order to combat illegal entry or residence in certain areas (e.g. frontier areas and ports, airports and railway stations handling international traffic), without prejudice to border controls.*

1.4 Two Member States (I and A) have introduced measures under this Point.

1.5 Italy indicated that since 21 October 1997, following Italy's implementation of the Schengen Convention, all posts at border crossing points have been linked up to the Schengen Information System (SIS). This has enabled routine checks to be carried out on a computerised basis in compliance with the Convention. The SIS is also used by the police forces within the country.

<sup>1</sup> Netherlands: in 6765/97 ASIM 53, p. 45, it was stated that legislation was being prepared to make only those persons legally resident in the Netherlands eligible for social benefits. The legislation has been approved by the Parliament and was expected to enter into force on 1 July 1998.

<sup>2</sup> Finland: the recommendation has been annexed to the directive issued by the Ministry of the Interior on 9 May 1997 concerning residence permits and work permits (5/011/97). Under the directive, the recommendation will be taken as a guide in the overall consideration of the granting of residence and work permits.



1.6 Austria has introduced new measures under this point. The new 1997 Aliens Law (1997 AL) entered into force on 1 January 1998. As such, identity checks within the meaning of Point 2 of the Council recommendation have been increased. Therefore, Austria's Aliens Law now affords sufficient scope for countering illegal immigration and residence by the means of such checks.

**Point 3 of the recommendation states that:**

*Third country nationals should be in a position, according to national law, to present to the competent authorities confirmation, for example by way of papers or documents by virtue of which they are so authorised, of their authority to reside within the territory of the Member State where they are.*

1.7 Three Member States (I, A and P) referred to measures under this Point.

1.8 In Italy, under Article 144 of the Consolidated Law (*testo unico*) on the Police, the police are entitled at all times to ask third-country nationals to produce their identity papers. Under Article 4(1) of Law No 39 of 28 February 1990, a third-country national who applies to the public authorities for a licence or to be registered with a professional association must produce a valid residence permit when submitting the application.

1.9 In Austria, under Section 32(1) of 1997 AL<sup>1</sup> foreign nationals are obliged, if so requested by the authorities or their officials acting pursuant to a federal law, to produce documents attesting to their right of residence and, if necessary, to accompany an official to the place where those papers are kept. They are also obliged, in duly substantiated cases, to provide the authorities and officials of the law enforcement agencies, at their request, with information on the purpose and intended duration of their stay in Austria, as well as to prove that they have the means to support themselves during their stay. Under Section 32(2), foreign nationals are required to carry their travel papers with them or to keep them close enough to their current place of residence to enable them to be retrieved, as required in Section 32(1), without undue delay.

A foreign national who does not carry his travel papers with him or keep them in accordance with Section 32(2) will be liable to an administrative penalty, Section 108(1) subparagraph 2. A foreign national who fails to produce documents attesting to his right of residence despite being called upon to do so by a law enforcement agency officer, or who fails to accompany that official to the place where they are kept, will be liable to an administrative penalty, Section 108(1) subparagraph 3.

A foreign national who fails to accompany a law enforcement agency officer to the place where the relevant papers are kept can be arrested under Section 110(3) to ensure that he appears before the authority, if his appearance is essential for the conduct of proceedings, unless there are specific reasons to suppose that he intends to leave Austria immediately.

1.10 In Portugal, Law No. 5/95 of 21 February introduces the obligation for citizens over the age of 16 to carry an identity document whenever they are in public places, places open to the public or places subject to police surveillance. The identity documents which must be carried by nationals of third countries are their residence permit, alien's identity card, and passport.

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<sup>1</sup> Austria: all following references are to the new 1997 Aliens Law.

The Law also provides that members of the security services may require the identification of any person who is in or moving within a public place, a place open to the public or a place subject to police surveillance, whenever there is reason to suspect that he has committed murder, manslaughter or physical attacks, crimes against peace, humanity, democracy, the values and interests of life in society and the State or has entered or stayed on national territory illegally or is in the process of being extradited or deported.

**Point 4 of the recommendation states, *inter alia*, that:**

*Where national law regards the residence or employment situation as a prerequisite for foreign nationals to qualify for benefits provided by a public service of a Member State in particular in the area of health, retirement, family or work, that condition cannot be met until it has been verified that the residence or employment situation of the person concerned and his or her family does not disqualify them from the benefit. Verification of residence or employment status is not required when intervention by a public authority is necessary on overriding humanitarian grounds.*

*The attention of the authorities responsible for issuing residence permits should also be drawn to the risk of marriages of convenience.*

1.11 Four Member States (DK<sup>1</sup>, D, I and A) have introduced specific measures to counter marriages of convenience.

1.12 In Denmark, there are three main proposals for changes in the law of marriage. The first relates to the right to marry. It is proposed in L 59 that a new provision should be inserted in Section 11a(1) of the Marriage Act so that aliens will not have the right to marry in Denmark if they are not lawfully resident in Denmark. The aim is to prevent the asylum rules being circumvented through marriages of convenience between an asylum applicant and a person lawfully resident in Denmark.

Under the proposed Section 11a(2), the *statsamt* (local administrative authority), responsible for administering the marriage legislation will, if there are particular reasons such as the length of the alien's stay in Denmark, be able to grant a permit despite the fact that the alien is not lawfully resident in the country. (According to the Government's comments on the bill, a condition for issuing the permit is that there should be a demonstrable connection between the asylum applicant and the person living in Denmark. Under the bill, these provisions were expected to enter into force on 1 January 1999).

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<sup>1</sup> Denmark: The information given relating to Denmark concerns a bill amending the Aliens Act, Penal Code and the Marriage Act, L 59, submitted by the Ministry of the Interior on 16 April 1998. The Danish Government's aim was to have the bill adopted during the previous session of the Parliament, i.e. before the end of June 1998. It is the intention that the amendments to the Aliens Act should enter into force on the day after publication in the Danish Gazette, although some provisions will enter into force only at a later date. It should be noted that due to a lack of a secure political majority in favour of the bill, it is possible that it may not be adopted during the current session of the Parliament or that some of the provisions will have been amended or deleted when the bill is examined by the Parliament.

The second proposed measure to counter marriages of convenience is that a provision will be introduced in Section 9(8) of the Aliens Act whereby residence permits may not be issued on the basis of marriage or cohabitation, if there are specific reasons for assuming that the chief aim of the marriage or cohabitation is to obtain a residence permit. According to the Government's comment on the bill, there will have to be a definite basis for any assumption by the aliens authorities that a marriage of convenience is involved.

The final proposal is that a new provision should be inserted into Section 9(9) of the Aliens Act, to the effect that a residence permit may not be issued on the basis of marriage, if one of the spouses is less than 25 years old, or where the marriage is the result of an agreement between persons other than the spouses. It should be noted that a residence permit in particular cases, e.g. involving under-age children, may be issued pursuant to the general rule in Section 9(2)(iv) of the Aliens Act.

1.13 In Germany, with the entry into force on 1 July 1998 of the Law amending the Law on the Contract of Marriage measures have been taken to counter the contracting and existence of marriages of convenience. Registrars are expressly entitled and duty-bound to refuse to take part in contracting marriages which are clearly not seriously intended and, in particular, which are clearly in breach of the law. Such refusals are expedient when persons concerned wish formally to contract a marriage but not to live together as man and wife. This is particularly significant in cases where the marriage partners do not speak a common language, are not closely acquainted or where the combination of a striking age difference and other accompanying circumstances might lead to the supposition that the marriage constitutes abuse of the law.

If in specific instances there is tangible evidence of this, the registrar may question the prospective spouses on the matter to the extent necessary, either separately or jointly, and require them to submit suitable evidence. If necessary, the registrar may also require a sworn disposition to be made in relation to significant facts concerning the existence or absence of grounds for annulment.

If the spouses jointly agreed to contract their marriage on a purely formal basis, then the marriage may be annulled at the request of one of the spouses or of the competent administrative authority. An exception to this rule applies where the spouses - regardless of their initial lack of intent - have gone on to live together as man and wife and thus overcome their original lack of intent.

1.14 In Italy, in order to qualify for health, welfare or other benefits provided by a public service, a third-country national must be in possession of a valid residence permit, except where humanitarian grounds apply. With regard to measures taken against bogus marriages, Italy referred to the Migration Working Party (Admission), which is responsible for this area.

1.15 In Austria, marriages of convenience have been made into an offence constituting grounds for the issue of a residence ban. Under Section 36(2) subparagraph 9 of the 1997 AL, a residence ban may be issued against any foreign national who has contracted a marriage and claimed a residence permit or an exemption certificate on the basis of that marriage, but has never lived with their spouse (i.e. led a family life within the meaning of Article 8 of the ECHR) and who paid to contract the marriage.

Under Section 106(1) subparagraph 1, the courts may impose up to one year's imprisonment or a daily fine for up to 360 days on anyone who arranges or otherwise helps to bring about marriages between foreign nationals or between Austrian citizens and foreign nationals for profit, although he is aware, or should have been aware, that the persons concerned intend to claim a residence permit on the basis of the marriage, but not to live together (i.e. to lead a family life within the meaning of

Article 8 of the ECHR).

**Point 5 of the recommendation states that:**

*Employers wishing to recruit foreign nationals should be encouraged to verify that their residence or employment situations are in order by requiring them to present the document(s) by virtue of which they are authorised to reside and work in the Member State concerned. Member States could stipulate that employers may, if necessary, under the conditions laid down by national law relating, in particular, to data protection, check with the authorities responsible in particular for issuing residence and work permits; the said authorities may communicate the relevant information under procedures which guarantee confidentiality in the transmission of individual data.*

1.16 Two Member States (I and S) specifically mentioned this Point.

1.17 In Italy, the local police authority and the Ministry of Labour and Social Security will conduct a prior check as to whether the residence and employment situations of a third-country national being recruited to work in Italy are in order.

Employers recruiting third-country nationals must submit all work permit applications to the provincial Employment Office (technically, applications for a *nulla osta* or green light to work); once the authorisation has been obtained, the employer has to regularise the foreign national's position with the local police authorities.

1.18 In Sweden, it is for the employer to ensure that foreign nationals have the necessary permits, which can be done by checking the person's passport. Local authorities such as tax authorities, the employment agency, the social welfare board and the local education authority have a duty to inform the police when an alien first comes in contact with them if the alien does not possess, or has not applied for, a residence permit - unless the alien is exempt from the requirement to have a residence permit.

**Point 6 of the recommendation states that:**

*Any person who is considered, under the national law of the Member State concerned, to be employing a foreign national who does not have authorization should be made subject to appropriate penalties.*

1.19 Only Italy referred to this Point. Italy's Law No 39/90 laid down criminal and administrative penalties in respect of persons employing unauthorised foreign nationals for purposes of exploitation.

**Point 7 of the recommendation states that:**

*The authorities competent to authorise residence should be empowered to take measures to check that persons who have been refused authorisation to reside within the territory of the Member State have left that territory of their own accord.*

1.20 Only Austria has introduced measures under this Point. In Austria it is possible to check that a foreign national has actually left the country by means of an "exit control". A foreign national denied the right of residence is given a form (name, date of birth and travel document number etc.) which is surrendered to a border official on leaving the country. The form is then returned to the authority which ordered the expulsion.

If the foreign national fails to leave the country as required, a detention order may be issued against them under Section 62(2) of the 1997 Aliens Law. If there is a strong risk that the person may abscond, Section 61(1) applies. This enables foreign nationals to be arrested and detained (detention pending expulsion), if necessary for the purposes of a procedure for the issue of a residence ban or expulsion order pending enforcement or for the purposes of expulsion, return or transit - the aim being to ensure that the measures can actually be carried out.

Foreign nationals subject to an enforceable residence ban or an expulsion order may be deported pursuant to Section 56(1) if it appears necessary to supervise their departure in the interest of public order or safety, if they have failed to leave the country within the time specified, if there are reasons to suppose that they will not comply with the requirement to leave, or if they have returned to Austria in breach of a residence ban.

**Point 8 of the recommendation states that:**

*Each Member State should consider setting up a central file of foreign nationals containing information on the administrative situation of foreign nationals with regard to residence, including any refusal of authorisation to reside and any expulsion measures. Any file thus set up will operate in compliance with the standards laid down in Council of Europe Convention 108 of 28 January 1981 for the protection of Individuals with regard to Automatic Processing of Personal Data.*

1.21 Two Member States (I and A) referred to measures under this Point.

1.22 Finland has introduced measures under this Point, where the law on the Aliens Register came into force on 1 January 1998<sup>1</sup>. The requirements of the Council recommendation were taken into account in the drafting of the law. The law contains provisions on the purpose, content and information sources of the Aliens Register and on the transfer of recorded data to sub-registers.

Where necessary, the Aliens Register may record identification data on foreign nationals and information appearing in an application concerning the permit requested or the case, the purpose of entry and residence and its duration. The Aliens Register may also, as necessary, record data on the handling of the case, reports concerning it, statements, the decision on the case and the reasons for the decision.

1.23 Italy operates a centralised data file (*Centro Elettronico Documentale* or CED), which also stores data on the administrative position of third-country nationals.

**Point 9 of the recommendation states that:**

*Member States should satisfy themselves that residence documents issued to foreign nationals are adequately secured against forgery and fraudulent use - particularly by colour photocopying - and should, if necessary, amend them accordingly.*

1.24 Three Member States (DK, D and A) have recently implemented measures to protect residence permits from forgery or fraudulent use, as set out in this Point.

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<sup>1</sup> Finland: as stated in answer to Question 15 in 6765/97 ASIM 53, p. 70.

1.25 In Denmark the Immigration Service is still in the process of preparing new machine-written laser-printed residence permits<sup>1</sup>. (The new residence permit was expected to come into use during the autumn of 1998).

1.26 In Germany due to the fact that residence permits are issued by a large number of authorities, it is felt that it is especially important that the blank forms should be kept secure. Work is currently under way so that if blank labels or forms disappear, they are registered as soon as possible and in as much detail as possible in both national and Schengen-wide search files. Efforts are also being made to alert the authorities to the incidence of fraudulent use of legitimately issued documents.

In the past it was also able to fraudulently obtain a resident permit during visits by forging a declaration that the person allegedly inviting the alien was ready to pay all the costs of residence and possible repatriation. A forgery-proof form for this declaration has now been introduced throughout Germany. In this way, together with a tightening up of the corresponding rules of procedure, the opportunities for fraud in this area have been considerable reduced.

1.27 In Austria, since 1 January 1998 residence permits have been issued in sticker form in accordance with the Joint Action of 16 December 1996 adopted by the Council of the European Union concerning a uniform format for residence permits<sup>2</sup>, so the technical specifications provide adequate protection against forgery.

**Point 10 of the recommendation states, *inter alia*, that:**

*Member States should take the measures necessary to reinforce and improve means of identifying foreign nationals who are not in a lawful position and who have no travel documents or other documents by which they can be identified.*

1.28 Two Member States (I and A) referred to measures under this Point.

1.29 In Italy, the police may require a foreign national who refuses or is unable to prove his identity to undergo photographic fingerprinting. On the same grounds the police may also detain a foreign national for up to 24 hours under Article 11 (detention for purposes of identification) of Decree Law No 59 of 21 March 1978 (converted by Law No 191 of 18 May 1978).

1.30 Austria has introduced measures under this Point. Now, all foreign nationals are fingerprinted and photographed in connection with any asylum application, residence ban or criminal conviction. The office for criminal records and forensic research keeps computerised records of all fingerprints of asylum seekers, pre-expulsion detainees and convicted or suspected criminals in the Automatic Fingerprint Information System. This offers a possibility of identifying undocumented foreign nationals.

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<sup>1</sup> As stated in 6765/97 ASIM 53, p. 72.

<sup>2</sup> OJ No L 7, 10.1.1997, p. 1.

Section 69 of the 1997 AL also offers one way of solving the identification problem: first of all it lays down the principle that pre-expulsion detention should be as brief as possible. Detention may continue only until such time as the reasons for ordering it no longer remain or as its purpose can no longer be achieved. Apart from certain exceptions, it may not exceed two months in duration. However, if the only reason why a foreign national cannot be expelled is because it is impossible to establish his identity and nationality, or because he does not have the necessary authorisation to enter or transit through another State (usually a travel document), detention may continue for up to four weeks after identity and nationality have been established, or after the authorisation has been obtained, but not longer than six months. In principle, a foreign national may not be detained pending expulsion for more than six months in any two year period in connection with the same set of circumstances. However, this does not apply to a maximum period of 14 days, for carrying out deportation, after authorisation (travel document) has been obtained.

Given the possibility of a long period in detention, the foreign national is usually more willing to reveal his identity. In addition the extended detention period means that there is a greater chance that the third country, although "reluctant", may still issue a travel document or repatriation certificate before the legal limit on pre-expulsion detention runs out.

**2. Did you encounter difficulties in adopting such provisions? If so, please state what type of problems and how you solved them.**

2.1 Two Member States (FIN and S) specifically stated that they had not encountered any difficulties in adopting provisions under this Council recommendation.

2.2 Germany stated that it was tackling the problem of blank residence permits disappearing, so the aliens authorities in Germany have recently begun to focus their attention on ways of combating the fraudulent use of documents. However, the fraudulent use of legitimately issued residence permits causes problems as it is often difficult to prove fraudulent use. This is partly due to the large number of differing residence permits in the Member States. The supply of information and technical back-up, the provision of training courses and increased co-operation between the police, border police and aliens authorities all form an integral part of measures in this area.

**3. Do you envisage adopting measures in the areas in question in the near future? If so, what kind of measure, in which areas and what proposed timescale?**

3.1 Three Member States (NL, FIN and S) expressly stated that they did not intend to adopt any measures under the Council recommendation in the near future.

3.2 Five Member States (B, GR, E, P and UK) either did not mention this recommendation, or implied that they did not intend to adopt any measures in this area in the near future.

3.3 Germany and Italy provided information on measures that they envisage adopting in the near future, in addition to the information given above in Question 2. Germany stated that it intended to improve significantly the security standards for passport replacement documents, such as refugee travel documents, in an effort to combat forgeries and counterfeits in this area. Italy stated, in connection with Point 9 of the Recommendation, that a new format residence permit is being designed, which will offer optimum security against attempts at forgery (watermarked paper, arms of the Ministry of the Interior, invisible multicolour printing detectable under Wood lamp, plastic



protection of the photo, etc.).

3.4 Ireland stated that a bill is intended to be published before the end of 1999 which will make the trafficking of illegal entrants a criminal offence.

#### **4. How do you apply in practice the instrument and your provisions?**

4.1 Germany set out the procedure to be followed in relation to Point 7 of the Council recommendation - regarding the authorities' competence to authorise residence and powers to check that persons who have been refused authorisation have left the territory.

Repatriations both directly to the country of origin or transiting *via* a third country, are monitored by the German border authorities. However, this is not possible when departure takes place *via* a Schengen State, as border controls no longer exist. In addition, signatories to the Dublin Convention<sup>1</sup> are obliged to prove that rejected asylum seekers have actually left the territory covered by the Convention. Yet when transit *via* a Member State's territory is involved, proof that a person has left the country can be provided only by that State's border authorities. In the case of transit operations involving flights over another Member State's territory, the border authorities of the other Member State monitor departures from the territory covered by the Convention. This procedure also applies in cases of voluntary departure by air.

As regards cases of voluntary departure by land transiting *via* a Member State, efforts should be made to reach an agreement between Member States on devising some form of documentary proof of departure, a duplicate of which could be detached by border authorities at the external frontier and forwarded to the issuing authority as proof of departure.

4.2 For more information also see some of the answers given above in Question 2.

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<sup>1</sup> OJ No C 254, 19.8.1997, p. 1.

**COUNCIL RECOMMENDATION OF 22 DECEMBER 1995 ON CONCERTED ACTION  
AND CO-OPERATION IN CARRYING OUT EXPULSION MEASURES**

(OJ No C 5, 10.1.1996, p. 2)

**A Principles with a view to co-operation in carrying out transit for expulsion purposes -  
Point 5(a) to (g) of the recommendation**

**1. Did you adopt in 1997 provisions in any of the areas covered by the instrument (particularly provisions which are not already reflected in 6765/97 ASIM 53 + ADD 1 and 2)? If so, please state what those measures are and give a brief résumé of their objectives and substance.**

1.1 All of the Member States that replied (except Ireland<sup>1</sup>) stated that they had had experience of co-operation in carrying out expulsion measures.

1.2 Eleven Member States (B, DK, GR<sup>2</sup>, E, IRL<sup>3</sup>, I, NL, A<sup>4</sup>, P, S and UK) have not recently adopted any provisions under this instrument, or did not specifically mention any new measures.

1.3 Two Member States (D and FIN) have recently implemented some, or all, of the provisions set out in the Council recommendation:

Germany: in transit operations by air over a Member State's territory, Germany has concluded expulsion and re-admission agreements with Austria, the Benelux countries, and France - while arrangements at working level exist with Italy, Portugal, Spain, and the United Kingdom. A corresponding agreement is currently being negotiated with Denmark. Furthermore, the measures under Point 2 of the Council recommendation have already been implemented by the Border Guard Directorate - as an established means of identifying aliens due for expulsion, identity parades have frequently been held away from consular premises;

Finland: has annexed the recommendation to the directive drafted by the Ministry of the Interior on the implementation of returns and expulsions, (which was expected to come into effect not later than 15 June 1998).

<sup>1</sup> Ireland has had little experience in the area of expulsion. The number of returns in 1998 (64) does however represent a significant increase over 1997 (6 returns) and reflects the increase in the number of persons who have entered the country illegally during the period 1997 to date.

<sup>2</sup> Greece does not have any land borders with other EU States, so that cases in which third-country nationals are expelled *via* another Member State occur only when airlines make a stopover in another Member State, with the result that the alien goes through the transit area at the airport in that Member State.

<sup>3</sup> Ireland has not adopted any formal measures to give effect to the provisions of this instrument, but informal transit arrangements are in place with other Member States as necessary.

<sup>4</sup> Austria has stated that in their opinion this recommendation has had no practical effect and is meaningless unless it is given the force of law, see par. 2.3.

**2. Did you encounter difficulties in adopting such provisions? If so, please state what type of problems and how you resolved them**

2.1 Eight Member States (DK, D, GR, E, NL, FIN, S and UK) stated that they had not experienced any major difficulties in the practical implementation of these provisions. However several minor problems were highlighted by these Member States.

Denmark stated that the National Police Force, which is responsible for the practical aspects of expulsion of aliens illegally resident in Denmark, has indicated that certain cases of expulsion involving transit through another Member State have had to be abandoned as the Member State in question has refused to issue a transit visa.

Two Member States (NL and UK) noted that there were practical problems in a lack of prior notification for the transit Member State and that there was a need for more agreement on the provision of escorts<sup>1</sup>. The United Kingdom also stated that it had experienced individuals claiming asylum while in transit in its territory.

According to the implementing authorities in Finland, some airports have experienced problems especially when a stop-over has necessitated a change of airport. Furthermore, some States have required accompanying deportees to have a transit visa.

Germany stated that to the best of its knowledge, the possibility mentioned in Point 5(g) of a financial settlement between Member States has never been applied and seems to be impracticable.

2.2 In Ireland at present, as a result of a recent decision in the Supreme Court which found that the existing deportation provisions were unconstitutional, removals of third-country nationals have ceased.

2.3 Austria was the only Member State to express serious reservations relating to the implementation of this Council recommendation. In Austria's view, the recommendation is meaningless unless it is given the force of law. Under Article 9.2 of the Austrian Constitution specific sovereign rights of the State can be transferred by law or by international treaty to intergovernmental institutions and their subsidiary bodies, as approved under Article 50.1 of the Constitution. While the activities of third-country bodies in Austria and those of Austrian bodies outside Austria can be regulated under international law. So the recommendation has had no practical effect as deportees, accompanied by representatives of executive bodies of other Member States, arrive unannounced at Schwechat airport. Austria has therefore concluded bilateral re-admission agreements containing provisions on transit with the Benelux countries and France. Further negotiations are under way with Germany and Italy.

**3. Do you envisage adopting measures in the areas in question in the near future? If so, what kind of measure, in which areas and with what proposed timescale?**

3.1 The vast majority of Member States (DK, D, GR, E, I, NL, A, P, FIN and S) either expressly stated that they did not envisage adopting any new measures in the near future, or did not specifically mention any proposals.

<sup>1</sup> Although the United Kingdom stated that there has been particular success with removals of ex-Zairian nationals from the United Kingdom using Belgium and Germany as transit stops.

3.2 Belgium stated that the competent authorities are proposing the development of a procedure to systemise the exchange of information between authorities of the departure airport and those of the transit airport. Under this procedure, the authorities of the departure airport would notify their counterparts at the transit airport of the arrival of an illegal immigrant, so that the transit airport authorities could ensure that the person in question actually takes the flight to their ultimate destination.

3.3 In Ireland, legislation has been published which will provide for powers, principles and procedures regarding the deportation of non-nationals.

3.4 The United Kingdom stated that in order to bring a co-ordinated approach to the problem of certain third countries not accepting the EU standard travel document, and the delay in producing a third-country national document, it is setting up a documentation liaison centre. There has also been a review of the enforcement work undertaken by “hybrid” ports, i.e. ports which cover on-entry and after-entry immigration work, to improve the coverage of immigration officers to areas where they are most needed. The results of this review will be implemented and should result in the removal of more people.

#### **4. How do you apply in practice the instrument and your provisions?**

4.1 Of the eleven Member States that stated that they had not recently adopted any provisions under this Council recommendation, six Member States (B, DK, GR, E, IRL and UK), plus Finland, furthermore did not specifically mention how the instrument was applied.

4.2 In Germany transit operations are carried out directly between the competent border authorities. They are based on existing expulsion and re-admission agreements or on agreements reached at working level.

Germany further stated that Belgium, France, Germany, Italy, Luxembourg, the Netherlands, Portugal, Spain and the United Kingdom have agreed to use a standard form both to apply for and to authorise/refuse the intended transit. Austria has not yet approved the introduction of the standard form, so German/Austrian transit operations are governed on a treaty basis by a re-admission agreement. Poland, Slovenia and Switzerland have also adopted the procedure, and the Canadian and the US embassies now issue requests for transit authorisation using the standard form. Authorisation for transit operations by air covers:

- exoneration from the transit visa requirement;
- assured connecting flight at the transit airport;
- message if the continuation flight has not been successfully taken;
- informing the authority making the request that the alien has been returned to the airport of departure; and
- granting assistance without charge, provided that no third party charges arise.

Authorisation will not be granted for cases where summary punishment orders or measures imposed in criminal proceedings have not yet been enforced against the alien in the transit State.

4.3 In its enforcement of expulsion measures involving transit in 1997, Italy cooperated mainly

with Germany, Spain and France. Italy also cooperated actively with those Member States which requested transit through Italian national territory.

4.4 The Netherlands endeavours as far as possible to expel aliens directly to their country of origin without the need for transit *via* other Member States. Where expulsion does require transit, this occurs on the basis of bilateral arrangements with other Member States, *inter alia* on the necessary escorting of the alien on leaving the Netherlands.

4.5 In Austria's view the Council recommendation has not had any practical effects, so Austria has concluded bilateral re-admission agreements containing provisions on transit with the Benelux countries and France. Further bilateral negotiations are under way with Germany and Italy, however in general all possible assistance is provided by the competent authorities if necessary.

4.6 Portugal's practice followed is in accordance with the principles set out in the Council recommendation, apart from carrying out expulsion measures as a concerted effort with other Member States because it is not considered appropriate to adopt that procedure.

4.6 In Sweden the instrument is applied by the relevant authorities.

**B Principles with a view to concerted action in carrying out expulsions -Point 6(a) to (d) of the recommendation**

**1. Did you adopt in 1997 provisions in any of the areas covered by the instrument (particularly provisions which are not already reflected in 6765/97 ASIM 53 + ADD 1 and 2)? If so, please state what those measures are and give a résumé of their objectives and substance.**

1.1 Only three Member States (B, D and NL) have undertaken joint expulsions of third-country nationals:

Belgium: undertook one experiment in joint expulsion to the ex-Zaire with Germany, France and the Netherlands. However this was before the adoption of the Council recommendation, and only three individuals were sent by Belgium;

Germany: co-operated in several joint expulsions to the ex-Zaire with Belgium, France and the Netherlands during 1995 and 1996<sup>1</sup>;

Netherlands: has regularly co-operated with France and Germany in joint expulsions of rejected aliens from the ex-Zaire.

1.2 All other Member States that replied stated or implied that they had not been involved in any joint expulsion actions with other Member States.

**2. Did you encounter difficulties in adopting such provisions? If so, please state what type of problems and how you resolved them.**

2.1 Germany stated that it had encountered problems with joint expulsion measures. No joint measures involving charter flights have been implemented recently since other Member States either no longer carry out such flights or do not inform the other Member States of the relevant dates. No

<sup>1</sup> However, see paragraph 2.1 below.

notifications have been made since the beginning of 1997.

**3. Do you envisage adopting measures in the areas in question in the near future? If so, what kind of measure, in which areas and with what proposed timescale?**

3.1 No Member State mentioned any intention to adopt measures on joint expulsions in the near future.

**4. How do you apply in practice the instrument and your provisions?**

4.1 Use has been made of chartered aircraft in which aliens to be expelled from several Member States (B, D and NL) have been sent back to their country of origin.

4.2 Germany noted that the rules set out in Point 6(a) to (d) were not applied in practice to expulsions using scheduled flights, but were applied exclusively to charter flights. In particular, the procedure described in Point 6(d) corresponded to understandings which have been reached; which have principally been determined in the IGC Subgroup on Charter Flights.

## VI

### COUNCIL CONCLUSIONS OF 4 MARCH 1996 ON CLAUSES TO BE INSERTED IN FUTURE MIXED AGREEMENTS

(4272/96 ASIM 6 and 5457/96 ASIM 37)

In general, the United Kingdom expressed the opinion that this instrument was not an issue for individual Member States to cover.

**1. Did you adopt in 1997 provisions in any of the areas covered by the instrument (particularly provisions which are not already reflected in 6765/97 ASIM 53 + ADD 1 and 2)? If so, please state what those measures are and give a brief résumé of their objectives and substance.**

1.1 Six Member States (D, E, I, P, FIN and S) expressly stated that they had not adopted any measures under the Council conclusions on re-admission clauses to be inserted in future mixed agreements.

1.2 Ireland stated that it has not included any re-admission clauses in mixed agreements with third countries.

**3. Do you envisage adopting measures in the areas in question in the near future? If so, what kind of measure, in which areas and with what proposed timescale?**

3.1 Two Member States (P and S) stated that they had no intention of adopting any such measures in the near future.

**4. How do you apply in practice the instrument and your provisions?**

4.1 Germany noted that this instrument fell within the European Union's area of competence.



## VII

### COUNCIL RECOMMENDATION OF 27 SEPTEMBER 1996 ON COMBATING THE ILLEGAL EMPLOYMENT OF THIRD-COUNTRY NATIONALS

(OJ No C 304, 14.10.1996, p. 1)

1. **Did you adopt in 1997 provisions in any of the areas covered by the instrument (particularly provisions which are not already reflected in 6765/97 ASIM 53 + ADD 1 and 2)? If so, please state what those measures are and give a brief résumé of their objectives and substance.**

1.1 Seven Member States (D, E, A, P, FIN, S and UK) have introduced new measures under the Council recommendation on the combating of illegal employment of third-country nationals.

1.2 In Germany there has been a complete change in the law relating to the employment of third-country nationals, which came into effect on 1 January 1998<sup>1</sup>. The previous Employment Promotion Law formed the Third Book of the Social Code, and the new provisions have essentially maintained the previous legal situation.

Under Section 284 of the Third Book of the Social Code, aliens who are third-country nationals may take up employment only with the permission of the Employment Office and may not be taken on by employers until they are in possession of such a permit. A person who intentionally or negligently employs a foreigner without the necessary work permit, or third-country nationals who take up employment without a work permit, is infringing the regulations.

The employer is liable to a fine of up to DM 500 000 (previously DM 100 000), and the foreigner without the requisite work permit is liable to a fine of up to DM 10 000 (previously DM 1 000).

1.3 In Spain the measures adopted in this area are set out in a provision which was adopted before the Council recommendation<sup>2</sup>.

This provision laid down that foreign nationals wanting to live and work in Spain should obtain the relevant residence and work permits beforehand. The activities a foreign national may pursue are also laid down in the rules.

Employing third-country nationals without work permits is prohibited. It is an offence under the above mentioned provision and may attract the administrative penalty of expulsion from the national territory.

Again, it is considered an offence to provide encouragement, help or shelter to foreign nationals who have entered Spain illegally or to assist in the breach of any obligation placed upon such

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<sup>1</sup> As enacted by the Employment Promotion Reform Law of 24 March 1997 (Federal Gazette I, p. 594) and most recently amended by Article 3 of the Law reforming the Compulsory Pension Insurance Scheme (1999 Pension Reform Law - RRG (*Rentenreformgesetz*) 1999) of 16 December 1997 (Federal Gazette I, p. 2998).

<sup>2</sup> Royal Decree 155/96 of 2 February 1996 giving consent to the Implementing Regulation for Constitutional Law 7/1985 on the rights and freedoms of foreign nationals in Spain.

persons under the current rules. This is punished by a fine of up to 500 000 pesetas.

When imposing the appropriate penalty, the degree of intention of the offender and their economic circumstances are taken into account, as well as whether or not it is a repeat offence.

As regards criminal penalties, Article 312 of the Penal Code stipulates that anyone trafficking illegally in labour and anyone who employs foreign nationals without work permits shall be given a prison sentence of between six months and three years, and fined six to twelve months' income. Moreover, the criminal penalty applies to employers as well as traffickers.

1.4 In Austria, the 1997 Aliens Law introduced several new measures as set out in the recommendation. Under Austrian legislation on the employment of foreign nationals, an employer may not as a rule recruit a foreign national until they have been issued with a permit to employ that person. In accordance with Section 4(3) of the Law on the employment of foreign nationals, an employment permit may not be issued unless the foreign national has right of residence under the 1997 AL, including the right to engage in paid employment.

Section 28 of the Law on the employment of foreign nationals contains the rules for the penalties for employers who employ a foreign national who does not have authorisation to work. Penalties range from between ATS 10 000 and ATS 240 000 per illegal worker, depending on the circumstances of the case. The inspectors who police the illegal employment of foreign nationals are parties to the proceedings; they endeavour to secure penalties that are commensurate with the economic impact of the offences.

Meanwhile, under Section 108(2) of the 1997 AL any person in authority who refuses to allow law enforcement officials access to business premises or work places, in accordance with Section 71(5)<sup>1</sup>, is guilty of an administrative offence and may be fined up to ATS 50 000.

Under Section 103(2), anyone who employs a foreign national contrary to the provisions of the Law on the employment of foreign nationals, must pay the costs incurred in implementing any expulsion and/or residence ban imposed as a result of the illegal employment, as well as the costs of detention pending expulsion.

1.5 In Portugal, the new Law No. 20/98 of 12 May 1998 now regulates the employment of aliens on the national territory. The general arrangements include:

- the requirement of a written contract of employment signed by both parties (the employer who carries out his activities in Portugal and the foreign citizen), and the contract must be carried out within Portuguese territory (Article 3);
- the contract of employment must contain certain particulars, namely:
  - the identity of the parties and the employer's branch of activity;
  - indication of the worker's authorisation or permit for residence in Portugal;
  - the professional category or the duties to be performed;
  - the date of the conclusion of the contract and its entry into force,
- a document providing proof of compliance with the legal provisions concerning the entry and

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<sup>1</sup> Section 71(5) states that officials of law enforcement agencies are authorised to enter business premises and work places if they suspect the presence of foreign nationals who are not legally resident in the federal territory.

residence of foreign citizens in Portugal should be annexed to the contract of employment drawn up in triplicate,

- deposit of the contract of employment:
  - prior to the date on which the foreign worker starts work, the employer must request that the contract of employment be deposited at the Institute for the Development and Inspection of Working Conditions (IDICT);
  - after the contract has been deposited, a sealed copy is filed by the IDICT and two copies are returned to the employer with the registration and deposit number, the employer being obliged to give one to the worker;
  - when the contract of employment expires, the employer must inform the IDICT in writing within 15 days.

There are also special arrangements which are applicable to certain citizens of third countries, which grant equal treatment to Portuguese citizens with regard to the freedom to engage in an occupation:

- the employer must inform the IDICT in writing of the conclusion of the contract of employment with the above mentioned foreign citizens prior to the commencement of the employment,
- the communication must include the following particulars:
  - nationality, professional category or duties to be performed by the worker;
  - the date on which the contract takes effect,
- the IDICT must also be informed within 15 days of the expiry of the contract.

The Law also lays down the penalties applicable to employers who infringe its provisions, raising the fines set by the previous Law and providing in some cases, in addition to the fine, for the penalty of deprivation (for a period of six months to one year counting from the final conviction) of:

- of the right to take part in auctions or open invitations to tender aimed at awarding contracts for public services and the granting of licences or permits;
- of the right to subsidies or advantages granted by public bodies or public services as well as assistance from Community funds.

Furthermore, the list of employers on which additional penalties were imposed is published in the second series of the *Diário da República* (Portuguese Official Journal) on the last working day of each quarter.

1.6 In Finland the Council recommendation has been annexed to the directive issued by the Ministry of the Interior on 9 May 1997 concerning residence permits and work permits (5/011/97). Under the directive, the recommendation will be taken as a guide in the overall consideration of the granting of permits.

1.7 In Sweden, there is a duty to inform the police authority of the place where a foreign national lives when the alien first comes into contact with a public body, where she/he does not possess, or has not applied for, a residence permit (unless exempt from the requirement to have a residence permit).

1.8 In the United Kingdom the Asylum and Immigration Act 1996 introduced penalties for employers who employ employees subject to immigration control.

**2. Did you encounter difficulties in adopting such provisions? If so, please state what type of problems and how you resolved them.**

2.1 No Member State mentioned any difficulties in adopting provisions under the Council recommendation on combating the illegal employment of third country nationals.

2.2 However the United Kingdom noted that it had not yet initiated any prosecutions under the Asylum and Immigration Act 1996 for the illegal employment of third-country nationals. It is normal practice to issue a warning letter in the first instance and this has been done in several cases.

**3. Do you envisage adopting measures in the areas in question in the near future? If so, what kind of measure, in which areas and with what proposed timescale?**

3.1 Ireland stated that a bill is intended to be published before the end of 1999.

3.2 No other Member State mentioned any proposals for adopting new or further measures in the area covered by the Council recommendation.

**4. How do you apply in practice the instrument and your provisions?**

4.1 In Spain and Sweden the instrument is implemented by the appropriate regional or national authorities<sup>1</sup>. In Austria it is the responsibility of the labour market department to check on whether a foreign national has the right to paid employment or not.

4.2 In Germany the Federal Labour Office (labour exchanges), Customs and Excise, health insurers, pension insurers, the aliens authorities, the Länder authorities responsible for enforcing the Law to Combat Unlawful Employment, accident insurers, financial authorities<sup>2</sup> and the Länder authorities responsible for worker protection, may all send officials to check that foreign workers are not being employed without a valid work permit - even where there are no grounds for suspicion. They may enter the land and premises of any employer during business hours and inspect the personal papers of the persons working in the premises or on the land of the employer or of a third party<sup>3</sup>.

The employment of an alien without the requisite work permit is punishable under Section 404 (2), point 2 of Volume III of the *Socialgesetzbuch* (Labour Code). It can be punished as an irregularity and the individual can be fined. As this threat of punishment is directed against the employer, the latter is required to check that the alien has the requisite work permit before he/she is employed. If there is reason to believe that aliens are being employed without requisite work permits, there is a general duty under Section 79 of the Aliens Law to inform the relevant authorities.

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<sup>1</sup> Spain: the appropriate departments collaborate and co-ordinate with each other in the fight against illegal employment and conduct joint operations when the situation so requires.

<sup>2</sup> Germany: since the enactment of the Employment Promotion Reform Law of 24 March 1997.

<sup>3</sup> Germany: Sections 304 to 308 of Volume III of the *Socialgesetzbuch* (Labour Code).

Upon commencement of employment, every employer must make the employee submit their social insurance card (Section 98(1) of Part Four of the Social Law). An alien who is sent to Germany under an employment contract concluded outside Germany, and is not subject to the Germany social security scheme, must obtain a substitute certificate. This substitute certificate must be submitted in place of the social insurance card.

In particularly serious cases, unlawful employment of aliens constitutes a criminal offence. When a person unlawfully employs more than five foreign workers concurrently for a period of at least 30 calendar days, or persistently employs aliens unlawfully, he/she is liable to imprisonment of up to one year and a fine. If the offence was committed from grossly selfish motives the person may be imprisoned for up to five years or fined.

Employers who employ foreign workers without work permits under conditions which are clearly out of proportion to the working conditions of German workers engaged in the same or similar activities, are liable to imprisonment of up to three years or a fine. In particularly serious cases the term of imprisonment may range from six months to five years.

