Permanente commissie
van deskundigen in
internationaal vreemdelingen-,
vluchtelingen- en strafrecht

Secretariaat
postbus 201, 3500 AE Utrecht/Nederland
telefoon 31 (30) 297 42 14/43 28
telefax 31 (30) 296 00 50
e-mail cie.meijers@forum.nl
http://www.commissie-meijers.nl

Aan De Eerste en de Tweede Kamer der Staten-Generaal

Kenmerk CM04-17
Betreft Voorstel voor een verordening van de Raad *tot vaststelling van een communautaire code betreffende de overschrijding van de grenzen door personen* (herziening van het Schengenhandboek) – COM (2004) 391
Datum 25 november 2004

Geachte heer, mevrouw,

In de vergadering van de Raad van Europese ministers van Justitie en Binnenlandse Zaken (JBZ-Raad) zal binnenkort worden gesproken over het voorstel voor een verordening van de Raad tot vaststelling van een communautaire code betreffende de overschrijding van de grenzen door personen (herziening van het Schengenhandboek, zie ook de fiche van de Nederlandse regering, Handelingen Tweede Kamer, 2003-2004, 22 112, nr. 335). Met deze uitgebreide regeling worden de betreffende regels in het Schengenuitvoeringsverdrag en alle daaruit voorkomende uitvoeringsregelingen omgezet naar een EU regeling. Dit is naar het oordeel van de Permanente Commissie een goede gelegenheid om de gedetailleerde regeling te stroomlijnen en waar nodig te verbeteren.

In bijgaande notitie treft u onze observaties aan met betrekking tot het onderliggende voorstel tot omzetting van het Schengen acquis. Wij hopen dat u er bij de regering op wilt aandringen om gebruik te maken van deze mogelijkheid om deze wetgeving te verbeteren om ongelijke toepassing van de regelingen in de lidstaten (m.n. signaleringen in het Schengen Informatie Systeem) te voorkomen en de rechtspositie van grensoverschrijdende burgers te verbeteren.

Deze notitie hebben wij gelijktijdig aangeboden aan de betrokken leden van het Europees Parlement. In dit kader zou de Permanente Commissie willen benadrukken dat inzake dit voorstel het Europese Parlement een adviesrecht heeft op basis van artikel 67 EG Verdrag. We verzoeken de leden van het parlement dan ook om er bij de Nederlandse regering op aan te dringen geen medewerking te verlenen aan besluitvorming in de Raad, alvorens dit advies over de verordening van het Europees Parlement is uitgebracht.

Namens de Permanente Commissie,

Hoogachtend,

Prof. mr. C.A. Groenendijk
voorzitter

Comments on the draft Regulation establishing a Community code on the rules governing the movement of persons across borders, COM (2004) 391, 26 May 2004

1 Introduction

The Standing Committee took notice of the proposal of the European Commission on the draft Regulation establishing a Community code on the rules governing the movement of persons across borders (hereafter 'Community Code'). The Community Code which is based on Article 62 (1) and 62 (2) a TEC will, if adopted, replace the Schengen acquis with regard to the rules on border and entry controls, including the Schengen Common Manual, the decisions of the Schengen Executive Committee, and certain provisions of the Schengen Implementing Agreement. On the basis of this Community Code, the Council Regulation 790/2001 is to be repealed. In Regulation 790/2001, the Council reserved to itself implementing powers with regard to certain detailed provisions and practical procedures for carrying border checks and surveillance. To our knowledge, this power has already been used twice to amend the Schengen consular instructions unilaterally.[1] The first amendment concerned the new obligation to demand travel insurance before issuing a short stay visa to third country nationals. The second concerned the instruction to consular employees to assess explicitly the immigration risk of each visa application.

The Standing Committee supports the initiative of the European Commission to develop a coherent and more transparent communitarian framework with regard to the law on border and movement control. It is important that the adoption of further rules in this field will be susceptible to democratic and judicial scrutiny. With regard to the content of the draft Regulation, the Standing Committee would like to forward some general remarks. Some of the following proposals are based on the earlier publication of the Standing Committee, *Border Control and movement of persons. Towards effective legal remedies for individuals in Europe* which was presented in the European Parliament to the European Commission in February 2004.[2]

2 Content of criteria on the basis of which third country nationals may be refused entry

On the basis of the actual Article 96 of the Schengen Convention (hereafter 'SC'), third country nationals who are to be refused entry by one of the Member States can be recorded for this purpose into a shared data base, the *Schengen Information System* or *SIS*. The result of this SIS record is that the person recorded into SIS on the basis of Article 96, is to be refused entry into every other Schengen State. With the establishment of SIS II, this database will be used by 25 EU Member States. Currently, the Schengen States have a broad margin of interpretation with regard to the national criteria applied for recording a person into SIS. This implies that persons can be refused for years access to EU territory on the basis of variable national grounds, including the fact of having committed a relatively minor offence, or being merely suspected of a crime. The Standing Committee questions whether the Commission should not have developed more harmonised rules with regard to the criteria applied to

[1] *OJ* L5/74 and *OJ* L5/79, 9 January 2004.
[2] P. Boeles et. al. *Draft for a Directive on minimum guarantees for individual freedom, security and justice in relation to decisions regarding movement of persons*, Utrecht: Standing Committee of Experts in International Immigration, Refugee and Criminal law, 2004. (available for download at http://www.commissie-meijers.nl)

third country nationals who seek entrance into the EU. These criteria could be provided by amending Article 5 of the proposed Community Code (which is based on Article 5 SC), or in a separate legal instrument.

- Considering the consequences of the EU wide application of national criteria applied to persons to be refused entry and the fact that Member States apply very different criteria to record a person into SIS, the Standing Committee advises to provide in this Community Code, or in another binding legal instrument, certain minimum standards with regard to the grounds being used to refuse third country nationals entry to the EU territory. The provision of clear, specific criteria, on the basis of which individuals may be refused entry, should prevent arbitrary and unpredictable use of relatively 'light' criteria by national authorities.
- These minimum standards should be based on the principle that decisions on the basis of which individuals are refused entry or visa, must be justified by overriding reasons of public interest: they must be suitable for securing the attainment of the objective which they pursue, and they must not go beyond what is necessary to attain that objective.

3 Refusal of entry at the borders

The proposed Community Code takes over the entry conditions as provided in the Article 5 of the Schengen Convention. The proposed Article 5 (1) of the Community Code states that third country nationals may be granted entry if they fulfil the conditions of entry as described in this Article. This provision implies a double check: even if the third country national fulfils every ground of entry and has been issued a visa, he or she can still be refused entry when arriving at the borders of one of the Member State's territories. This double check can be justified by the fear of Member States that between the moment of issuing the visa and the moment of actual entry, circumstances can be changed which could include reasons to prevent the entry of the person concerned. However, the Standing Committee is concerned that the actual provision is too vague and includes the risk of an arbitrary and opaque implementation. The condition as described in Article 5 (1) sub e ('*they are not concerned a threat to public policy, internal security, public health or international relations of any of the Member States*') is also very broad. When the primary concern of this condition is the protection of national security, it is according to the Standing Committee justified to apply with regard to third country nationals the same principles as which are applied with regard to EU nationals and nationals of privileged countries. EU nationals may only be refused entry if the personal conduct of the person concerned indicates a specific risk of an actual and serious prejudice to the requirements of public policy or national security of one or more Member States.

- Therefore, the Standing Committee advocates to amend Article 5 (1) in: *'For stays not exceeding 90 days, third country nationals shall be granted entry into the territory of Member States if they fulfil the following conditions….'*, and;
- The condition of Article 5 (1) sub e should be amended in: *'the personal conduct of the persons concerned, does not indicate a specific risk of an actual and serious prejudice to the requirements of public policy or national security of one or more Member States'.*

4 The right to judicial review and good administration

The Standing Committee proposes to include in the draft Regulation additional provisions which seek to protect the legal position and legitimate interests of individuals seeking to cross EU borders. In its judgment of 25 July 2002, C-459/99, the EC Court of Justice affirmed that the right of everyone to effective judicial review of any decision of national authorities constitutes a general principle, which stems from the constitutional traditions common to the Member States. More recently, the Court recalled this general principle, applying this to the national decisions on applications of third country nationals long-term visa or provisional residence permits. In the *Panayotova* judgment of 16 November 2004, C-327/02, the Court stated in para. 27: *'that Community law requires effective judicial scrutiny of the decisions of national authorities taken pursuant to the applicable provisions of Community law'*. More in particular with regard to the (Dutch) scheme applicable to long-term residence visa, the Court concluded in para. 39, that *'this system must be based on a procedural system which is easily accessible and capable of ensuring that the persons concerned will have their applications dealt with objectively and within a reasonable time, and refusals to grant a permit must be capable of being challenged in judicial or quasi-judicial proceedings'*.

- The Standing Committee proposes to incorporate in this draft Regulation an explicit regulation of the right of every individual within the jurisdiction of the European Union, to an effective legal remedy. We refer to the provision, Article 6, of our draft Directive on Border Control and Movement of Persons, mentioned above:

Article 6 of the draft Directive of the Standing Committee on minimum guarantees:

1. *Everyone within the jurisdiction of a Member State or the European Community [European Union] has the right to an effective legal remedy before a court against any decision as referred to in Article 1.*
2. *This remedy shall be easily and promptly accessible and offer adversarial proceedings before an independent and impartial court competent to review on the merits of the reasons for the decision and relevant evidence, if need be with appropriate procedural limitations on the use of classified information. The court will decide within a reasonable time. The court will decide speedily when detention is at issue or when personal liberty and integrity are affected in any other way.*
3. *Proceedings shall offer the individual concerned the opportunity to be heard either in person or by representative. The principle of equality of arms must be abided.*
4. *The court shall have the power to order effective suspension of the execution of measures whose effects are potentially irreversible for the period of the proceedings.*
5. *The court shall have the power to annul a decision when it finds the decision arbitrary, disproportionate or unlawful.*
6. *The courts shall be competent to order any appropriate measure against the responsible authority of any Member State repairing or compensating damages caused by such decisions.*

The right to good administration for everyone is provided by Article 41 of the EU Charter of Fundamental Rights. This right includes: the right to be heard before any individual measure, which would affect him or her adversely, is taken and the obligation of the administration to give reasons for its decisions.

- According to the Standing Committee these rights should be explicitly included in the draft regulation on border crossing. Article 11 (3) of the Community Code provides that the authorities should make a *'substantiated decision'* which shall state the available remedies. This provision should be completed by adding that the decision refusing an individual a visa or entry, should be written and in a language which is comprehensible for the individual concerned or providing an English summary of the decision. The decision should indicate the legal provisions or provisions underlying the decision and all relevant reasons. The decision should state the competent court, and its address.
- With regard to third country nationals who are refused entry on the basis of a SIS entry, the decision should also state which Member State has entered the entry into SIS, and on which grounds the person is entered into SIS.

5 Reintroduction of checks at internal borders

Currently, on the basis of Article 2 (2) Schengen Convention, Member States may reintroduce internal border checks in the event of serious threats to public policy, or internal security. This regulation is to be replaced by Articles 20 to 28 of the proposed Community Code (the text of the Community Code adds public health to the grounds mentioned above). The Standing Committee welcomes the replacement of Article 2 (2) SC by a communitarian and a more detailed regulation. The Standing Committee especially supports the role, which is foreseen for the Commission and the explicit requirement that the scope and duration of the checks should be proportional to the threats involved. It is also to be welcomed that on the basis of the proposed Article 20 (1) of the Community Code, these checks may in principle not exceed a time period of 30 days. According to Article 20 (2) this time limit may be prolonged by a Member State for *'renewable periods of up to 30 days'* when the actual threats persists beyond 30 days, and only after consulting the other Member States and the Commission. Article 26 of the proposed Community Code includes the obligation for Member States to report on the reintroduction of internal border checks to the Commission, the European Parliament, and the Council.

- The obligation of Member States to report to the EU institutions should also have to apply to the emergency procedures as regulated in Article 22. The Standing Committee therefore proposes to include in the proposed text of Article 26 after *'under Article 20'*, a reference to Article 22 as well.

The Community Code, in the proposed Article 24, provides for the joint reintroduction of internal checks by all or several Member States in the event of a cross-border terrorist threat. The European Parliament is to be informed of these measures *'without delay'*. This provision however does not include a maximum duration of these measures. This allows for the governments to maintain the internal border checks for an indefinite period.

- The Standing Committee proposes to amend Article 24 (2) in '*These checks may only be reintroduced for a limited period of no more than 30 days. If the serious threat to public policy, internal security or public health has not ceased to exist, this period may only be extended by another period of 30 days on the basis of a proposal by the Commission.'*

On the basis of Article 28 of the proposed Community Code, information on measures of reintroduction of internal border checks can be kept secret on request of Member States.

The Standing Committee is very concerned that this provision will allow Member States to keep every information on these measures confidential, even if there are no legitimate reasons for this confidentiality. This would be contrary to the general EU principle of transparency as laid down in Article 42 of the EU Charter and in the Regulation 1049/2001 on access to documents of EU institutions.

- The Standing Committee proposes to add to Article 28, a paragraph which limits the possibility of confidentiality conform Article 4 of Regulation 1049/2001: '*Information on the reintroduction and prolongation of checks may only be kept confidential if disclosure of these information would undermine overriding interests of public security, defence and military matters, and international relations.'*

6 Conclusion

In the least few years, controlling internal and external borders has been a major issue on the EU agenda. The EU governments have adopted many rules and measures in this field with the aim of fighting terrorism and preventing illegal immigration. Rules have been adopted with regard to the exchange of personal information, the establishment of an EU Agency for the Management of External Borders, and the use of biometrics in passports and visa. In the light of these developments, the Standing Committee is concerned about the protection of the rights of individuals. The Standing Committee is worried that as a result of the actual measures, individuals who seek to cross EU borders for legitimate reasons will be seen and treated in the first place as possible terrorists, criminal suspects, or illegal immigrants, and no longer as persons enjoying their right of free movement. It is necessary that Community legislation should not only strengthen the powers of border control authorities, but also provide for an effective protection of individual's rights.

Utrecht, 22 November 2004