

2. Regulation (EC) No. 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders

OJ L 105, 13.4.2006, p. 1, last amended by OJ L 97, 9.4.2008, p. 60

(Astrid Epiney/Andrea Egbuna-Joss)

Dieser Beitrag wurde erstmals wie folgt veröffentlicht:

Astrid Epiney/Andrea Egbuna-Joss, Regulation (EC) No 562/2006 of the European Parliament and the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), in: Kay Hailbronner (Hrsg.), EU Immigration and Asylum Law. Commentary, München 2010, S. 63-148. Es ist möglich, dass die Druckversion – die allein zitierfähig ist – im Verhältnis zu diesem Manuskript geringfügige Modifikationen enthält.

A. Text

Regulation (EC) No 562/2006 of the European Parliament and of the Council

of 15 March 2006

establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 62 para. 1 and (2)(a) thereof,

Having regard to the proposal from the Commission,

Acting in accordance with the procedure laid down in Article 251 of the Treaty,*

Whereas:

(1) The adoption of measures under Article 62 (1) of the Treaty with a view to ensuring the absence of any controls on persons crossing internal borders forms part of the Union's objective of establishing an area without internal borders in which the free movement of persons is ensured, as set out in Article 14 of the Treaty.

(2) In accordance with Article 61 of the Treaty, the creation of an area in which persons may move freely is to be flanked by other measures. The common policy on the crossing of external borders, as provided for by Article 62(2) of the Treaty, is such a measure.

(3) The adoption of common measures on the crossing of internal borders by persons and border control at external borders should reflect the Schengen *acquis* incorporated in the

* Opinion of the European Parliament of 23 June 2005 (not yet published in the Official Journal) and Council Decision of 21 February 2006.

European Union framework, and in particular the relevant provisions of the Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders^{**} and the Common Manual.^{***}

(4) As regards border control at external borders, the establishment of a "common corpus" of legislation, particularly via consolidation and development of the *acquis*, is one of the fundamental components of the common policy on the management of the external borders, as defined in the Commission Communication of 7 May 2002 "Towards integrated management of the external borders of the Member States of the European Union". This objective was included in the "Plan for the management of the external borders of the Member States of the European Union", approved by the Council on 13 June 2002 and endorsed by the Seville European Council on 21 and 22 June 2002 and by the Thessaloniki European Council on 19 and 20 June 2003.

(5) The definition of common rules on the movement of persons across borders neither calls into question nor affects the rights of free movement enjoyed by Union citizens and members of their families and by third-country nationals and members of their families who, under agreements between the Community and its Member States, on the one hand, and those third countries, on the other hand, enjoy rights of free movement equivalent to those of Union citizens.

(6) Border control is in the interest not only of the Member State at whose external borders it is carried out but of all Member States which have abolished internal border control. Border control should help to combat illegal immigration and trafficking in human beings and to prevent any threat to the Member States' internal security, public policy, public health and international relations.

(7) Border checks should be carried out in such a way as to fully respect human dignity. Border control should be carried out in a professional and respectful manner and be proportionate to the objectives pursued.

(8) Border control comprises not only checks on persons at border crossing points and surveillance between these border crossing points, but also an analysis of the risks for internal security and analysis of the threats that may affect the security of external borders. It is therefore necessary to lay down the conditions, criteria and detailed rules governing checks at border crossing points and surveillance.

(9) Provision should be made for relaxing checks at external borders in the event of exceptional and unforeseeable circumstances in order to avoid excessive waiting time at borders crossing-points. The systematic stamping of the documents of third-country nationals remains an obligation in the event of border checks being relaxed. Stamping makes it possible to establish, with certainty, the date on which, and where, the border was crossed, without establishing in all cases that all required travel document control measures have been carried out.

^{**} OJ L 239, 22.9.2000, p. 19. Convention as last amended by Regulation (EC) No 1160/2005 of the European Parliament and of the Council (OJ L 191, 22.7.2005, p. 18).

^{***} OJ C 313, 16.12.2002, p. 97. Common Manual as last amended by Council Regulation (EC) No 2133/2004 (OJ L 369, 16.12.2004, p. 5).

(10) In order to reduce the waiting times of persons enjoying the Community right of free movement, separate lanes, indicated by uniform signs in all Member States, should, where circumstances allow, be provided at border crossing points. Separate lanes should be provided in international airports. Where it is deemed appropriate and if local circumstances so allow, Member States should consider installing separate lanes at sea and land border crossing points.

(11) Member States should ensure that control procedures at external borders do not constitute a major barrier to trade and social and cultural interchange. To that end, they should deploy appropriate numbers of staff and resources.

(12) Member States should designate the national service or services responsible for border-control tasks in accordance with their national law. Where more than one service is responsible in the same Member State, there should be close and constant cooperation between them.

(13) Operational cooperation and assistance between Member States in relation to border control should be managed and coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States established by Regulation (EC) No 2007/2004.*

(14) This Regulation is without prejudice to checks carried out under general police powers and security checks on persons identical to those carried out for domestic flights, to the possibilities for Member States to carry out exceptional checks on baggage in accordance with Council Regulation (EEC) No 3925/91 of 19 December 1991 concerning the elimination of controls and formalities applicable to the cabin and hold baggage of persons taking an intra-Community flight and the baggage of persons making an intra-Community sea crossing,** and to national law on carrying travel or identity documents or to the requirement that persons notify the authorities of their presence on the territory of the Member State in question.

(15) Member States should also have the possibility of temporarily reintroducing border control at internal borders in the event of a serious threat to their public policy or internal security. The conditions and procedures for doing so should be laid down, so as to ensure that any such measure is exceptional and that the principle of proportionality is respected. The scope and duration of any temporary reintroduction of border control at internal borders should be restricted to the bare minimum needed to respond to that threat.

(16) In an area where persons may move freely, the reintroduction of border control at internal borders should remain an exception. Border control should not be carried out or formalities imposed solely because such a border is crossed.

(17) Provision should be made for a procedure enabling the Commission to adapt certain detailed practical rules governing border control. In such cases, the measures needed to implement this Regulation should be taken pursuant to Council Decision 1999/468/EC of 28

* Council Regulation (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (OJ L 349, 25.11.2004, p. 1).

** OJ L 374, 31.12.1991, p. 4. Regulation as amended by Regulation (EC) No 1882/2003 of the European Parliament and of the Council (OJ L 284, 31.10.2003, p. 1).

June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission.*

(18) Provision should also be made for a procedure enabling the Member States to notify the Commission of changes to other detailed practical rules governing border control.

(19) Since the objective of this Regulation, namely the establishment of rules applicable to the movement of persons across borders cannot be sufficiently achieved by the Member States and can therefore be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve that objective.

(20) This Regulation respects fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. It should be applied in accordance with the Member States' obligations as regards international protection and non-refoulement.

(21) By way of derogation from Article 299 of the Treaty, the only territories of France and the Netherlands to which this Regulation applies are those in Europe. It does not affect the specific arrangements applied in Ceuta and Melilla, as defined in the Agreement on the Accession of the Kingdom of Spain to the Convention implementing the Schengen Agreement of 14 June 1985.**

(22) In accordance with Articles 1 and 2 of the Protocol on the Position of Denmark annexed to the Treaty on European Union and to the Treaty establishing the European Community, Denmark is not taking part in the adoption of this Regulation and is not bound by it or subject to its application. Given that this Regulation builds upon the Schengen *acquis* under the provisions of Title IV of Part Three of the Treaty establishing the European Community, Denmark should, in accordance with Article 5 of the said Protocol, decide within a period of six months after the date of adoption of this Regulation whether it will implement it in its national law or not.

(23) As regards Iceland and Norway, this Regulation constitutes a development of provisions of the Schengen *acquis* within the meaning of the Agreement concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the latter's association with the implementation, application and development of the Schengen *acquis** which fall within the area referred to in Article 1, point A, of Council Decision 1999/437/EC** on certain arrangements for the application of that Agreement.

(24) An arrangement has to be made to allow representatives of Iceland and Norway to be associated with the work of committees assisting the Commission in the exercise of its implementing powers. Such an arrangement has been contemplated in the Exchanges of Letters between the Council of the European Union and the Republic of Iceland and the

* OJ L 184, 17.7.1999, p.23.

** OJ L 239, 22.9.2000, p.69.

* OJ L 176, 10.7.1999, p. 36.

** OJ L 176, 10.7.1999, p. 31.

Kingdom of Norway concerning committees which assist the European Commission in the exercise of its executive powers,^{***} annexed to the abovementioned Agreement.

(25) As regards Switzerland, this Regulation constitutes a development of provisions of the Schengen *acquis* within the meaning of the Agreement signed between the European Union, the European Community and the Swiss Confederation concerning the association of the Swiss Confederation with the implementation, application and development of the Schengen *acquis*, which fall within the area referred to in Article 1, point A, of Decision 1999/437/EC read in conjunction with Article 4 (1) of Council Decisions 2004/849/EC^{****} and 2004/860/EC.^{*****}

(26) An arrangement has to be made to allow representatives of Switzerland to be associated with the work of committees assisting the Commission in the exercise of its implementing powers. Such an arrangement has been contemplated in the Exchange of Letters between the Community and Switzerland, annexed to the abovementioned Agreement.

(27) This Regulation constitutes a development of provisions of the Schengen *acquis* in which the United Kingdom does not take part, in accordance with Council Decision 2000/365/EC of 29 May 2000 concerning the request of the United Kingdom of Great Britain and Northern Ireland to take part in some of the provisions of the Schengen *acquis*.^{*****} The United Kingdom is therefore not taking part in its adoption and is not bound by it or subject to its application.

(28) This Regulation constitutes a development of provisions of the Schengen *acquis* in which Ireland does not take part, in accordance with Council Decision 2002/192/EC of 28 February 2002 concerning Ireland's request to take part in some of the provisions of the Schengen *acquis*.^{*****} Ireland is therefore not taking part in its adoption and is not bound by it or subject to its application.

(29) In this Regulation, the first sentence of Article 1, Article 5(4)(a), Title III and the provisions of Title II and the annexes thereto referring to the Schengen Information System (SIS) constitute provisions building on the Schengen *acquis* or otherwise related to it within the meaning of Article 3(2) of the 2003 Act of Accession,

HAVE ADOPTED THIS REGULATION:

^{***} OJ L 176, 10.7.1999, p. 53.

^{****} Council Decision 2004/849/EC of 25 October 2004 on the signing, on behalf of the European Union, and on the provisional application of certain provisions of the Agreement between the European Union, the European Community and the Swiss Confederation concerning the Swiss Confederation's association with the implementation, application and development of the Schengen *acquis* (OJ L 368, 15.12.2004, p. 26).

^{*****} Council Decision 2004/860/EC of 25 October 2004 on the signing, on behalf of the European Community, and on the provisional application of certain provisions of the Agreement between the European Union, the European Community and the Swiss Confederation, concerning the Swiss Confederation's association with the implementation, application and development of the Schengen *acquis* (OJ L 370, 17.12.2004, p. 78).

^{*****} OJ L 131, 1.6.2000, p. 43.

^{*****} OJ L 64, 7.3.2002, p. 20.

B. Literature

Brouwer, Evelien, Digital borders and real rights: effective remedies for third-country nationals in the Schengen information system, *Immigration and Asylum Law and Policy in Europe* Vol. 15, 2008, 289-291, 303-325; *Cholewinski*, Ryszard, Borders and Discrimination in the European Union, in: Anderson, Malcolm/Apap, Joanna (eds.), *Police and Justice Co-operation and the New European Borders*, 2002, 81-102; *Cholewinski*, Ryszard, No right of entry: The legal regime on crossing the EU external border, in: Kees Groenendijk/Elspeth Guild/Paul Minderhoud (eds.), *In Search of Europe's Borders*, *Immigration and Asylum Law and Policy in Europe* Vol. 5, Kluwer Law International 2003, 105-130; *Garcia-Jourdan*, Sophie, L'émergence d'un espace européen de liberté, de sécurité et de justice, Bruylant 2005, 135-234; *Guild*, Elspeth/*Bigo*, Didier, The Legal Mechanisms – Collectively Specifying the Individual: The Schengen Border System and Enlargement, in: Anderson, Malcolm/Apap, Joanna (eds.), *Police and Justice Co-operation and the New European Borders*, *European Monographs* Vol. 40, Kluwer, 2002, 121-138; *Groenendijk*, Kees, Reinstatement of Controls at the Internal Borders of Europe: Why and Against Whom, *European Law Journal* Vol. 10, No. 2, March 2004, 150-170; *Karanja*, Stephen Kabera, Transparency and Proportionality in the SIS and Border Control Cooperation, Martinus Nijhoff Publishers 2008, 361-393; *Mitsilegas*, Valsamis, Border Security in the European Union: Towards Centralised Controls and Maximum Surveillance, in: Baldaccini, Anneliese/Guild, Elspeth/Toner, Helen (eds.), *Whose Freedom, Security and Justice? EU Immigration and Asylum Law and Policy*, Hart Publishing, 2007, 359-394; *Peers*, Steve, Key Legislative Developments on Migration in the European Union, *European Journal of Migration and Law* (2006), 321-356, 321-352; *Peers*, Steve, Enhancing Cooperation on Border Controls in the European Union, in: Cholewinski, Ryszard/Perruchoud, Richard/MacDonald, Euan (eds.), *International Migration Law – Developing Paradigms and Key Challenges*, T.C.M. Asser Press 2007, 447-463; *Peers*, Steve, Visas and Border Controls, in: *ibid.*, *Justice and Home Affairs*, 2nd ed., Oxford EC Law Library, Oxford University Press, 2006, 93-181; *Peers*, Steve/*Rogers*, Nicola, *EU Immigration and Asylum Law, Text and Commentary*, *Immigration and Asylum Policy in Europe* Vol. 12, 2006, 169-184; *Schain*, Martin A., The State Strikes Back: Immigration Policy in the European Union, *EJIL* 2009, 93 ff; *ter Steeg*, Marcus, Das Einwanderungskonzept der EU, Zwischen politischem Anspruch, faktischen Regelungsbedürfnissen und den primärrechtlichen Grenzen in Titel IV des EG-Vertrages, 2005, 408-420.

C. Interpretation

TITLE I

GENERAL PROVISIONS

Article 1

Subject matter and principles

This Regulation provides for the absence of border control of persons crossing the internal borders between the Member States of the European Union.

It establishes rules governing border control of persons crossing the external borders of the Member States of the European Union.

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I. General remarks

1. Introduction and purpose of the Regulation

- 1 Regulation 562/2006¹ provides for the absence of border controls at “internal borders”² and establishes **common rules to be applied by the Member States when**

¹ Regulation (EC) no. 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), OJ L 105/1 (2006); amended by Regulation (EC) no. 296/2008 of the European Parliament and of the Council of 11 March 2008, OJ L 97/60 (2008) and (EC) no. 81/2009 of the European Parliament and of the Council of 14 January 2009, OJ L 35/56 (2009).

controlling persons crossing the external borders of the Schengen area (art. 1 Regulation 562/2006). Since controls at internal borders have to be abolished, border checks conducted by one Member State at its external border are executed on behalf of all the other Member (resp. Schengen) States as well, which made the need for the establishment of common standards for controls on external borders evident.

2 Regulation 562/2008 entered into force on 13 October 2006³ and is a **development of the Schengen acquis**. It was adopted on the basis of art. 62 paras. 1 and 2 EC Treaty (art. 77 para. 1 TFEU) and combines in a single instrument the existing rules of the acquis on border control which were previously found in the Schengen Implementing Convention (SIC), the Common Manual and a number of decisions of the Schengen Executive Committee. It clarified which of these rules were to be considered legally binding⁴ by integrating them into a regulation, and also clarified and further developed selected substantive aspects of the relevant rules on border control.

3 Regulation 562/2006 is part of the **European Union’s policy of external border control and management**. Other important instruments in that field include:

- The provisions of the SIC on border controls that have not been repealed by Regulation 562/2006;⁵
- the Practical Handbook for Border Guards (Schengen Handbook);⁶
- the two regulations and the decision with respect to the establishment and functioning of the European Border Agency “FRONTEX”;⁷

² Cf. the legal definition in art. 2 para. 1 Regulation 562/2006.

³ Art. 34 Regulation 562/2006 which concerns the Member States duties to notify certain facts to the Commission already entered into force on 14 April 2006.

⁴ Cf. the comments on the drafting history below (II).

⁵ See more detailed discussion below II. (Drafting History).

⁶ Commission Recommendation establishing a common “Practical Handbook for Border Guards (Schengen Handbook)” to be used by Member States’ competent authorities when carrying out the

The responsibility for the implementation of the rules laid down in Regulation 562/2006 lies with the Member States. Nevertheless and in order to coordinate and strengthen cooperation between the Member States, in particular with regard to Title II of Regulation 562/2006,⁸ a European agency for the management of operational cooperation at the external borders, FRONTEX, was established in 2004.⁹ FRONTEX has its seat in Warsaw, Poland,¹⁰ and became fully operational on 3 October 2005.¹¹

- the rules on local border traffic¹² and
- the regime on carrier sanctions.¹³

4 The control of external borders and especially the combating of illegal immigration is furthermore also one of the most important goals of the **European Union's visa policy**.¹⁴ These two areas of law, their secondary instruments and in particular also

border control of persons, COM (2006) 5186 final; amended by Commission Recommendation of 25 June 2008, COM (2008) 2976 final.

⁷ Council Regulation (EC) no. 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ L 349/1 (2004); later amended by Regulation (EC) no. 863/2007 of 11 July 2007 establishing a mechanism for the creation of Rapid Border Intervention Teams, OJ L 199/30 (2007); Council Decision 2005/358/EC of 26 April 2005 designating the seat of the European Agency for the Management of Operational Cooperation at the External Border of the Member States of the European Union, OJ L 114/13 (2005).

⁸ Cf. art. 16 Regulation 562/2006.

⁹ Cf. Regulation (EC) no. 2007/2004.

¹⁰ Cf. Council Decision 2005/358/EC.

¹¹ See in more detail *Peers*, Justice and Home Affairs Law, p. 142 et seq.; *ter Steeg*, Einwanderungskonzept, p. 412 et seq.

¹² Regulation (EC) no. 1931/2006/EC of the European Parliament and of the Council of 20 December 2006 laying down rules on local border traffic at the external land borders of the Member States and amending the provisions of the Schengen Convention, OJ L 405/1 (2006); corrigenda in OJ L 29/3 (2007).

¹³ Council Directive 2004/82/EC of 29 April 2004 on the obligation of carriers to communicate passenger data, OJ L 61/24 (2004). On carrier sanction see for example *Peers/Rogers*, EU Immigration and Asylum Law, p. 799-808; *Karanja*, Transparency and Proportionality, p. 369 et seqq.

¹⁴ See *Epiney/Egbuna-Joss*, The Visa Regulation 539/2001, in this volume. On the interaction of these areas see also *Cholewinski*, No right of entry, 127 et seq.

the corresponding databases are closely interwoven and should not be considered separately: The Schengen Information System, and in particular art. 96 SIC alerts for the purposes of refusing entry to the Schengen area, is a vital instrument being used during the examination of visa applications.

- 5 The planned **Visa Information System** (hereinafter: VIS)¹⁵ will go beyond the SIS and also store biometric data and data relating to visa applications that cannot be entered into the SIS for lack of a legal basis. According to art. 2 Regulation 767/2008, the VIS shall not only facilitate the visa application procedure as such but also facilitate checks at external border crossing points and the fight against fraud. The authorities at the external borders will have access to the VIS for the checks that are to be conducted according to art. 5 in conjunction with art. 7 Regulation 562/2006 (art. 18 Regulation 767/2008).¹⁶

2. Territorial scope of the Regulation

- 6 The Schengen Borders Code is fully applicable to all the “**old**” **Member States** with the exception of the non-European territories of France and the Netherlands.¹⁷ The **United Kingdom and Ireland** have not opted in to this regulation and it therefore does not apply to these two states.

- 7 **Denmark** does in general not participate in the adoption of measures based on Part III Title V TFEU (art. 1, 2 of the Protocol on the Position of Denmark). According to art. 5 of the protocol, Denmark can, however, decide within a period of six months to implement such measures in national law, which it has done with respect to Regulation 562/2006. Such a decision results in an obligation under international law

¹⁵ Council Decision of 8 June 2004 establishing the Visa Information System (VIS), OJ L 213/5 (2004); Regulation (EC) no. 767/2008 of the European Parliament and of the Council of 9 July 2008 concerning the Visa Information System (VIS) and the exchange of data between Member States on short-stay visas (VIS Regulation), OJ L 218/60 (2008). The VIS is not yet functioning, but was originally expected to be fully operable at the end of 2009. As serious delays in preparations are being experienced, it seems likely that the VIS will not be in operation until later in 2010.

¹⁶ See also Regulation (EC) no. 81/2009 of the European Parliament and of the Council of 14 January 2009 amending Regulation (EC) no. 562/2006 as regards the use of the Visa Information System (VIS) under the Schengen Borders Code, OJ L 35/56 (2009).

¹⁷ Recital 21 of Regulation 562/2006.

between Denmark and the other Member States bound by the Schengen acquis (art. 5 para. 1 second sentence Protocol on the Position of Denmark). It remains unclear what exactly is to be understood under such an obligation under international law. Considering the unambiguous wording as well as the clearly expressed will of Denmark not to be bound by Title IV beyond the Schengen Implementation Convention, it becomes clear that such obligations are not obligations under the third pillar, but “ordinary” obligations under international law. This is relevant against the background that the judicial protection rules do not apply to Denmark with respect to Regulation 562/2006 and that the regulation is not directly applicable in Denmark. Future rulings of the European Court of Justice on the interpretation of Regulation 562/2006 are nevertheless to be expected to be taken into account by Denmark.

- 8 The “**new**” **Member States** have been bound by the entire Schengen *acquis* and its further developments from the date of their accession to the Union. In order to become “full” Schengen states applying all the Schengen rules (including for example the ones on the abolition of internal border controls), the Council had resp. has to take a unanimous decision in this regard (art. 2 para. 2 Schengen Protocol).¹⁸ Romania, Bulgaria and Cyprus that are not yet full Schengen States already apply the rules on external borders control, while controls at internal borders are still maintained.¹⁹
- 9 Regulation 562/2006 is applicable to the **Spanish exclaves of Ceuta and Melilla** only as far as the declaration of Spain in the Final Act to the Agreement on the

¹⁸ Cf. already the common declaration to art. 139 of the Schengen Implementation Convention. The Council takes such a decision after having evaluated if the requirements for the correct application of the Schengen acquis are met in the Member State in question. Of particular importance are in this regard the correct implementation of external borders control as well as of the accompanying measures, for example in the area of data protection. See on this particularity of the Schengen acquis for example *Peers*, Justice and Home Affairs Law, 60 et seqq.; the exact procedure is explained for example in EU, Press release of 31 March 2008, Background on Schengen enlargement, MEMO/07/619.

¹⁹ The list of „full“ Schengen States is found in the Schengen Handbook (6), Part One, 1, but a consolidated version of the Practical Handbook is not always available for download. See concerning the state of play in the accession to Schengen for Bulgaria www.mvr.bg/en/Schengen/accession.htm (last access: 13 January 2010), for Romania www.schengen.mira.gov.ro/English/index.htm (last access: 13 January 2010).

Accession of the Kingdom of Spain to the Schengen Implementation Convention²⁰ does not provide otherwise (art. 36 Regulation 562/2006).²¹ According to that declaration,²² the controls between Ceuta and Melilla and the customs area of the European Union are to be maintained, thereby weakening the rules set out in art. 20, 21 Regulation 562/2006 concerning the admissibility of controls at internal borders and within a Member State. As far as this declaration does not provide special rules, Regulation 562/2006 is also applicable to these territories.

10 By reason of their **association agreements to the Schengen acquis** the non-EU-Member States **Iceland** and **Norway**²³ as well as **Switzerland**²⁴ are bound by and fully applying the Borders Code. The **Principality of Liechtenstein** plans to join the Schengen Area in the near future.²⁵

3. Refugees, asylum-seekers and other persons in need of international protection

11 The consequences of strict external border controls can be particularly harsh on **persons seeking international protection**: Persons fleeing from persecution, from a serious threat to their life or physical and mental integrity or from an armed conflict will typically not fulfil the conditions for entry into the Schengen area²⁶ as they will

²⁰ OJ L 239/69 (2000).

²¹ Cf. also recital 21 of the Preamble and already art. 138 of the Schengen Implementation Convention.

²² OJ L 239/73 (2000).

²³ Agreement with Iceland and Norway of 17 May 1999 concerning the latter's association with the implementation, application and development of the Schengen acquis, OJ L 176/35 (1999).

²⁴ Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen acquis, OJ L 53/52 (2008).

²⁵ Protocol between the European Union, the European Community, the Swiss Confederation and the Principality of Liechtenstein on the accession of the Principality of Liechtenstein to the Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen acquis, 2006/0251 (CNS), not yet ratified.

²⁶ See the comments on art. 5 Regulation 562/2006 below.

rarely be able to provide all the supporting documents required or in a lot of cases not even be in the possession of valid travel documents. It will often be almost impossible for these persons to even reach the external borders, which is caused mainly by the visa requirement imposed on the nationals of countries of origin and the system of carrier sanctions that stipulates an obligation of the carrier to control that all its passengers are in possession of valid travel documents and the necessary visa and otherwise refuse access to the carrier. From a legal point of view, it is very problematic that officials of carriers are given the factual power to refuse persons in need of international protection the possibility to even reach the borders of the Schengen area.²⁷

- 12 If third-country national reach an external border of a Member State, they must be granted the possibility to seek international protection in the European Union and their application must be examined to ensure that they are in no case returned to a country where they are at risk of being persecuted or where their life or freedom is at risk (**prohibition of refoulement** which is considered a rule of *ius cogens*).²⁸

Regulation 562/2006 takes these protection obligations into account in several provisions:²⁹

- Recital (20) and **art. 3 lit. b) Regulation 562/2006** clearly state that the provisions of Regulation 562/2006 should be applied in accordance with protection obligations under international law and without prejudice to the rights of persons seeking international protection.

²⁷ See the detailed analysis from *Guiraudon*, Before the EU Border: Remote Control of the “Huddled Masses”, in: Groenendijk/Guild/Minderhoud (eds.), *In Search of Europe’s Borders*, p. 191-214; see further also *Karanja*, Border Control, p. 370 et seq.; *Peers/Rogers*, Carrier Sanctions, p. 802 et seqq.

²⁸ See in more detail and with further references *Epiney/Waldmann/Egbuna-Joss/Oeschger*, Maximen und Verfahren im regulären und beschleunigten Asylverfahren, in: UNHCR/SFH (eds.), *Schweizer Asylrecht, EU-Standards und internationales Flüchtlingsrecht – Eine Vergleichsstudie*, p.199-300 (203 et seqq.)

²⁹ Cf. also point 10 of Part Two, Section 1 of the Schengen Handbook.

- The imposition of penalties for unauthorised crossing of the external borders in **art. 4 para. 3 Regulation 562/2006** is without prejudice to the prohibition of such criminal penalties for refugees in art. 31 of the 1951 Geneva Refugee Convention on the sole account of their illegal entry or presence on the territory of a Schengen state provided that they present themselves without delay to the authorities and show good cause for their illegal entry or presence.
- **Art. 5 para. 4 lit. c) Regulation 562/2006** provides for possible derogations from the entry conditions of art. 5 para. 1 among other reasons on grounds of international obligations or on humanitarian reasons.
- **Art. 13 para. 1 Regulation 562/2006** establishes that the application of special provisions concerning the right to asylum and international protection remain unaffected by the principle that entry should be refused if the entry conditions of art. 5 are not fulfilled.

13 Whereas the Common Manual did not contain much information on the treatment of asylum seekers at the external borders,³⁰ Point 10 of Part Two, Section 1 of the **Schengen Handbook** states very clearly that all applications for international protection at the border must be assessed, and that any behaviour or expression of fear of the person of suffering serious harm if returned to his or her country of origin must be considered as an application for international protection.

14 The applications must be examined either in special border procedures or regular asylum procedures within the territory. The **question is raised if a general right of entry has to be granted to persons seeking international protection**, even in case the conditions of art. 5 Regulation 562/2006 are not fulfilled, if the entry is the only way for persons seeking international protection or asylum to ask for that protection according to the relevant European Union rules, especially **Directive 2004/83** on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international

³⁰ Cf. *Peers*, Cooperation on Border Controls, p. 450 et seqq.

protection and the content of the protection granted³¹ and **Directive 2005/85** on minimum standards for procedures for granting and withdrawing refugee.³²

As far as **Directive 2004/83** is concerned, it does only provide for the conditions under which asylum or international protection has to be granted; it does not contain any provision on the question of entry into European Union's territory.

Directive 2005/85 clearly states that its provisions apply to “all applications for asylum made in the territory, **including at the border or in the transit zones** of the Member States” (art. 3 para. 1 Directive 2005/85, emphasis added). According to art. 35 Directive 2005/85, Member States are authorized to either adopt special provisions applicable to border procedures in accordance with the principles and guarantees set out in Chapter II of Directive 2005/85 (art. 35 para. 1) or maintain their existing³³ border procedures in derogation thereof (art. 35 para. 2). But even in the case of procedures according to art. 35 para. 2, Member States must ensure that a **decision** on the application is being **taken within four weeks, or otherwise the person must be granted a right of entry** into the territory and the application must then be examined in observation of the procedural standards set out in Directive 2005/85 (art. 35 para. 4) and in accordance with the substantive criteria set out in Directive 2004/83 on minimum standards for the qualification of third-country national as refugees. These provisions illustrate that the procedure can in principle be conducted without an entry in the territory of the State so that they can not be interpreted in the sense of a right to enter the territory.

15 Once the person seeking international protection **has entered the territory**, art. 7 para. 1 Directive 2005/85 grants him a **right to remain** in the territory during the

³¹ Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, OJ 304/2 (2004).

³² Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, OJ L 326/13 (2005). See the detailed discussion of the procedural guarantees set out in Directive 2005/85 in *Epiney/Waldmann/Egbuna-Joss/Oeschger* (note 28), p. 209-228.

³³ Whereas “existing” means only such special procedures that were already in force on 1 Dec. 2005.

examination of his application, not however during a possible appeals procedure.³⁴ Art. 7 para. 1 itself does, however, not grant a general right of entry in order to request asylum, which is of particular importance for Member States whose national law does not provide for special border procedures. Considering that art. 7 para. 1 Directive 2005/83 grants only a “right to remain” – assuming that the person has already entered the territory at an earlier point – and considering the possible impact of a general right of entry to request asylum, such a right and the conditions for its exercise would have had to be regulated explicitly.³⁵

16 The conclusion must be drawn that **none of the provisions of Directive 2005/85 can be interpreted in the sense that a “right of entry”** in order to be able to request international protection is granted. However, in order to ensure that the non-refoulement principle is respected, national authorities at the external borders must nevertheless ensure that all applications for international protection are examined, either by sending the person to the Member State responsible for the application according to the criteria set out in Regulation 343/2003³⁶ or by examining the application themselves during special border procedures or regular procedures within the territory after having granted a right of entry for that purpose. Furthermore, in cases a person requests for international protection, the prohibition of refoulement has to be respected. The full application of this principle may lead to the de facto obligation of the State to allow the entry; once, the person entered into the territory of a Member State, art. 7 Directive 2005/85 applies.

4. Judicial protection

17 Before the Treaty of Lisbon entered into force, **judicial protection was restricted** for the areas of law covered by **Title IV EC Treaty**, which of course also included the rules of Regulation 562/2006. According to **art. 68 para. 1 EC Treaty**, only the

³⁴ See on art. 7 Directive 2005/83 and the “right to remain”, for example *Epiney/Waldmann/Egbuna-Joss/Oeschger* (note 28), p. 213 et seq.

³⁵ Cf. *Epiney/Waldmann/Egbuna-Joss/Oeschger* (note 28), p. 213.

³⁶ Council Regulation (EC) no. 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national („Dublin II), OJ L50/1 (2003).

highest national courts were bound to request a preliminary ruling of the European Court of Justice if questions on the interpretation or on the validity of European Union acts were raised. Consequently, lower national courts did not have the right or the possibility to request an interpretation of the applicable EU law. Moreover, the exact interpretation of art. 68 para. 1 EC was debatable and two questions were of particular importance in that context:

- 18 Firstly, one had to ask if there was an actual **obligation for the highest national courts to request a preliminary ruling** – correlating to art. 234 para. 3 EC Treaty. The wording of art. 68 para. 1 EC Treaty was not totally clear in that respect, especially when taking into account the wording in other official languages.³⁷ Better arguments spoke, however, for an answer in the affirmative. Only this interpretation allowed for an (at least partially) effective judicial protection and for the safeguarding of a uniform application of Community law.³⁸
- 19 Secondly, the wording of art. 68 did not suggest that **national courts of first instance had the right not to apply Community law they considered invalid**, the result of which was that they were possibly forced to apply such acts even if they considered them invalid on grounds of violations of fundamental rights recognized in Community law. This result was unacceptable from a rule of law perspective and would have eroded the judicial protection possibilities of the individuals concerned. On the other hand, it would have been contradictory to the so-called Foto-Frost-jurisprudence of the ECJ³⁹ to allow any national court not to apply a Community act – with respect to which there is after all a general assumption of validity - „at their own discretion“. By and large, there were therefore good reasons to conclude – contrary to its wording – that art. 68 para. 1 EC Treaty permitted national courts of

³⁷ Whereas in the English version “...that court or tribunal shall (...) request the Court of Justice to give a ruling thereon.”, art. 68 para. 1 in German reads “...so legt dieses Gericht dem Gerichtshof die Frage zur Entscheidung vor“, and in French “cette juridiction (...) demande à la Cour de justice de statuer sur cette question...“.

³⁸ See also *Peers*, Justice and Home Affairs Law, 38.

³⁹ ECJ, judgment of 22 October 1987, case 314/85, *Foto-Frost*, ECR (1987) 4199.

lower instances to request a preliminary ruling (only) in so far as they intended to not apply a Community act because they considered it unlawful and void.

20 Persons who considered their fundamental rights to be violated had nevertheless in general **first to exhaust the national appeals procedures before they had any sort of judicial protection at Community level**. These restrictions seemed particularly problematic in the field of border controls as the persons concerned would often not have the necessary financial resources or the time to exhaust the national appeals procedures, and appeals against a refusal of entry would not have any suspensive effect as far as a right to remain in the territory was concerned. Art. 68 para. 1 EC Treaty could therefore have resulted in the actual deprivation of these persons of effective judicial protection.

21 **Art. 68 para. 2 EC Treaty** further excluded the Court's jurisdiction on any measure or decision taken pursuant to art. 62 para. 1 with a view to the **maintenance of law and order and to the safeguarding of internal security**. In the context of Regulation 562/2006 this seemed to exclude any judicial review by the ECJ of the rules on the abolition of controls at the internal border (Title III Regulation 562/2006) including the exceptional temporary reinstatement of such controls. This exception excluded judicial review by the ECJ of measures that were prone to affect the fundamental rights of the individual, and equally put the uniform interpretation and application of Community law at risk.

22 Art. 67 para. 2 second indent requested the Council to take a decision in 2004 (i.e. five years after the entry into force of the Treaty of Amsterdam) with a view to "adapting the provisions relating to the powers of the Court of Justice".⁴⁰ In 2006, the Commission took the initiative to address these legal concerns and the inactivity of the Council in that respect and recommended to the Council to remove these restrictions. However, the Council never adopted such a decision.

⁴⁰ See as to the nature of the 'obligation' *Peers*, The Jurisdiction of the Court of Justice over EC Immigration and Asylum Law: Time For a Change?, in: *Baldaccini/Guild/Toner* (eds.), *Whose Freedom, Security and Justice? EU Immigration and Asylum Law and Policy*, p. 85-108, 96 et seqq.

Fortunately, the **Treaty of Lisbon** which entered into force on 1 December 2009 has improved the judicial protection in this area. The Treaty on the Functioning of the European Union⁴¹ does not contain any provision similar to art. 68 EC Treaty and the general rules on the jurisdiction of the ECJ therefore now also apply to Title V (“Area of Freedom, Security and Justice”) of the Treaty on the Functioning of the European Union, except the domains mentioned in Art. 276 TFEU which do not include the area of border controls.

II. Drafting history of Regulation 562/2006

23 The abolition of checks at internal borders and the transfer of those checks to the external borders was the main subject and purpose of the Schengen Convention of 1985 (art. 17) and the **Schengen Implementation Convention** of 1990 (hereinafter: SIC; Title II, art. 2-8).

Art. 2 para. 1 SIC provided for the abolition of controls at internal borders, **whereas art. 2 para. 2** left the possibility of Member States to reinstate border controls for public policy or national security reason unaffected.

The rules on the **crossing of the external borders** were found in **art. 3-8 SIC**. Art. 5 SIC being a key provision listed the conditions on which third country nationals could be granted entry into the territories of the participating States. According to art. 6 para. 1 SIC the checks at external borders were to be carried out by the competent national authorities in accordance with their national laws and taking into account certain uniform principles listed in art. 6 para. 2. Art. 7 SIC established an obligation of cooperation between the participating States, and art. 8 SIC conferred the power to adopt decisions on the practical aspects of carrying out the border checks unto the Schengen Executive Committee.

⁴¹ Consolidated version of the Treaty on the Functioning of the European Union, OJ C 115/47 (2008).

- 24 Making use of these powers, the Executive Committee adopted the **Common Manual**⁴² detailing in its Part I the conditions for entering the Schengen area and giving practical guidance for the implementation of art. 3-5 SIC, and in Part II the carrying out of border checks at the external borders and therewith supplementing art. 6-7 SIC.⁴³
- 25 In 1999, the **Treaty of Amsterdam** and the so-called Schengen Protocol attached to it integrated the Schengen acquis on border control into the legal framework of the Community. The Council designed art. 62 paras. 1 and 2 as the new legal basis for art. 2-7 SIC, the Decision of the Executive Committee establishing the Common Manual⁴⁴ and five more decisions of the Committee.⁴⁵
- 26 The **Common Manual** was a result of the Schengen intergovernmental cooperation and after the entry into force of the Treaty of Amsterdam, the powers to amend the Manual and its 21 annexes were conferred upon the Council.⁴⁶ The European Parliament had largely been and continued to be excluded from effective participation in the legislative process in the area of border control.

Even after the Common Manual had become part of EU law, it still differed from other EU law in that it did not take the form of any of the instruments provided for by art. 288 TFEU, which lead to some ambiguity about its legal effect. The legal

⁴² Decision of the Executive Committee of 28 April 1999 on the definitive versions of the Common Manual and the Common Consular Instructions (SCH/COM-ex (99)13), OJ L239/317 (2000). The Common Manual was first published in OJ C 313/97 (2002). It was considered as a confidential document until the Council took the necessary decisions to declassify it; Council Decision 2000/751/EC, OJ L 303/29 (2000), and Council Decision 2002/535/EC, OJ L 123/ 49 (2002); cf. *Peers/Rogers*, Border Control, p. 179. For an overview of the amendments made by the Council, see *Peers*, EJML 2006, p. 325 et seq.

⁴³ See *Peers*, EJML 2006, p. 324 et seqq.

⁴⁴ See note 42 above.

⁴⁵ Cf. *Peers*, EJML 2006, p. 324.

⁴⁶ Council Regulation 790/2001/EC of 24 April 2001 reserving to the Council implementing powers with regard to certain detailed provisions and practical procedures for carrying out border checks and surveillance, OJ L 116/5 (2001). The Parliament objected the proposal of the Regulation, but since it had only consultative rights its objections were subsequently ignored by the Council; cf. *Peers/Rogers*, Border Control, p. 179.

uncertainty was further increased by the fact that the Manual was a sort of hybrid between a source of EU law and a practical handbook that sometimes borrowed from or simply reproduced the contents of other sources as for example the Common Consular Instructions.⁴⁷

27 Discussions about the need to revise the Common Manual started not long after the entry into force of the Treaty of Amsterdam, and it became clear that the Member States favoured the Commission's proposal to **separate the legal instrument from the practical handbook**.⁴⁸

The Commission drafted and released a proposal for a regulation in May 2004.⁴⁹ With effect from 1 January 2005, the decision-making rules for measures adopted on the basis of art. 62 para. 1 and para. 2 lit. a) EC Treaty were amended⁵⁰ and provided for the application of the co-decision procedure pursuant to art. 251 EC Treaty and qualified majority voting. The Council and the European Parliament reached a final agreement in the first reading in June 2005,⁵¹ and the **regulation was formally adopted on 15 March 2006**.⁵²

28 **Regulation 562/2006 entered into force on 13 October 2006** with the exception of art. 34. Art. 34 establishes obligations of the Member States to notify certain facts to the Commission and entered into force already on 14 April 2006 (art. 40 Regulation 562/2006). With its entry into force, the following provisions and measures were **repealed**:

- art 2-8 SIC (art. 39 para. 1 Regulation 562/2006);

⁴⁷ Cf. Commission Proposal for a Council Regulation establishing a Community Code on the rules on the movement of persons across borders, COM (2004) 391 final, p. 6.

⁴⁸ Cf. COM (2004) 391 final, p. 6 et seq.; see also *Peers*, EJML 2006, 326 et seq.

⁴⁹ COM (2004) 391 final.

⁵⁰ Council Decision 2004/927/EC of 22 December 2004 providing for certain areas covered by Title IV of Part Three of the Treaty establishing the European Community to be governed by the procedure laid down in Article 251 of that Treaty, OJ L 396/45 (2004), art. 1 para. 1.

⁵¹ See *Peers*, EJML 2006, p. 329 for possible reasons for the first-reading agreement.

- the Common Manual and its annexes (art. 39 para. 2 lit. a);
- the relevant decisions of the Schengen Executive Committee (art. 39 para. 2 lit. b);
- Annex 7 of the Common Consular Instructions which was also part of the Common Manual (art. 39 para. 2 lit. c);
- the Council Regulation conferring the implementing powers in the area of border control on the Council (art. 39 para. 2 lit. e);
- Council Regulation 2133/2004 on the systematic stamping of travel documents of third country nationals (art. 39 para. 2 lit. g);
- Council Decision 2004/581/EC on signs at external borders (art. 39 para. 2 lit. e); and
- a Council Decision amending the Common Manual (art. 39 para. 2 lit. f).

Regulation 562/2009 has since been **amended by two regulations**: Regulation 296/2008⁵³ amending the existing rules on the implementing powers of the Commission and Regulation 81/2009 regarding the use of the VIS under the Schengen Code.⁵⁴

29 As mentioned above, one of the goals when drafting what later became Regulation 562/2006 was to separate the provisions of the Common Manual that were legally binding from the ones that were not. The practical guidance for border guards when implementing the provision of Regulation 562/2006 was then compiled in the so-

⁵² See also *Peers*, EJML 2006, p. 327 et seq.; *Peers/Rogers*, Border Control, p. 173.

⁵³ Regulation (EC) no. 296/2008 of the European Parliament and of the Council of 11 March 2008 amending Regulation (EC) no. 562/2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), as regards the implementing powers conferred on the Commission, OJ L 97/60 (2008).

⁵⁴ OJ L 35/56 (2009).

called “**Schengen Handbook**”⁵⁵ with a view to ensuring an effective and harmonized implementation of the common rules on border control. The provisions of the Schengen Handbook are recommendations and not legally binding.

III. Concept of the commentary

30 Regulation 562/2006 contains a multitude of provisions of different importance including some provisions of a rather technical nature. The legal significance of the provisions of this regulation may therefore vary. Against this background and considering the limited space available for this commentary, not all articles of Regulation 562/2006 can or will be discussed individually and systematically. Instead, an overview of the different titles of the regulation shall be given and only the articles of particular importance for the legal status of individuals and/or for the understanding of the basic principles of the regulation will be analyzed and discussed in more detail.

⁵⁵ COM (2006) 5186 final; amended by COM (2008) 2976 final.

Article 2

Definitions

For the purposes of this Regulation the following definitions shall apply:

1. "internal borders" means:

- (a) the common land borders, including river and lake borders, of the Member States;
- (b) the airports of the Member States for internal flights;
- (c) sea, river and lake ports of the Member States for regular ferry connections;

2. "external borders" means the Member States' land borders, including river and lake borders, sea borders and their airports, river ports, sea ports and lake ports, provided that they are not internal borders;

3. "internal flight" means any flight exclusively to or from the territories of the Member States and not landing in the territory of a third country;

4. "regular ferry connection" means any ferry connection between the same two or more ports situated in the territory of the Member States, not calling at any ports outside the territory of the Member States and consisting of the transport of passengers and vehicles according to a published timetable;

5. "persons enjoying the Community right of free movement" means:

- (a) Union citizens within the meaning of Article 17 (1) of the Treaty, and third-country nationals who are members of the family of a Union citizen exercising his or her right to free movement to whom Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States* applies;
- (b) third-country nationals and their family members, whatever their nationality, who, under agreements between the Community and its Member States, on the one hand, and those third countries, on the other hand, enjoy rights of free movement equivalent to those of Union citizens;

6. "third-country national" means any person who is not a Union citizen within the meaning of Article 17 (1) of the Treaty and who is not covered by point 5 of this Article;

7. "persons for whom an alert has been issued for the purposes of refusing entry" means any third-country national for whom an alert has been issued in the Schengen Information System (SIS) in accordance with and for the purposes laid down in Article 96 of the Schengen Convention;

* OJ L 158, 30.4.2004, p.77.

8. "border crossing point" means any crossing-point authorised by the competent authorities for the crossing of external borders;
9. "border control" means the activity carried out at a border, in accordance with and for the purposes of this Regulation, in response exclusively to an intention to cross or the act of crossing that border, regardless of any other consideration, consisting of border checks and border surveillance;
10. "border checks" means the checks carried out at border crossing points, to ensure that persons, including their means of transport and the objects in their possession, may be authorised to enter the territory of the Member States or authorised to leave it;
11. "border surveillance" means the surveillance of borders between border crossing points and the surveillance of border crossing points outside the fixed opening hours, in order to prevent persons from circumventing border checks;
12. "second line check" means a further check which may be carried out in a special location away from the location at which all persons are checked (first line);
13. "border guard" means any public official assigned, in accordance with national law, to a border crossing point or along the border or the immediate vicinity of that border who carries out, in accordance with this Regulation and national law, border control tasks;
14. "carrier" means any natural or legal person whose profession it is to provide transport of persons;
15. "residence permit" means:
- (a) all residence permits issued by the Member States according to the uniform format laid down by Council Regulation (EC) No 1030/2002 of 13 June 2002 laying down a uniform format for residence permits for third-country nationals;*
 - (b) all other documents issued by a Member State to third-country nationals authorising a stay in, or re-entry into, its territory, with the exception of temporary permits issued pending examination of a first application for a residence permit as referred to in point (a) or an application for asylum;
16. "cruise ship" means a ship which follows a given itinerary in accordance with a predetermined programme, which includes a programme of tourist activities in the various ports, and which normally neither takes passengers on nor allows passengers to disembark during the voyage;
17. "pleasure boating" means the use of pleasure boats for sporting or tourism purposes;

* OJ L 157, 15.6.2002, p.1.

18. "coastal fisheries" means fishing carried out with the aid of vessels which return every day or within 36 hours to a port situated in the territory of a Member State without calling at a port situated in a third country;

19. "threat to public health" means any disease with epidemic potential as defined by the International Health Regulations of the World Health Organisation and other infectious diseases or contagious parasitic diseases if they are the subject of protection provisions applying to nationals of the Member States.

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I. General remarks

- 1 The definitions in **art. 2 Regulation 2006/562** are of great significance for the correct interpretation of the other provisions of the Regulation. Whereas most of the definitions in art. 2 are self-explanatory, some are worth discussing and will be analysed in greater detail below.

II. Internal borders (para. 1)

- 2 **Art. 2 para. 1** defines “**internal borders**” as the common borders between Member States, thereby in principle also including the borders between the Schengen States and Great Britain and Ireland that are not bound by this regulation.¹ As a logical consequence of not being bound by this piece of legislation, art. 20 Regulation 562/2006 (which provides for the absence of controls at internal borders) does as a matter of course also not apply to these states. In addition, Protocol (No. 20) on the application of certain aspects of Article 26 TFEU to the United Kingdom and to Ireland (1997)² entitles the United Kingdom and Ireland to maintain controls at their

¹ See commentary on art. 1 marg. no. 6.

² OJ C 321 E/196 (2006).

borders to other Member States. Said protocol thereby modifies the legal scope of art. 26 TFEU³ with respect to the United Kingdom and Ireland.

- 3 Furthermore, the Schengen acquis has been extended to some Non-member States (Norway, Iceland and Switzerland), so that border controls are also abolished at the borders to these countries. Therefore, the notion of “internal borders” should be understood as to also include borders between the participating EU-Member States and the Non-EU Member States Norway, Iceland and Switzerland that are applying the Schengen acquis on the basis of association agreements.

III. Persons enjoying the right of free movement and third- country nationals (paras. 5 and 6)

- 4 **Art. 2 paras. 5, 6 Regulation 562/2006** define the notions of „**persons enjoying the Community right of free movement**“ and „**third country national**“. It is remarkable that the latter notion is defined more narrowly than the notion of „alien“ in art. 1 SIC, excluding all EU citizen and their family members (whatever their nationality) enjoying the right of free movement as well as any other person and their family members enjoying a equivalent right of free movement based bilateral agreements as for example the EEC Agreement or the Agreement on the free movement of persons concluded with Switzerland.⁴

- 5 The question under what conditions it can be presumed that a bilateral agreement grants rights that are equivalent to the free movement rights of EU citizen and their family members can be difficult to answer. A decisive factor should be whether the agreement grants rights that are similarly defined to the same categories of persons as the EU, including to persons not exercising any economic activity in particular.

³ According to the jurisprudence of the ECJ, art. 26 TFEU is, however, not directly applicable as far as the elimination of border controls is concerned. The latter could only be achieved through the adoption of corresponding harmonisation measures, cf. ECJ, judgment of 21 September 1999, case C-378/97, *Wijsenbeek*, ECR (1999) I-6207. See on the significance of this ruling in the present context *Peers*, Justice and Home Affairs, p. 124 et seqq.

⁴ Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons, OJ L 114/6 (2002).

- 6 The question if a person is to be considered as a third country national is of some importance since Regulation 562/2006 provides in different articles for less favourable rules as far as third country national are concerned, in comparison with persons enjoying the right of free movement laid down in EU law (for example in art. 5 in relation to the entry)
- 7 The larger definition of ‘aliens’ according to art. 1 SIC remains pertinent for the provisions of the SIC that are not repealed by art. 562/2006.⁵ According to art. 134 SIC, the SIC is, however, only applicable as far as it is in conformity with EU law, so that the exercise of the right of free movement pursuant to EU law may in no way be impeded by the provisions of the SIC that have not been repealed.

⁵ As for example art. 22 SIC concerning the obligation of aliens to register with the authorities. According to art. 39 para. 1, Regulation 562/2006 does only repeal art. 2-8 SIC.

Article 3

Scope

This Regulation shall apply to any person crossing the internal or external borders of Member States, without prejudice to:

- (a) the rights of persons enjoying the Community right of free movement;
- (b) the rights of refugees and persons requesting international protection, in particular as regards non-refoulement.

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I. General remarks

- 1 Art. 3 leaves explicitly the rights of persons enjoying the right of free movement and of persons seeking international protection unaffected.

II. The Rights of persons enjoying the right of free movement (lit. a)

- 2 **Art. 3 lit. a) Regulation 562/2006** states in no uncertain terms that the application of this regulation must **not impede the exercise of the right of free movement**, which is of particular importance to **third-country nationals** wanting to cross the external borders of the Union: If they are entitled to free movement as a **family member of a Union citizen**, they must be granted entry even if they do not meet all the requirements of art. 5 Regulation 562/2006. The European Court of Justice ruled in *MRAX*¹ in favour of a right of entry for a third-country national married to a Union citizen solely on the ground of the existing family relationship which could be

¹ ECJ, judgment of 25 July 2002, case C-459/99, *MRAX*, ECR (2002) I-6591.

proved. According to the Court, the right of entry is to be granted even if the person concerned is not in possession of a visa, a passport or a valid travel document, but can prove his identity and the existence of his marriage in another manner, provided that he does not constitute a threat to public order and security. Further, such a third-country national is not to be expelled from the territory solely on the grounds of his illegal entry. In case C-503/03, the Court declared that a third-country national married to a Union citizen was not to be denied entry solely on the ground that there was an alert for refusal of his entry in the SIS according to art. 96 SIC. In such a case, the „automatic“ refusal of entry according to art. 5 and 15 SIC in cases of an existing alert would not be in compliance with the requirements of EU law which took precedence over the SIC according to art. 134 SIC. EU law would require the authorities to examine in each individual case if the individual behaviour of the person concerned constituted a risk to public order and security. Considering the clear wording of art. 3 lit. a) Regulation 562/2006, it is to be assumed that the conclusions drawn from this jurisprudence are also applicable and pertinent on the basis of Regulation 562/2006, which is of particular importance against the background that the requirements for an alert for the refusal of entry of a third-country national in general are much lower than for a refusal of entry of third-country family member of a Union citizen exercising his or her right of free movement.² In this context, it should further be recalled that pursuant to the findings of the ECJ in the *Metock* case³ the right of stay of third-country nationals that are family members of a Union citizen is not (or no longer)⁴ dependent on a previous legal sojourn in the EU territory.⁵

² Cf. also *Eicke*, *Paradise Lost? Exclusion and Expulsion from the EU*, in: Groenendijk/Guild/Minderhoud (eds.), *In Search of Europe's Borders*, p. 147-168, p. 160 et seqq.

³ ECJ, judgment of 25 July 2008, case C-127/08, *Metock*, ECR (2008) I-6241.

⁴ Cf. the previous different findings in the Court's judgment in the *Akrich* case, ECJ, judgment of 23 September 2003, case C-109/01, *Akrich*, ECR (2003) I-9607.

⁵ Cf. the detailed analysis of the *Metock* judgment and its embedding in the previous jurisprudence of the Court of *Epiney*, EuR 2008, p. 840 et seqq.

III. The rights of refugees and persons requesting international protection (lit. b)

- 3 According to **art. 3 b) Regulation 562/2006** the **rights of refugees and persons requesting international protection** remain unaffected by this regulation. Under certain conditions, such persons must be granted a right of entry in order for their applications to be examined.⁶

⁶ Cf. the detailed comments on art. 1 marg. no. 11 et seqq.

TITLE II

EXTERNAL BORDERS

CHAPTER I

Crossing of external borders and conditions for entry

Article 4

Crossing of external borders

1. External borders may be crossed only at border crossing points and during the fixed opening hours. The opening hours shall be clearly indicated at border crossing points which are not open 24 hours a day.

Member States shall notify the list of their border crossing points to the Commission in accordance with Article 34.

2. By way of derogation from paragraph 1, exceptions to the obligation to cross external borders only at border crossing points and during the fixed opening hours may be allowed:

(a) in connection with pleasure boating or coastal fishing;

(b) for seamen going ashore to stay in the area of the port where their ships call or in the adjacent municipalities;

(c) for individuals or groups of persons, where there is a requirement of a special nature, provided that they are in possession of the permits required by national law and that there is no conflict with the interests of public policy and the internal security of the Member States;

(d) for individuals or groups of persons in the event of an unforeseen emergency situation.

3. Without prejudice to the exceptions provided for in paragraph 2 or to their international protection obligations, Member States shall introduce penalties, in accordance with their national law, for the unauthorised crossing of external borders at places other than border crossing points or at times other than the fixed opening hours. These penalties shall be effective, proportionate and dissuasive.

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I. General principles on the crossing of external borders (para. 1)

- 1 Title II (art. 4-19) regulates the controls at external borders.
- 2 Art. 4 establishes that **external borders** may only be **crossed at the designated border crossing points and during the fixed opening hours** (art. 4 para. 1 Regulation 562/2006). This article replaces art. 3 SIC and points 1.2 and 1.3 of part I of the Common Manual. According to art. 34 para. 1 (b) Regulation 562/2006, Member States have to notify their border crossing points to the Commission, the updates are then published in the Official Journal.¹ The competent national authorities have to carry out border surveillance pursuant to **art. 12** in order to prevent unauthorised border crossings.

II. Possible derogations (para. 2)

- 3 Art. 4 para. 2 provides for **derogations** from Art. 4 para. 1 in connection with pleasure boating and coastal fishing lit. a),² for seamen going ashore only to stay near the port or the surrounding area where their ships call (b),³ under certain conditions for persons where there is a “requirement of a special nature” lit. c), and for individual or groups in an unforeseen emergency situation lit. d). Whereas art. 4 para. 2 a), b) and d) provide for rather clear exceptions, the meaning of the exception in art. 4 para. 2 lit. c) remains rather obscure. It seems to be sufficient that there is a “requirement of a special nature” without providing further guidance on what kind of requirements are to be considered to be of such nature. No extraordinary situation of any kind is required, leaving a large margin of discretion to the Member States that is only limited in that the public order and internal security of the other Member States may not be threatened (which are once again indeterminate legal concepts that need to be further clarified). One could think of touristic activities or border crossings for

¹ A monthly updated list is also available on the website of the Directorate-General for Justice, Freedom and Security.

² See the definitions in art. 2 paras. 17 and 18 of Regulation 562/2006.

³ Cf. point 3.4 of Part Two, Section 1 of the Schengen Handbook.

certain types of workers as possible examples for the application of art. 4 para. 2 c) Regulation 562/2006.

- 4 It should further be noted in this context that this provision (and as a matter of fact all provisions of Regulation 562/2006) is without prejudice to the rights of holder of local border traffic cards under Regulation 1931/2006 on local border traffic at the external borders⁴ and/ or under bilateral agreements.⁵ According to art. 15 para. 1 Regulation 1931/2006 the bilateral agreements concluded for the implementation of the local border traffic regime may provide for an easing of the border crossing in derogation of art. 4 para. 1 Regulation 562/2006.

III. Penalties for the illegal crossing of external borders (para. 3)

- 5 Art. 4 para. 3 takes over art. 3 para. 2 SIC and concerns the introduction of penalties for violations of art. 4 para. 1. Art. 4 para. 3 is without prejudice to the prohibition of criminal sanctions in art. 31 of the Geneva Convention on the status of refugees of 21 June 1951 imposed solely on account of the illegal entry or presence of a refugee in the sense of art. 1 of the Convention on the conditions that he comes directly from a country where he was at a risk of being persecuted and that he presents himself without delay to the authorities and gives good reasons for his illegal entry or presence.⁶

⁴ Regulation (EC) no. 1931/2006 of 20 December 2006 laying down rules on local border traffic at the external borders of the Member States and amending the provisions of the Schengen Convention; OJ L 405/1 (2006); Corrigendum, OJ L 29/3 (2007).

⁵ Art. 35 Regulation 562/2006, at 3.4 of Part Two, Section 1 of the Schengen Handbook.

⁶ For a detailed commentary on art. 31 Geneva Refugee Convention see for example *Hathaway*, *The Rights of Refugees under International Law*, p. 370-439. See also the comments on refugees, asylum seekers and persons in need of international protection, art. 1 marg. no. 11 et seqq.

Article 5

Entry conditions for third-country nationals

1. For stays not exceeding three months per six-month period, the entry conditions for third-country nationals shall be the following:

(a) they are in possession of a valid travel document or documents authorising them to cross the border;

(b) they are in possession of a valid visa, if required pursuant to Council Regulation (EC) No 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement,* except where they hold a valid residence permit;

(c) they justify the purpose and conditions of the intended stay, and they have sufficient means of subsistence, both for the duration of the intended stay and for the return to their country of origin or transit to a third country into which they are certain to be admitted, or are in a position to acquire such means lawfully;

(d) they are not persons for whom an alert has been issued in the SIS for the purposes of refusing entry;

(e) they are not considered to be a threat to public policy, internal security, public health or the international relations of any of the Member States, in particular where no alert has been issued in Member States' national data bases for the purposes of refusing entry on the same grounds.

2. A non-exhaustive list of supporting documents which the border guard may request from the third-country national in order to verify the fulfilment of the conditions set out in paragraph 1, point c, is included in Annex I.

3. Means of subsistence shall be assessed in accordance with the duration and the purpose of the stay and by reference to average prices in the Member State(s) concerned for board and lodging in budget accommodation, multiplied by the number of days stayed.

Reference amounts set by the Member States shall be notified to the Commission in accordance with Article 34.

The assessment of sufficient means of subsistence may be based on the cash, travellers' cheques and credit cards in the third-country national's possession. Declarations of sponsorship, where such declarations are provided for by national law and letters of guarantee from hosts, as defined by national law, where the third-country national is staying with a host, may also constitute evidence of sufficient means of subsistence.

4. By way of derogation from paragraph 1:

(a) third-country nationals who do not fulfil all the conditions laid down in paragraph 1 but hold a residence permit or a re-entry visa issued by one of the Member States or, where required, both documents, shall be authorised to enter the territories of the other Member States for transit purposes so that they may reach the territory of the

* OJ L 81, 21.3.2001, p.1. Regulation as last amended by Regulation (EC) No 851/2005 (OJ L 141, 4.6.2005, p.3).

Member State which issued the residence permit or re-entry visa, unless their names are on the national list of alerts of the Member State whose external borders they are seeking to cross and the alert is accompanied by instructions to refuse entry or transit;

(b) third-country nationals who fulfil the conditions laid down in paragraph 1, except for that laid down in point (b), and who present themselves at the border may be authorised to enter the territories of the Member States, if a visa is issued at the border in accordance with Council Regulation (EC) No 415/2003 of 27 February 2003 on the issue of visas at the border, including the issue of such visas to seamen in transit.*

Visas issued at the border shall be recorded on a list.

If it is not possible to affix a visa in the document, it shall, exceptionally, be affixed on a separate sheet inserted in the document. In such a case, the uniform format for forms for affixing the visa, laid down by Council Regulation (EC) No 333/2002 of 18 February 2002 on a uniform format for forms for affixing the visa issued by Member States to persons holding travel documents not recognised by the Member State drawing up the form,** shall be used;

(c) third-country nationals who do not fulfil one or more of the conditions laid down in paragraph 1 may be authorised by a Member State to enter its territory on humanitarian grounds, on grounds of national interest or because of international obligations. Where the third-country national concerned is the subject of an alert as referred to in paragraph 1(d), the Member State authorising him or her to enter its territory shall inform the other Member States accordingly.

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* OJ L 64, 7.3.2003, p.1.

** OJ L 53, 23.2.2002, p.4.

I. General remarks

- 1 **Art. 5** lists the **conditions of entry for third-country nationals** and certain derogations thereof. This art. is one of the key provisions of Regulation 562/2006 and sets out the conditions of entry into the Schengen area for stays not exceeding three months per six-month period. Further guidance for the application of art. 5 Regulation 562/2006 is found in point 1.1 of Part Two, Section 1 of the Schengen Handbook. Art. 5 Regulation 562/2006 replaces art. 5 SIC and points 2 to 4 of Part 1 of the Common Manual.

II. Individual right of entry

- 2 Whereas art. 5 SIC stipulated that aliens “**may** be granted entry” if the conditions mentioned were fulfilled, art. 5 Regulation 562/2009 is worded differently and states that “the entry conditions for third-country nationals **shall** be the following”. The change of wording in art. 5 was made at the behest of the European Parliament and the question has to be raised if art. 5 Regulation 562/2009 stipulates an **individual right of entry** into the Schengen area also for third-country nationals within the meaning of art. 2 para. 6 Regulation 562/2006 if these persons fulfil all the conditions listed.¹
- 3 In this respect, art. 5 Regulation 562/2009 needs to be considered in conjunction with **art. 13 Regulation 562/2009** according to which entry shall be refused if a third-country national does not fulfil the conditions of art. 5. In deciding if the conditions are actually fulfilled, the national authorities will have a certain margin of discretion. Nevertheless it is clear that their discretion is not unlimited: Art. 13 para. 2 Regulation 562/2006 states that a refusal of entry needs to be substantiated and authorities are bound to use the standard form in Annex V containing an exhaustive list of reasons for refusal that is corresponding to the entry conditions set out in art. 5 para. 1 Regulation 562/2008. Persons refused entry shall have the right to appeal (art. 13 para. 3 Regulation 562/2006).

¹ *Peers*, EJML 2006, p. 332.

4 The explicit possibility to appeal the refusal decision speaks clearly in favour of the conclusion that art. 5 does grant individual rights and if the conditions of this provision are fulfilled third-country nationals have an individual right of entry.² In addition, the European Court of Justice has ruled that EU law provisions are granting individual rights if the provisions in question also aim at the protection of the interest of the individual, irrespective of whether the actual wording of the provision states (only) a corresponding obligation of the Member States. It is obvious that the entry into the Schengen area is of (sometimes great) importance for the individual, and therefore art. 5 para. 1 should be interpreted as granting an individual right of entry if the conditions mentioned in this provisions are fulfilled.

5 It should, however, not be forgotten that **no „right“ to be issued a visa** can be deduced from Regulation 539/2001 so that in conclusion, the decision to let a person enter the Schengen area remains – at least with respect to persons who need a visa – at the discretion of the Member States. Furthermore, the indeterminate legal notions used in art. 5 further give the national authorities a certain margin of appreciation, even if – as argued – a right to entry has to be admitted.

III. Conditions of entry into the Schengen Area (para. 1)

6 **Art. 5 para. 1 Regulation 562/2006** lists five conditions of entry into the Schengen area.

1. Possession of valid travel documents (para. 1 lit. a)

7 What documents are accepted as valid travel documents by the individual Member States can be found in Decisions (98) 56 and (99) 14 of the Schengen Executive Committee.³ Generally speaking most of the Member States accept ordinary passports, diplomatic passports, service passports and travel documents for refugees as valid travel documents in the sense of art. 5 para. 1 lit. a) Regulation 562/2006. According to art. 7 para. 3 (i), (ii) Regulation 562/2006 border guards shall examine

² See, however, the restrictions that applied to judicial protection in areas covered by Title IV EC Treaty explained in the comments on art. 1 marg. no. 17 et seqq. above.

³ The lists have since been updated in accordance with Regulation 789/2001.

whether this condition is fulfilled by verifying that the travel document is not expired and does not bear signs of falsification or counterfeiting.

IV. Possession of a valid visa if required pursuant to regulation 539/2001 (para. 1 lit. b)⁴

8 Once the VIS will be functional, border guards will have the possibility but also the obligation to consult the VIS to verify the identity of the person and the authenticity of the visa (art. 7 para. 3 lit. a) (aa) Regulation 562/2006).

9 If the third-country national does not need a visa pursuant to Regulation 539/2001, border guards have to examine the entry and exit stamps in his or her travel document in order to verify that he or she has not already exceeded the maximum duration of stay of three months per six-month period (art. 7 para. 3 (iii) Regulation 562/2006).

10 Art. 5 para. 1 lit. b) provides for an exception from the visa requirement if the third-country national is in possession of a valid residence permit of a Schengen state. Such a valid residence permit⁵ can either be a permit issued on the basis of EU law (as for example the family reunification directive, Directive 2003/86,⁶ or the long-term residents directive, Directive 2003/109)⁷ or any other document issued by a Member State pursuant to national law authorizing a stay in its territory. A list of the national residence permits has to be notified to the Commission pursuant to art. 34 para. 1.

⁴ See the *Epiney/Egbuna-Joss*, Commentary on Regulation 539/2001, in this volume.

⁵ Cf. the definition in art. 2 (15) that refers to Regulation 1030/2002 laying down a uniform format for residence permits for third-country nationals, OJ L 157/1 (2002).

⁶ Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, OJ L251/12 (2003).

⁷ Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, OJ L 16/44 (2004).

V. Justified purpose of stay and sufficient means of subsistence (para. 1 lit. c)

- 11 Art. 5 para. 1 lit. c) is to be read in conjunction with art. 5 paras. 2, 3 Regulation 562/2006 in conjunction with Annex I and art. 7 para. 3 (iv), (v) Regulation 562/2006.
- 12 Whether the conditions of art. 5 para. 1 lit. c) are fulfilled or not is to be verified by requesting supporting documents, a non-exhaustive list of which is found in Annex I.
- 13 What constitute **sufficient means of subsistence** is to be assessed in reference of the purpose and the duration of stay (art. 5 para. 3 subpara. 1). The Member States have to notify their reference amounts to the Commission (art. 5 para. 3 subpara. 2, Art. 34 para. 1):⁸ Some Member States have set the reference amount in relation to their national subsistence minimum, others have set out a specific amount or formula while yet others have only notified their guidelines for assessment. A majority of states considers around 30 € per day to be sufficient, some states request, however, proof of higher financial resources. Certain states have also notified special rules for students or visitors staying with friends or family.
- 14 The third-country nationals need to proof by means of cash, travellers' cheques and credit cards in their possession that they have the required amounts at their disposal. If provided for in national law, sponsorship declarations and letters of guarantee are also accepted (art. 5 para. 3 subpara. 3 Regulation 562/2006).
- 15 By and large, it is welcome that the criteria for the assessment of sufficient means have been stated more precisely than in art. 5 SIC and that the discretion of the authorities in assessing the means has been further limited. The specifications in art. 5 para. 3 Regulation 562/2006 do nevertheless also not guarantee a uniform application of this criterion since the required amounts may vary considerably between the Member States as shown above.

⁸ For an updated list of the reference amounts notified consult the Commission's scoreboard, http://ec.europa.eu/justice_home/doc_centre/freetravel/rights/doc_freetravel_rights_en.htm, II.3 (last access: 13 January 2010).

16 It is surprising that according to art. 5 para. 1 lit. c) Regulation 562/2006 third-country nationals still have to **justify the purpose and circumstances of their stay**: If a stay is in principle permissible independent of its purpose – as seems to be suggested by art. 5 para. 1 Regulation 562/2006 – and if there is an actual right of entry if the requirements of art. 5 para. 1 are met, it is questionable why the purpose of the stay must still be justified in detail. Depending on the circumstances, such an obligation to state the purpose of stay may violate the private sphere of the individual, and the statement of the purpose of stay may furthermore also affect the decisions of the competent authorities (when making use of their discretion). It is further unclear when a purpose of stay can be considered as having been „justified“: It will be difficult to provide actual proof for several purposes of stay.

17 Finally, it should be pointed out that the interests of the Member States are sufficiently protected by ensuring that the third-country national is not a threat to public policy, internal security, public health or the international relations of any of the Member States. Against this background, the justification of the purpose of stay in art. 5 para. 1 lit. c) – whereas the standard of „proof“ should be quite low in order not to impede the right of entry – should be interpreted in conjunction with art. 5 para. 1 as to only be required in order to ensure that the person concerned is not a risk to any of the public interests mentioned in art. 5 para. 3 lit. e) Regulation 562/2006.

VI. No art. 96 SIC alert in the SIS for the purpose of refusing entry (para. 1 lit. d)

18 It should be recalled⁹ that a third-country national who is married to a Union citizen may not be refused entry solely because of an art. 96 SIC alert.¹⁰ In such situations, the rules on the right of free movement laid down in EU law apply and take precedence so that the authorities must examine in each individual case if the person concerned constitutes a risk for public order and security.

⁹ See already the comments made above, art. 3 marg. no. 2

¹⁰ ECJ, judgment of 31 January 2006, case C-503/03, *Commission v. Spain*, ECR (2006) I-1097.

VII. No threat to public policy, internal security, public health or international relations (para. 1 lit. e)

- 19 Not constituting a **threat to public policy, internal security, public health or international relations** of any of the Schengen states is the last condition mention in art. 5 para. 1.
- 20 The condition that the person may not constitute a **threat to public health** is new compared to art. 5 SIC.¹¹ The notion is defined in art. 2 para. 19 Regulation 562/2006 and means any disease with epidemic potential and other infectious or contagious diseases if there are certain protection provisions applying to nationals of the Member State concerned.
- 21 Entry is to be refused if the third-country national is considered a threat to any of the listed public interests of **any** Member State. The third-country national therefore has (theoretically) to meet the respective requirements of **all** Member States, which can constitute a significant obstacle. Even though these are EU law notions, Member States have a certain margin of appreciation and as a result, the concepts of these public interests in the Member States may differ.

VIII. Derogations from the conditions of entry (para. 4)

- 22 **Art. 5 para. 4** provides for three **possible derogations to art. 5 para. 1**.
- 1. Right of transit when in possession of a residence permit or a re-entry visa (para. 4 lit. a)**
- 23 If a third-country national is in **possession of a residence permit or a re-entry visa**, he has the right of transit through the other Schengen states in order to reach the state that issued his permit, even if he does not fulfil all the conditions of art. 5 para. 1.
- 24 Art. 5 para. 4 lit. a) Regulation 562/2006 is also to be interpreted as granting individual rights to the persons concerned. According to this provision, entry into the Schengen area can only be refused if there is an alert with the instruction to refuse

¹¹ Cf. *Peers*, EJML 2006, p. 332.

entry or transit in the national database of the Schengen states whose external borders he wants to cross. As a result, third-country nationals who hold a residence permit need generally not prove that they have sufficient means of subsistence, neither need they provide supporting documents identifying their purpose of stay.

2. Issue of visa at the border (para. 4 lit. b)

25 To a third-country national who fulfils all the conditions in art. 5 para. 1 except that he does not have the necessary visa, a **visa can be issued at the border pursuant to Regulation 414/2003.**¹²

3. Entry on humanitarian grounds, grounds of national interest or because of international obligations (para. 4 lit. c)

26 Third-country nationals who do not fulfil the conditions of art. 5 para. 1 may be granted **entry on humanitarian grounds, on grounds of national interest or because of international obligations.** The latter reason is of particular importance for persons seeking international protection and in the context of the non-refoulement principle. If a SIS alert exists for that person, the Member state authorising entry has to inform the other Member States.

27 Art. 5 para. 4 lit. c) is worded in a non-binding way (“...*may* be granted...”) leaving the decision to grant entry in such cases to the discretion of the Member State concerned. It should be remembered, however, that the obligations flowing from the prohibition of refoulement¹³ are of mandatory nature and under certain conditions prohibit the rejection of a person at the border.

¹² Council Regulation (EC) no. 415/2003 of 27 February 2003 on the issue of visas at the border, including the issue of such visas to seamen in transit, OJ L 64/1 (2003).

¹³ See the detailed comments on refugees, asylum seekers and persons in need of international protection above, art. 1 marg. no. 11-16.

Article 6

Conduct of border checks

1. Border guards shall, in the performance of their duties, fully respect human dignity.

Any measures taken in the performance of their duties shall be proportionate to the objectives pursued by such measures.

2. While carrying out border checks, border guards shall not discriminate against persons on grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

Article 7

Border checks on persons

1. Cross-border movement at external borders shall be subject to checks by border guards. Checks shall be carried out in accordance with this chapter.

The checks may also cover the means of transport and objects in the possession of the persons crossing the border. The law of the Member State concerned shall apply to any searches which are carried out.

2. All persons shall undergo a minimum check in order to establish their identities on the basis of the production or presentation of their travel documents. Such a minimum check shall consist of a rapid and straightforward verification, where appropriate by using technical devices and by consulting, in the relevant databases, information exclusively on stolen, misappropriated, lost and invalidated documents, of the validity of the document authorising the legitimate holder to cross the border and of the presence of signs of falsification or counterfeiting.

The minimum check referred to in the first subparagraph shall be the rule for persons enjoying the Community right of free movement.

However, on a non-systematic basis, when carrying out minimum checks on persons enjoying the Community right of free movement, border guards may consult national and European databases in order to ensure that such persons do not represent a genuine, present and sufficiently serious threat to the internal security, public policy, international relations of the Member States or a threat to the public health.

The consequences of such consultations shall not jeopardise the right of entry of persons enjoying the Community right of free movement into the territory of the Member State concerned as laid down in Directive 2004/38/EC.

3. On entry and exit, third-country nationals shall be subject to thorough checks.

(a) thorough checks on entry shall comprise verification of the conditions governing entry laid down in Article 5 (1) and, where applicable, of documents authorising residence and the pursuit of a professional activity. This shall include a detailed examination covering the following aspects:

(i) verification that the third-country national is in possession of a document which is valid for crossing the border and which has not expired, and that the document is accompanied, where applicable, by the requisite visa or residence permit;

- (ii) thorough scrutiny of the travel document for signs of falsification or counterfeiting;
- (iii) examination of the entry and exit stamps on the travel document of the third-country national concerned, in order to verify, by comparing the dates of entry and exit, that the person has not already exceeded the maximum duration of authorised stay in the territory of the Member States;
- (iv) verification regarding the point of departure and the destination of the third-country national concerned and the purpose of the intended stay, checking if necessary, the corresponding supporting documents;
- (v) verification that the third-country national concerned has sufficient means of subsistence for the duration and purpose of the intended stay, for his or her return to the country of origin or transit to a third country into which he or she is certain to be admitted, or that he or she is in a position to acquire such means lawfully;
- (vi) verification that the third-country national concerned, his or her means of transport and the objects he or she is transporting are not likely to jeopardise the public policy, internal security, public health or international relations of any of the Member States. Such verification shall include direct consultation of the data and alerts on persons and, where necessary, objects included in the SIS and in national data files and the action to be performed, if any, as a result of an alert;
- (aa) if the third country national holds a visa referred to in Article 5 (1) (b), the thorough checks on entry shall also comprise verification of the identity of the holder of the visa and of the authenticity of the visa, by consulting the Visa Information System (VIS) in accordance with Article 18 of Regulation (EC) No 767/2008 of the European Parliament and of the Council of 9 July 2008 concerning the Visa Information System (VIS) and the exchange of data between Member States on short-stay visas (VIS Regulation);
- (ab) by way of derogation, where:
 - (i) traffic of such intensity arises that the waiting time at the border crossing point becomes excessive;
 - (ii) all resources have already been exhausted as regards staff, facilities and organisation; and
 - (iii) on the basis of an assessment there is no risk related to internal security and illegal immigration;the VIS may be consulted using the number of the visa sticker in all cases and, on a random basis, the number of the visa sticker in combination with the verification of fingerprints.

However, in all cases where there is doubt as to the identity of the holder of the visa and/or the authenticity of the visa, the VIS shall be consulted systematically using the number of the visa sticker in combination with the verification of fingerprints.

This derogation may be applied only at the border crossing point concerned for as long as the above conditions are met;
- (ac) the decision to consult the VIS in accordance with point (ab) shall be taken by the border guard in command at the border crossing point or at a higher level. The Member State concerned shall immediately notify the other Member States and the Commission of any such decision;
- (ad) each Member State shall transmit once a year a report on the application of point (ab) to the European Parliament and the Commission, which shall include the number of third-country nationals who were checked in the VIS using the number of

the visa sticker only and the length of the waiting time referred to in point (ab)(i); (ae) points (ab) and (ac) shall apply for a maximum period of three years, beginning three years after the VIS has started operations. The Commission shall, before the end of the second year of application of points (ab) and (ac), transmit to the European Parliament and to the Council an evaluation of their implementation. On the basis of that evaluation, the European Parliament or the Council may invite the Commission to propose appropriate amendments to this Regulation;

(b) thorough checks on exit shall comprise:

(i) verification that the third-country national is in possession of a document valid for crossing the border;

(ii) verification of the travel document for signs of falsification or counterfeiting;

(iii) whenever possible, verification that the third-country national is not considered to be a threat to public policy, internal security or the international relations of any of the Member States;

(c) In addition to the checks referred to in point (b) thorough checks on exit may also comprise:

(i) verification that the person is in possession of a valid visa, if required pursuant to Regulation (EC) No 539/2001, except where he or she holds a valid residence permit; such verification may comprise consultation of the VIS in accordance with Article 18 of Regulation (EC) No 767/2008;

(ii) verification that the person did not exceed the maximum duration of authorised stay in the territory of the Member States;

(iii) consultation of alerts on persons and objects included in the SIS and reports in national data files.

(d) for the purpose of identification of any person who may not fulfil, or who may no longer fulfil, the conditions for entry, stay or residence on the territory of the Member States, the VIS may be consulted in accordance with Article 20 of Regulation (EC) No 767/2008.

4. Where facilities exist and if requested by the third-country national, such thorough checks shall be carried out in a private area.

5. Third-country nationals subject to a thorough second line check shall be given information on the purpose of, and procedure for, such a check.

This information shall be available in all the official languages of the Union and in the language(s) of the country or countries bordering the Member State concerned and shall indicate that the third-country national may request the name or service identification number of the border guards carrying out the thorough second line check, the name of the border crossing point and the date on which the border was crossed.

6. Checks on a person enjoying the Community right on free movement shall be carried out in accordance with Directive 2004/38/EC.

7. Detailed rules governing the information to be registered are laid down in Annex II.

Article 8

Relaxation of border checks

1. Border checks at external borders may be relaxed as a result of exceptional and

unforeseen circumstances. Such exceptional and unforeseen circumstances shall be deemed to be those where unforeseeable events lead to traffic of such intensity that the waiting time at the border crossing point becomes excessive, and all resources have been exhausted as regards staff, facilities and organisation.

2. Where border checks are relaxed in accordance with paragraph 1, border checks on entry movements shall in principle take priority over border checks on exit movements.

The decision to relax checks shall be taken by the border guard in command at the border crossing point.

Such relaxation of checks shall be temporary, adapted to the circumstances justifying it and introduced gradually.

3. Even in the event that checks are relaxed, the border guard shall stamp the travel documents of third-country nationals both on entry and exit, in accordance with Article 10.

4. Each Member State shall transmit once a year a report on the application of this Article to the European Parliament and the Commission.

Article 9

Separate lanes and information on signs

1. Member States shall provide separate lanes, in particular at air border crossing points in order to carry out checks on persons, in accordance with Article 7. Such lanes shall be differentiated by means of the signs bearing the indications set out in the Annex III.

Member States may provide separate lanes at their sea and land border crossing points and at borders between Member States not applying Article 20 at their common borders. The signs bearing the indications set out in the Annex III shall be used if Member States provide separate lanes at those borders.

Member States shall ensure that such lanes are clearly signposted, including where the rules relating to the use of the different lanes are waived as provided for in paragraph 4, in order to ensure optimal flow levels of persons crossing the border.

2. (a) Persons enjoying the Community right of free movement are entitled to use the lanes indicated by the sign in part A of Annex III. They may also use the lanes indicated by the sign in part B of Annex III.

(b) All other persons shall use the lanes indicated by the sign in part B of Annex III.

The indications on the signs referred to in points (a) and (b) may be displayed in such language or languages as each Member State considers appropriate.

3. At sea and land border crossing points, Member States may separate vehicle traffic into different lanes for light and heavy vehicles and buses by using signs as shown in Part C of Annex III.

Member States may vary the indications on those signs where appropriate in the light of local circumstances.

4. In the event of a temporary imbalance in traffic flows at a particular border crossing point, the rules relating to the use of the different lanes may be waived by the competent authorities for the time necessary to eliminate such imbalance.

5. The adaptation of existing signs to the provisions of paragraphs 1, 2 and 3 shall be completed by 31 May 2009. Where Member States replace existing signs or put up

new ones before that date, they shall comply with the indications provided for in those paragraphs.

Article 10

Stamping of the travel documents of third-country nationals

1. The travel documents of third-country nationals shall be systematically stamped on entry and exit. In particular an entry or exit stamp shall be affixed to:

- (a) the documents, bearing a valid visa, enabling third-country nationals to cross the border;
- (b) the documents enabling third-country nationals to whom a visa is issued at the border by a Member State to cross the border;
- (c) the documents enabling third-country nationals not subject to a visa requirement to cross the border.

2. The travel documents of nationals of third countries who are members of the family of a Union citizen to whom Directive 2004/38/EC applies, but who do not present the residence card provided for in Article 10 of that Directive, shall be stamped on entry or exit.

The travel documents of nationals of third countries who are members of the family of nationals of third countries enjoying the Community right of free movement, but who do not present the residence card provided for in Article 10 of Directive 2004/38/EC, shall be stamped on entry or exit.

3. No entry or exit stamp shall be affixed:

- (a) to the travel documents of Heads of State and dignitaries whose arrival has been officially announced in advance through diplomatic channels;
- (b) to pilots' licences or the certificates of aircraft crew members;
- (c) to the travel documents of seamen who are present within the territory of a Member State only when their ship puts in and in the area of the port of call;
- (d) to the travel documents of crew and passengers of cruise ships who are not subject to border checks in accordance with point 3.2.3 of Annex VI;
- (e) to documents enabling nationals of Andorra, Monaco and San Marino to cross the border.

Exceptionally, at the request of a third-country national, insertion of an entry or exit stamp may be dispensed with if insertion might cause serious difficulties for that person. In that case, entry or exit shall be recorded on a separate sheet indicating the name and passport number. That sheet shall be given to the third-country national.

4. The practical arrangements for stamping are set out in Annex IV.

5. Whenever possible, third-country nationals shall be informed of the border guard's obligation to stamp their travel document on entry and exit, even where checks are relaxed in accordance with Article 8.

6. The Commission shall report to the European Parliament and the Council by the end of 2008 on the operation of the provisions on stamping travel documents.

Article 11

Presumption as regards fulfilment of conditions of duration of stay

1. If the travel document of a third-country national does not bear an entry stamp, the competent national authorities may presume that the holder does not fulfil, or no longer fulfils, the conditions of duration of stay applicable within the Member State concerned.

2. The presumption referred to in paragraph 1 may be rebutted where the third-country national provides, by any means, credible evidence, such as transport tickets or proof of his or her presence outside the territory of the Member States, that he or she has respected the conditions relating to the duration of a short stay.

In such a case:

(a) where the third-country national is found on the territory of a Member State applying the Schengen *acquis* in full, the competent authorities shall indicate, in accordance with national law and practice, in his or her travel document the date on which, and the place where, he or she crossed the external border of one of the Member States applying the Schengen *acquis* in full;

(b) where the third-country national is found on the territory of a Member State in respect of which the decision contemplated in Article 3(2) of the 2003 Act of Accession has not been taken, the competent authorities shall indicate, in accordance with national law and practice, in his or her travel document the date on which, and the place where, he or she crossed the external border of such a Member State.

In addition to the indications referred to in points (a) and (b), a form as shown in Annex VIII may be given to the third-country national.

Member States shall inform each other and the Commission and the Council General Secretariat of their national practices with regard to the indications referred to in this Article.

3. Should the presumption referred to in paragraph 1 not be rebutted, the third-country national may be expelled by the competent authorities from the territory of the Member States concerned.

Article 12

Border surveillance

1. The main purpose of border surveillance shall be to prevent unauthorised border crossings, to counter cross-border criminality and to take measures against persons who have crossed the border illegally.

2. The border guards shall use stationary or mobile units to carry out border surveillance.

That surveillance shall be carried out in such a way as to prevent and discourage persons from circumventing the checks at border crossing points.

3. Surveillance between border crossing points shall be carried out by border guards whose numbers and methods shall be adapted to existing or foreseen risks and threats. It shall involve frequent and sudden changes to surveillance periods, so that unauthorised border crossings are always at risk of being detected.

4. Surveillance shall be carried out by stationary or mobile units which perform their duties by patrolling or stationing themselves at places known or perceived to be

sensitive, the aim of such surveillance being to apprehend individuals crossing the border illegally. Surveillance may also be carried out by technical means, including electronic means.

5. Additional measures governing surveillance may be adopted. Those measures, designed to amend non-essential elements of this Regulation by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 33(2).

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I. Basic principles for the carrying out of border checks (art. 6)

- 1 **Art. 6** codifies **basic principles** that shall be respected by the border guards when **conducting border checks** explained in detail in art. 7. This art. was inserted at the behest of the European Parliament.¹

1. Human dignity (art. 6 para. 1)

- 2 According to art. 6 para. 1 border guards are to fully respect **human dignity**, and any measure taken by them has to be proportionate to the objectives of the measure in question. Art. 6 para. 2 prohibits any discriminatory treatment by border guards on grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

¹ See *Peers*, EJML 2006, p. 335 with further references.

2. Prohibition of discrimination (art. 6 para. 2)

- 3 The **explicit prohibition of discrimination** in art. 6 para. 2 is a significant improvement; the SIC and the Common Manual did not contain a similar provision. It is worth pointing out that art. 6 para. 2 does not prohibit differential treatment on grounds of nationality. Furthermore, the national authorities generally have rather broad discretionary powers when applying the EU legislation in the field of immigration and border control. Nevertheless, a systematic differential treatment of for example black Africans or Muslim persons is clearly prohibited by art. 6 Regulation 562/2006.
- 4 The **principle of non-discrimination** on the grounds mentioned in art. 6 para. 2 is also a general principle of law and thereby a **fundamental right** in EU law, which is further supported by the explicit codification in art. 21 para. 2 of the European Union's Charter of Fundamental Rights. The prohibition of discrimination on the grounds mentioned in art. 6 para. 2 Regulation 562/2006 is therefore not only part of secondary but also of primary law, which can be relevant in case of conflict with other provisions of the regulation or other secondary law. The directives that were adopted on the basis of art. 13 EC Treaty / art. 19 TFEU (in particular Directive 2000/43² and Directive 2000/78³) are, however, not applicable to the entry of third-country nationals into the EU territory since this area does not fall into the scope of application of these instruments.⁴

² Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L180/22 (2000).

³ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L303/16 (2000).

⁴ See for example art. 3 para. 2 Directive 2000/43 which explicitly excludes the area of entry into and residence in the territory of the Member States. The scope of application of Directive 2000/78 is restricted to the areas of employment and occupation. On the implications and its potential application of the Community's non-discrimination principle to the EU rules on border control and visa see *Cholewinski*, *Borders and Discrimination*, p. 81, 93 et seqq.

5 **II. Detailed guidelines for the conduction of border checks (art. 7)**

Art. 7 states in details the **guidelines that have to be respected by the Member States when conducting border checks**. In comparison to art. 6 SIC, the guidelines are worded in much more detail and concern partially also rather technical aspects. A lot of the rules set out in art. 7 are self-explanatory and need no further analysis. As a matter of principle, all persons – including EU citizen and their family members and other persons making use of their right of free movement - shall undergo a minimum check when crossing the external borders with a view to establishing their identities (“first-line check”; art. 7 para. 2 Regulation 562/2006). Third country nationals not enjoying the right of free movement shall be subjected to thorough checks (“second-line checks”) on entry (art. 7 para. 3 lit. a) and on exit (art. 7 para. 3 lit. b and c) Regulation 562/2006). The third-country nationals subjected to a “second-line check” are to be informed in an official EU language or the language of the neighbouring countries of the Member State concerned of the purpose and the procedure of such a check (art. 7 para. 5 Regulation 562/2006).

III. Separate lines for persons enjoying the right of free movement and third-country nationals (art. 9)

6 Considering the different intensity of checks to be carried out on persons enjoying the rights of free movement laid down in EU law on the one hand and third-country nationals on the other hand, Member States shall provide **separate lines** for people subjected only to a first-line check and persons subjected to a thorough check (**art. 9**), making use of the signs set out in Annex III.⁵

IV. Exceptional and temporary relaxation of border checks (art. 8)

⁵ Art. 9 took over Council Decision 2004/581/EC, OJ L 261/36 (2004).

7 In the case of exceptional and unforeseen circumstances, **art. 8** allows the **exceptional and temporary relaxation of border checks** in order to avoid excessive waiting times (art. 8 para. 1). Such a relaxation is only permissible if both exceptional *and* unforeseen circumstances exist. It can be concluded *e contrario* that art. 8 is not pertinent in situations of “normal” and/or foreseeable heavy traffic at external borders. In such situations, it is the duty of the Member States to take the necessary steps with respect to the number of staff, infrastructure and organisation in order to deal with the heavy traffic. The question whether the circumstances are really “exceptional” and “unforeseen” cannot always be answered clearly, leaving some discretion to the Member States. If the checks are relaxed, checks on entry take priority over checks on exit (art. 8 para. 2), leaving the obligation to systematically stamp the travel documents according to **art. 10** unaffected⁶ (art. 8 para. 3 Regulation 562/2006).

V. Unstamped travel documents (art. 11) and principles on border surveillance (art. 12)

8 **Art. 11** concerns cases where the travel document does not bear an entry stamp and addresses the question under what conditions it can be presumed that the third country national does no longer fulfil the conditions of the maximum duration of stay. **Art. 12** formulates some rather broad principles for the carrying out of border surveillance.⁷

⁶ Art. 10 and art. 11 (presuming the non-fulfillment of the conditions of stay when the document is not stamped) took over the rules of Regulation 2133/2004, OJ L 369/5 (2004).

⁷ Cf. the definition in art. 2 para. 11.

Article 13

Refusal of entry

1. A third-country national who does not fulfil all the entry conditions laid down in Article 5. (1) and does not belong to the categories of persons referred to in Article 5(4) shall be refused entry to the territories of the Member States. This shall be without prejudice to the application of special provisions concerning the right of asylum and to international protection or the issue of long-stay visas.

2. Entry may only be refused by a substantiated decision stating the precise reasons for the refusal. The decision shall be taken by an authority empowered by national law. It shall take effect immediately.

The substantiated decision stating the precise reasons for the refusal shall be given by means of a standard form, as set out in Annex V, Part B, filled in by the authority empowered by national law to refuse entry. The completed standard form shall be handed to the third-country national concerned, who shall acknowledge receipt of the decision to refuse entry by means of that form.

3. Persons refused entry shall have the right to appeal. Appeals shall be conducted in accordance with national law. A written indication of contact points able to provide information on representatives competent to act on behalf of the third-country national in accordance with national law shall also be given to the third-country national.

Lodging such an appeal shall not have suspensive effect on a decision to refuse entry. Without prejudice to any compensation granted in accordance with national law, the third-country national concerned shall, where the appeal concludes that the decision to refuse entry was ill-founded, be entitled to correction of the cancelled entry stamp, and any other cancellations or additions which have been made, by the Member State which refused entry.

4. The border guards shall ensure that a third-country national refused entry does not enter the territory of the Member State concerned.

5. Member States shall collect statistics on the number of persons refused entry, the grounds for refusal, the nationality of the persons refused and the type of border (land, air or sea) at which they were refused entry. Member States shall transmit those statistics once a year to the Commission. The Commission shall publish every two years a compilation of the statistics provided by the Member States.

6. Detailed rules governing refusal of entry are given in Part A of Annex V.

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I. Refusal of entry (para. 1)

- 1 Art. 13 Regulation 562/2006 is the correlate to art. 5 and establishes the **obligation of Member States to refuse entry** if the conditions of the latter provision are not fulfilled (art. 13 para. 1 Regulation 562/2006). This obligation is without prejudice to special provisions in the context of the right of asylum and the prohibition of refoulement¹ and for holder of national visa authorising a longer stay.²

II. Procedural guarantees if entry is refused (paras. 2 and 3)

- 2 If entry is refused, certain **procedural guarantees** found in art. 13 paras. 2 and 3 Regulation 562/2006 have to be granted to the third-country national. Part A of Annex V contains further details on the procedures for refusing entry (art. 13 para. 6 Regulation 562/2006).

The explicit inclusion of procedural guarantees in the Schengen Borders Codex is an important achievement of the European Parliament during negotiations³ and a significant improvement compared to the rules contained in the SIC. The Common Manual contained rules similar to the ones codified in art. 13 Regulation 563/2006 but they were not legally binding.⁴

¹ Such cases are also already covered by the derogation provided for in art. 5 para. 4 lit. c) Regulation 562/2006.

² *Peers*, EJML 2006, 337 et seqq.

³ Cf. *Brouwer*, *Effective remedies*, p. 290.

⁴ Cf. *Peers*, EJML 2006, 338 et seq.

1. Substantiated decision

- 3 Art. 13 para. 2 makes it mandatory for the authorities to **substantiate the refusal decision** and to give precise reasons by making use of the **standard form** found in Annex V, part B of Regulation 562/2006 which contains a number of precisions on the procedure for refusing entry at the border.⁵ According to part A of Annex V, para. 1 lit. a) the third-country national has to sign the form and shall be given a copy.⁶

2. Right to appeal

- 4 The refusal decision will take immediate effect, but according to art. 13 para. 3 subpara 1, the person refused entry has the **right to appeal**.⁷ The appeal will be conducted in accordance with national law and the refused third-country national is to be informed about how to find legal representation in order to lodge the appeal.⁸
- 5 Such an appeal will, however, have **no suspensive effect** (art. 13 para. 3 subpara. 2) with the result that the third-country national cannot enter or remain in the territory of the Schengen states whose external borders he intended to cross. This is also stated in art. 13 para. 4 Regulation 562/2006 that obliges the border guards to make sure that the third-country national does not enter the Member State concerned.

III. Obligations of the carrier

- 6 Part A, Annex V para. 3 authorises the border guards in situations where the third-country national has arrived at the border by a **carrier** to order the carrier to bring the third-country national back to the third country from which he was brought without delay.

⁵ Cf. *Brouwer*, Effective remedies, p. 290 et seq.

⁶ Cf. *Brouwer*, Effective remedies, p. 290.

⁷ Cf. also the comments on judicial protection above at I.4.

⁸ Cf. *Brouwer*, Effective remedies, p. 290.

CHAPTER III

Staff and resources for border control and cooperation between Member States

Article 14

Staff and resources for border control

Member States shall deploy appropriate staff and resources in sufficient numbers to carry out border control at the external borders, in accordance with Articles 6 to 13, in such a way as to ensure an efficient, high and uniform level of control at their external borders.

Article 15

Implementation of controls

1. The border control provided for by Articles 6 to 13 shall be carried out by border guards in accordance with the provisions of this Regulation and with national law.

When carrying out that border control, the powers to instigate criminal proceedings conferred on border guards by national law and falling outside the scope of this Regulation shall remain unaffected.

Member States shall ensure that the border guards are specialised and properly trained professionals. Member States shall encourage border guards to learn languages, in particular those necessary for the carrying-out of their tasks.

2. Member States shall notify to the Commission the list of national services responsible for border control under their national law in accordance with Article 34.

3. To control borders effectively, each Member State shall ensure close and constant cooperation between its national services responsible for border control.

Article 16

Cooperation between Member States

1. The Member States shall assist each other and shall maintain close and constant cooperation with a view to the effective implementation of border control, in accordance with Articles 6 to 15. They shall exchange all relevant information.

2. Operational cooperation between Member States in the field of management of external borders shall be coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States (hereinafter referred to as the Agency) established by Regulation (EC) No 2007/2004.

3. Without prejudice to the competences of the Agency, Member States may continue operational cooperation with other Member States and/or third countries at external borders, including the exchange of liaison officers, where such cooperation

complements the action of the Agency.

Member States shall refrain from any activity which could jeopardise the functioning of the Agency or the attainment of its objectives.

Member States shall report to the Agency on the operational cooperation referred to in the first subparagraph.

4. Member States shall provide for training on the rules for border control and on fundamental rights. In that regard, account shall be taken of the common training standards as established and further developed by the Agency.

Article 17

Joint control

1. Member States which do not apply Article 20 to their common land borders may, up to the date of application of that Article, jointly control those common borders, in which case a person may be stopped only once for the purpose of carrying out entry and exit checks, without prejudice to the individual responsibility of Member States arising from Articles 6 to 13.

To that end, Member States may conclude bilateral arrangements between themselves.

2. Member States shall inform the Commission of any arrangements concluded in accordance with paragraph 1.

CHAPTER IV

Specific rules for border checks

Article 18

Specific rules for the various types of border and the various means of transport used for crossing the external borders

The specific rules set out in Annex VI shall apply to the checks carried out at the various types of border and on the various means of transport used for crossing border crossing points.

Those specific rules may contain derogations from Articles 5 and 7 to 13.

Article 19

Specific rules for checks on certain categories of persons

1. The specific rules set out in Annex VII shall apply to checks on the following categories of persons:

- (a) Heads of State and the members of their delegation(s);
- (b) pilots of aircraft and other crew members;
- (c) seamen;

- (d) holders of diplomatic, official or service passports and members of international organisations;
- (e) cross-border workers;
- (f) minors.

Those specific rules may contain derogations from Articles 5 and 7 to 13.

2. Member States shall notify to the Commission the model cards issued by their Ministries of Foreign Affairs to accredited members of diplomatic missions and consular representations and members of their families in accordance with Article 34.

- 1 Art. 14-17 Regulation 562/2006 provide rules on the necessary staff and resources for border control (**art. 14**), the implementation of the controls by national border guards and the obligation of Member States to properly train them (**art. 15**), on the cooperation between Member States and between Member States and FRONTEX (**art. 16**) as well as rules on the common control of land borders of States that are not yet full Schengen Member and have therefore not yet abolished the checks at internal borders pursuant to art. 20 Regulation 562/2006.
- 2 **Art. 18 and 19** contain specific rules on various types of borders and certain categories of persons.

TITLE III

INTERNAL BORDERS

CHAPTER I

Abolition of border control at internal borders

Article 20

Crossing internal borders

Internal borders may be crossed at any point without a border check on persons, irrespective of their nationality, being carried out.

Article 21

Checks within the territory

The abolition of border control at internal borders shall not affect:

(a) the exercise of police powers by the competent authorities of the Member States under national law, insofar as the exercise of those powers does not have an effect equivalent to border checks; that shall also apply in border areas. Within the meaning of the first sentence, the exercise of police powers may not, in particular, be considered equivalent to the exercise of border checks when the police measures:

- (i) do not have border control as an objective,
- (ii) are based on general police information and experience regarding possible threats to public security and aim, in particular, to combat cross-border crime,
- (iii) are devised and executed in a manner clearly distinct from systematic checks on persons at the external borders,
- (iv) are carried out on the basis of spot-checks;

(b) security checks on persons carried out at ports and airports by the competent authorities under the law of each Member State, by port or airport officials or carriers, provided that such checks are also carried out on persons travelling within a Member State;

(c) the possibility for a Member State to provide by law for an obligation to hold or carry papers and documents;

(d) the obligation on third-country nationals to report their presence on the territory of any Member State pursuant to the provisions of Article 22 of the Schengen Convention.

Article 22

Removal of obstacles to traffic at road crossing-points at internal borders

Member States shall remove all obstacles to fluid traffic flow at road crossing-points at internal borders, in particular any speed limits not exclusively based on road-safety considerations.

At the same time, Member States shall be prepared to provide for facilities for checks in the event that internal border controls are reintroduced.

CHAPTER II

Temporary reintroduction of border control at internal borders

Article 23

Temporary reintroduction of border control at internal borders

1. Where there is a serious threat to public policy or internal security, a Member State may exceptionally reintroduce border control at its internal borders for a limited period of no more than 30 days or for the foreseeable duration of the serious threat if its duration exceeds the period of 30 days, in accordance with the procedure laid down in Article 24 or, in urgent cases, with that laid down in Article 25. The scope and duration of the temporary reintroduction of border control at internal borders shall not exceed what is strictly necessary to respond to the serious threat.

2. If the serious threat to public policy or internal security persists beyond the period provided for in paragraph 1, the Member State may prolong border control on the same grounds as those referred to in paragraph 1 and, taking into account any new elements, for renewable periods of up to 30 days, in accordance with the procedure laid down in Article 26.

Article 24

Procedure for foreseeable events

1. Where a Member State is planning to reintroduce border control at internal borders under Article 23 (1), it shall as soon as possible notify the other Member States and the Commission accordingly, and shall supply the following information as soon as available:

- (a) the reasons for the proposed reintroduction, detailing the events that constitute a serious threat to public policy or internal security;
- (b) the scope of the proposed reintroduction, specifying where border control is to be reintroduced;
- (c) the names of the authorised crossing-points;
- (d) the date and duration of the proposed reintroduction;
- (e) where appropriate, the measures to be taken by the other Member States.

2. Following the notification from the Member State concerned, and with a view to

the consultation provided for in paragraph 3, the Commission may issue an opinion without prejudice to Article 64 (1) of the Treaty.

3. The information referred to in paragraph 1, as well as the opinion that the Commission may provide in accordance with paragraph 2, shall be the subject of consultations between the Member State planning to reintroduce border control, the other Member States and the Commission, with a view to organising, where appropriate, mutual cooperation between the Member States and to examining the proportionality of the measures to the events giving rise to the reintroduction of border control and the threats to public policy or internal security.

4. The consultation referred to in paragraph 3 shall take place at least fifteen days before the date planned for the reintroduction of border control.

Article 25

Procedure for cases requiring urgent action

1. Where considerations of public policy or internal security in a Member State demand urgent action to be taken, the Member State concerned may exceptionally and immediately reintroduce border control at internal borders.

2. The Member State reintroducing border control at internal borders shall notify the other Member States and the Commission accordingly, without delay, and shall supply the information referred to in Article 24 (1) and the reasons that justify the use of this procedure.

Article 26

Procedure for prolonging border control at internal borders

1. Member States may only prolong border control at internal borders under the provisions of Article 23(2) after having notified the other Member States and the Commission.

2. The Member State planning to prolong border control shall supply the other Member States and the Commission with all relevant information on the reasons for prolonging the border control at internal borders. The provisions of Article 24(2) shall apply.

Article 27

Informing the European Parliament

The Member State concerned or, where appropriate, the Council shall inform the European Parliament as soon as possible of the measures taken under Articles 24, 25 and 26. As of the third consecutive prolongation pursuant to Article 26, the Member State concerned shall, if requested, report to the European Parliament on the need for border control at internal borders.

Article 28

Provisions to be applied where border control is reintroduce at internal borders

Where border control at internal borders is reintroduced, the relevant provisions of Title II shall apply *mutatis mutandis*.

Article 29

Report on the reintroduction of border control at internal borders

The Member State which has reintroduced border control at internal borders under Article 23 shall confirm the date on which that control is lifted and, at the same time or soon afterwards, present a report to the European Parliament, the Council and the Commission on the reintroduction of border control at internal borders, outlining, in particular, the operation of the checks and the effectiveness of the reintroduction of border control.

Article 30

Informing the public

The decision to reintroduce border control at internal borders shall be taken in a transparent manner and the public informed in full thereof, unless there are overriding security reasons for not doing so.

Article 31

Confidentiality

At the request of the Member State concerned, the other Member States, the European Parliament and the Commission shall respect the confidentiality of information supplied in connection with the reintroduction and prolongation of border control and the report drawn up under Article 29.

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I. General principle: absence of internal border controls (art. 20)

- 1 **Title III (art. 20-31)** concerns internal border control or rather the absence thereof.
- 2 **Art. 20** states the principle that internal borders may be crossed at any point without border checks on persons. This principle was previously codified in art. 2 para. 1 SIC. Closely connected to the elimination of internal border controls is the obligation to remove all obstacles to traffic in art. 22.

II. Checks within the territory of Member States (art. 21)

1. Police controls

- 3 The elimination of controls at internal borders does not affect the right of Member States to carry out **police controls within their territory**. Such controls are rather regarded as „compensatory measures“ for the lifting of border controls, recurring for example to the methods of „dragnet controls“ (temporarily limited control of persons in the border area or further inside the territory) or of „target search“ (targeted search for persons by specialised police entities).¹ Such measures have sometimes to be provided for in the national legal orders of the Member States concerned and must be in conformity with EU law, therefore they may especially not have effects equivalent to border checks which is explicitly prohibited in **art. 21 lit. a) Regulation 562/2006**. The latter provision lists in a non-exhaustive manner the measures to be considered as non-equivalent to border checks. Border checks are essentially characterized by being carried out irrespective of suspicion, in a stationary manner and by being carried out on the sole ground of crossing of the border. „Normal“ national police measures will usually not have all these characteristics and therefore not be considered to have equivalent effects to border checks. However, systematic police controls in the border area if carried out without suspicion do not seem to be in conformity with art. 20 Regulation 562/2006 since their effect would be similar to actual border controls and compromise the effectiveness of the prohibition of internal border controls.

¹ Cf. *Epiney/Meier/Egbuna-Joss*, Schengen/Dublin, in: Thürer/Weber/Portmann/Kellerhals (eds.), *Bilaterale Verträge I & II Schweiz – EU*, p. 903, 927, with further references.

2. Checks at ports and airports, the obligation to carry papers, and the obligation of third-country nationals to report their presence

4 **Art. 21 lit. b) Regulation 562/2006** clarifies that the principle of absence of internal border checks on person does not affect the admissibility of **security checks at ports and airports** as long as they are carried out in a non-discriminatory manner. **Art. 21 lit. c) Regulation 562/2006** provides that national laws on the **obligation to carry papers or documents** remain unaffected allowing therefore the competent authorities to demand in conformity with their national law that papers and documents must be carried along and produced if requested. Equally unaffected remains the obligation of third-country nationals to report their presence in the territory of a Schengen state pursuant to art. 22 SIC (**art. 21 lit. d) Regulation 562/2006**).

III. Temporary re-instatement of internal border controls (art. 23-31)

5 **Art. 23** provides for the **possibility to temporarily re-impose internal border controls** in order to safeguard public policy or internal security.² **Art. 24-31** contain procedural regulations on the reinstatement of controls at internal borders. In principle, the public has to be informed fully of the reasons for the re-imposing of controls (**art. 30**).

6 The substantive requirements of art. 23 as well as the procedural requirements of art. 24 et seqq. are rather strict,³ even though it is obvious that in the context of the substantive requirement the reference made to the notions of public order and internal security will give the Member States a certain margin of discretion. It is worth pointing out that art. 23 requires the existence of a „serious“ **threat of public order or internal security**, and border checks may only be re-instated **exceptionally**

² See in this context the analysis of temporary reinstatements of internal border controls under the SIC in *Groenendijk*, ELJ 2004, p. 150–170.

³ In comparison to the rules of the SIC, it will be exceedingly difficult for Member States to temporarily reinstate border controls; see also *Peers*, EU Justice and Home Affairs, p. 133, 134, who further discusses the existing practice on the temporary re-instatement of border controls.

and in observance of the time limits set out in this provision. Art. 23 para. 1 last sentence Regulation 562/2006 states that the scope and duration of the temporary re-instatement of border controls may not exceed what is essential to respond to the serious threat. It is only since the entry into force of the Treaty of Lisbon, that the lawfulness of such measures can be examined by the Court of Justice. The former restriction on the Court's jurisdiction in art. 68 para. 2 EC Treaty⁴ had not allowed such an examination by the Court.

7 It has to be stressed that even the temporary re-instatement of border checks pursuant to art. 23 et seqq. does not affect the right of free movement of Union citizens and their family members, which already results from art. 3 Regulation 562/2006. A refusal of entry to such persons must therefore comply with the rather strict requirements of EU Law in general and with Directive 2004/38 in particular.

⁴ See the comments on judicial protection above, art. 1 marg. no. 21.

TITLE IV

FINAL PROVISIONS

Article 32

Amendments to the Annexes

Annexes III, IV and VIII shall be amended in accordance with the regulatory procedure with scrutiny referred to in Article 33(2).

Article 33

Committee

1. The Commission shall be assisted by a committee, hereinafter "the Committee".
2. Where reference is made to this paragraph, Article 5a (1) to (4) and Article 7 of Decision 1999/468/EC shall apply, having regard to the provisions of Article 8 thereof.
3. The Committee shall adopt its rules of procedure.

Article 34

Notifications

1. Member States shall notify the Commission of:
 - (a) the list of residence permits;
 - (b) the list of their border crossing points;
 - (c) the reference amounts required for the crossing of their external borders fixed annually by the national authorities;
 - (d) the list of national services responsible for border control;
 - (e) the specimen of model cards issued by Foreign Ministries.
2. The Commission shall make the information notified in conformity with paragraph 1 available to the Member States and the public through publication in the *Official Journal of the European Union*, C Series, and by any other appropriate means.

Article 35

Local border traffic

This Regulation shall be without prejudice to Community rules on local border traffic and to existing bilateral agreements on local border traffic.

Article 36

Ceuta and Melilla

The provisions of this Regulation shall not affect the special rules applying to the cities of Ceuta and Melilla, as defined in the Declaration by the Kingdom of Spain on the cities of Ceuta and Melilla in the Final Act to the Agreement on the Accession of the Kingdom of Spain to the Convention implementing the Schengen Agreement of 14 June 1985.*

Article 37

Notification of information by the Member States

By 26 October 2006, the Member States shall notify the Commission of national provisions relating to Article 21(c) and (d), the penalties as referred to in Article 4(3) and the bilateral arrangements concluded in accordance with Article 17 (1). Subsequent changes to those provisions shall be notified within five working days. The information notified by the Member States shall be published in the *Official Journal of the European Union*, C Series.

Article 38

Report on the application of Title III

The Commission shall submit to the European Parliament and the Council by 13 October 2009 a report on the application of Title III.

The Commission shall pay particular attention to any difficulties arising from the reintroduction of border control at internal borders. Where appropriate, it shall present proposals aimed at resolving such difficulties.

Article 39

Repeals

1. Articles 2 to 8 of the Convention implementing the Schengen Agreement of 14 June 1985 shall be repealed with effect from 13 October 2006.

2. The following shall be repealed with effect from the date referred to in paragraph 1:

- (a) the Common Manual, including its annexes;
- (b) the decisions of the Schengen Executive Committee of 26 April 1994 (SCH/Com-ex (94) 1, rev 2), 22 December 1994 (SCH/Com-ex (94)17, rev. 4) and 20 December 1995 (SCH/Com-ex (95) 20, rev. 2);

* OJ L 239, 22.9.200, p. 73.

- (c) Annex 7 to the Common Consular Instructions;
 - (d) Council Regulation (EC) No 790/2001 of 24 April 2001 reserving to the Council implementing powers with regard to certain detailed provisions and practical procedures for carrying out border checks and surveillance;*
 - (e) Council Decision 2004/581/EC of 29 April 2004 determining the minimum indications to be used on signs at external border crossing points;**
 - (f) Council Decision 2004/574/EC of 29 April 2004 amending the Common Manual;***
 - (g) Council Regulation (EC) No 2133/2004 of 13 December 2004 on the requirement for the competent authorities of the Member States to stamp systematically the travel documents of third country nationals when they cross the external borders of the Member States and amending the provisions of the Convention implementing the Schengen agreement and the Common Manual to this end.****
3. References to the Articles deleted and instruments repealed shall be construed as references to this Regulation.

Article 40

Entry into force

This Regulation shall enter into force on 13 October 2006. However, Article 34 shall enter into force on the day after its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in the Member States in accordance with the Treaty establishing the European Community.

- 1 Title IV (art. 32-40) consists of the final provisions.
- 2 Art. 32 provides the procedure for the revision of annexes III, IV and VIII by making use of the comitology procedure provided for in art. 33. The other annexes as well as other amendments of the regulation have to be made by following the regular legislative procedure.

* OJ L 116, 26.4.2001, p.5. Regulation amended by Decision 2004/927/EC (OJ L 396, 31.12.2004, p.45).

** OJ L 261, 6.8.2004, p.119.

*** OJ L 261, 6.8.2004, p.36.

**** OJ L 369, 16.12.2004, p.5.

3 Art. 34 imposes notification obligations on the Member States with respect to the five points listed in art. 34 para. 1. The notified information is to be published in the Official Journal, C series or by any other appropriate means.¹ Art. 37 contains another notification obligation of the Member States, and art. 38 requires the Commission to submit a report on the application of Title III by 13 October 2009.

¹ A regular update of the notifications in accordance with art. 34 Regulation 562/2006 can be found on the Commission's Scoreboard on the internet under http://ec.europa.eu/justice_home/doc_centre/freetravel/rights/doc_freetravel_rights_en.htm , at II.3. (last access: 13 January 2010).