

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)

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THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 62(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⁽¹⁾,

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 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⁽²⁾ and the Common Manual⁽³⁾.

(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

⁽¹⁾ Opinion of the European Parliament of 23 June 2005 (not yet published in the Official Journal) and Council Decision of 21 February 2006.

⁽²⁾ 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).

⁽³⁾ 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).

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.

(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⁽⁴⁾.

(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

⁽⁴⁾ 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).

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⁽⁵⁾, 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 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission⁽⁶⁾.

(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⁽⁷⁾.

⁽⁵⁾ 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).

⁽⁶⁾ OJ L 184, 17.7.1999, p. 23.

⁽⁷⁾ OJ L 239, 22.9.2000, p. 69.

(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⁽⁸⁾ which fall within the area referred to in Article 1, point A, of Council Decision 1999/437/EC⁽⁹⁾ 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 Kingdom of Norway concerning committees which assist the European Commission in the exercise of its executive powers⁽¹⁰⁾, 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⁽¹¹⁾ and 2004/860/EC⁽¹²⁾.

(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.

⁽⁸⁾ OJ L 176, 10.7.1999, p. 36.

⁽⁹⁾ OJ L 176, 10.7.1999, p. 31.

⁽¹⁰⁾ OJ L 176, 10.7.1999, p. 53.

⁽¹¹⁾ 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).

⁽¹²⁾ 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).

(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⁽¹³⁾. 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⁽¹⁴⁾. 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:

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.

I. General remarks

1. Introduction and purpose of the Regulation

1

Regulation 562/2006¹ (Schengen Borders Code, SBC) provides for the absence of border controls at 'internal borders'² and establishes **common rules and standards to be applied by the Member States when controlling persons crossing the external borders** of the Schengen

⁽¹³⁾ OJ L 131, 1.6.2000, p. 43.

⁽¹⁴⁾ OJ L 64, 7.3.2002, p. 20.

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 2006 L 105/1, last amended by OJ 2013 L 295/1.;

² Cf. the legal definition in Article 2(1) Regulation 562/2006.

area (Article 1). The aim of external border control is to help combat illegal immigration and trafficking in human beings and to protect the security of the Schengen area.³ Controls at internal borders have to be abolished and may only be re-introduced exceptionally and temporarily in the event of a serious threat to the public policy or internal security of one or several Member States. Provisions on controls on internal borders and on external borders are somehow interdependent: Since controls at internal borders have to be abolished, border checks conducted by one Member State at its external borders are executed on behalf of all the other Member (resp. Schengen) States as well.

2

Regulation 562/2008 entered into force on 13 October 2006⁴ and is a **development of the Schengen acquis**. It was adopted on the basis of Article 77 (2)(b) and (e) TFEU (formerly Article 62(1) and (2)(a) EC Treaty) 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 binding⁵ 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;⁶

–the Practical Handbook for Border Guards (Schengen Handbook);⁷

–the regulations and the decision with respect to the establishment and functioning of the European Border Agency 'FRONTEX';⁸

³ Cf. recital 6 of Regulation 562/2006

⁴ Article 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.

⁵ Cf. the comments below II. (Drafting history).

⁶ See more detailed discussion below II. (Drafting History).

⁷ Commission Recommendation establishing a common 'Practical Handbook for Border Guards (Schengen Handbook)' to be used by Member States' competent authorities when carrying out the border control of persons, COM (2006) 5186 final; amended by Commission Recommendation of 25 June 2008, COM (2008) 2976 final, Commission Recommendation of 29 September 2009, COM(2009) 7376 final, Commission Recommendation of 8 September 2010, COM(2010) 5559 final, Commission Recommendation of 20 June 2011, COM(2011) 3918 final, and Commission Recommendation of 14 December 2012, COM (2012)9330 final.

⁸ 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 2004 L 349/1; later amended by Regulation (EC) No. 863/2007 of 11 July 2007 establishing a mechanism for the creation of Rapid Border Intervention Teams, OJ 2007 L 199/30, Regulation (EU) No. 1168/2011 of 25 October 2011, OJ

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 562/2006,⁹ a European agency for the management of operational cooperation at the external borders, FRONTEX, was established in 2004.¹⁰ FRONTEX has its seat in Warsaw, Poland,¹¹ and became fully operational on 3 October 2005.¹²

–the rules on local border traffic;¹³ and

–the regime on carrier sanctions.¹⁴

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**.¹⁵ These two areas of law, their secondary instruments and in particular the corresponding databases are closely interwoven and should not be considered separately: The Schengen Information System, and in particular Article 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

2011 L 304/1, Regulation (EU) No. 1052/2013 of 22 October 2013 establishing the European Border Surveillance System (Eurosir), OJ 2013 L 295/11 and Regulation (EU) No. 656/2014 of 15 May 2014 (Sea Borders Regulation). 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).

⁹ Cf. Article 16 Regulation 562/2006.

¹⁰ Cf. Regulation (EC) No. 2007/2004.

¹¹ Cf. Council Decision 2005/358/EC.

¹² See in more detail *Tomkin*, Frontex, in: *Peers/Guild/Tomkin*, p. 119-203; *Peers*, Justice and Home Affairs Law, p. 216 ff. as well as the commentaries by *Ryan* on the Frontex Regulation (EC) 2007/2004 and on the Sea Borders Regulation 656/2014, in this volume.

¹³ 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 2006 L 405/1; *corrigenda* in OJ 2007 L 29/3. For a commentary on this regulation see for example *Peers*, Other Border Control Measures, in: *Peers/Guild/Tomkin*, p. 205-222 (206-214).

¹⁴ Council Directive 2004/82/EC of 29 April 2004 on the obligation of carriers to communicate passenger data, OJ 2004 L 61/24. On carrier sanction see for example *Violeta Moreno Lax*, Carrier Sanctions, in: *Steve Peers et al.* (eds.), *EU Immigration and Asylum Law (Text and Commentary): Second Revised Edition*, Vol. 2: *EU Immigration Law, Immigration and Asylum Policy in Europe* Vol. 27, 2012, p. 363-384; *Karanja*, Transparency and Proportionality, p. 369 ff.; *Tilman Rodenhäuser*, IJRL 26 (2014), p.223-247.

¹⁵ See *Meloni*, Regulation 810/2009 (Visa Code), in this volume. On the interaction of these areas see also *Cholewinski*, No right of entry, p. 127 et seq.

The **Visa Information System** (hereinafter: VIS)¹⁶ which became operational in October 2011 goes beyond the SIS and also stores biometric data and data relating to visa applications that cannot be entered into the SIS for lack of a legal basis. According to Article 2 VIS Regulation, 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 have access to the VIS for the checks that are to be conducted according to Article 5 in conjunction with Article 7 Regulation 562/2006 (Article 18 VIS Regulation).¹⁷

6

Harmonized rules and procedural guarantees also apply to third-country nationals who are found to be unlawfully staying in the Schengen area - because they do not or no longer fulfil the criteria for entry into the Schengen area as set out in Article 5 Reg. 562/2006 and do not have any other right for entry, stay or residence in any Schengen state: The **Return Directive 2008/115/EC**¹⁸ obliges the Schengen States to issue a return decision against such individuals. If they do not depart voluntarily, they may be removed. An entry ban for the Schengen area has to be issued, and Member States may decide to register these bans in the SIS.

2. Territorial scope of the Regulation

7

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.¹⁹ The **United Kingdom and Ireland** have not opted in to this regulation and it therefore does not apply to these two states.

8

Denmark does in general not participate in the adoption of measures based on Part III Title V TFEU (Article 1, 2 of Protocol No. 22 on the Position of Denmark). According to Article 4 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 between Denmark and the other Member States bound by the Schengen acquis (Article 4(1) second sentence Protocol on the

¹⁶ Council Decision of 8 June 2004 establishing the Visa Information System (VIS), OJ 2004 L 213/5; 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 2008 L 218/60. .

¹⁷ 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 2009 L 35/56.

¹⁸ Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals; for an analysis see *Lutz/Mananashvili*, Return Directive, in this volume.

¹⁹ Recital 21 of Regulation 562/2006.

Position of Denmark). Despite the fact that Reg. 562/2006 is therefore not directly applicable, and the general rules on judicial protection do also not apply, it is nevertheless expected that the rulings of the European Court of Justice on the interpretation of this regulation will be taken into account by Denmark.

9

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 (Article 2(2) Schengen Protocol).²⁰ Romania, Bulgaria, Cyprus and Croatia are not yet full Schengen States, and even though they already apply the rules on external borders control, controls at internal borders are still being maintained.²¹

10

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 Accession of the Kingdom of Spain to the Schengen Implementation Convention²² does not provide otherwise (Article 36 Regulation 562/2006).²³ According to that declaration,²⁴ 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 Article 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.

11

²⁰ Cf. already the common declaration to Article 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, p. 88-90.

²¹ The list of ‘full’ Schengen States is found in the Schengen Handbook (FN 7), 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 the Commission’s website at: http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/schengen/index_en.htm [last accessed 20 January 2015].

²² OJ 2000 L 239/69.

²³ Cf. also recital 21, and already Article 138 of the Schengen Implementation Convention.

²⁴ OJ 2000 L 239/73 .

By reason of their association agreements to the Schengen acquis the non-EU-Member States **Iceland and Norway²⁵ as well as Switzerland²⁶ and the Principality of Liechtenstein²⁷** are bound by and fully applying the Schengen Borders Code Regulation.

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

12

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 area²⁸ as they will in a lot of cases not even be in the possession of valid travel documents and even more rarely be able to provide all the required supporting documents.

13

If third-country nationals 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).²⁹

Regulation 562/2006 takes these protection obligations into account in several provisions:³⁰

–Recital (20) and **Article 3(b)** 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.

–The imposition of penalties for unauthorised crossing of the external borders in **Article 4(3)** is without prejudice to Article 31 of the 1951 Geneva Refugee Convention which prohibits

²⁵ 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 1999 L 176/35.

²⁶ 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 2008 L 53/52.

²⁷ 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, OJ 2011 L 160/39.

²⁸ Cf. below the comments on Article 5 Regulation 562/2006.

²⁹ 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 ff.).

³⁰ Cf. also point 10 of Part Two, Section 1 of the Schengen Handbook.

such criminal penalties for refugees 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.

–**Article 5(4)(c)** provides for possible derogations from the entry conditions of Article 5(1) among other reasons on grounds of international obligations or on humanitarian reasons.

- **Article 6(1)** stresses the importance of border guards respecting human dignity in the performance of their duties, in particular when vulnerable persons – e.g. traumatised persons, unaccompanied minors or victims of human trafficking – are involved.

–**Article 13(1)** 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 Article 5 are not fulfilled.

14

Whereas the Common Manual did not contain much information on the treatment of asylum seekers at the external borders,³¹ 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.

15

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 Article 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 the Asylum Qualification Directive 2011/95/EU and the Asylum Procedures Directive 2013/32/EU³².

As far as the **Asylum Qualification Directive 2011/95** is concerned, it only provides 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.

The **Asylum Procedures Directive 2013/32** 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**” (Article 3(1) Asylum Procedures Directive 2013/32, emphasis added). According to Article 43 Asylum Procedures Directive 2013/32, Member States are authorized to adopt special provisions applicable to border procedures in accordance with the principles and guarantees set out in Chapter II of Asylum Procedures Directive 2013/32 (Article 43(1)). According to Article 43(2), Member States must ensure that a **decision** on the application is

³¹ Cf. *Peers*, *Cooperation on Border Controls*, p. 450 ff.

³² Directive 2013/32/EU of 26 June 2013 on common procedures for granting and withdrawing international protection, OJ 2013 L 180/60.

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 all the procedural standards set out in the Asylum Procedures Directive 2013/32. Article 43(3) provides for an **exception** to the latter rule **in case of a large influx of people**. The Member States may then still apply the border procedures, as long as the persons seeking international protection are accommodated in the proximity to the border or transit zone.

16

The **jurisprudence of the ECJ** on this issue remains somewhat unclear. In **ANAFE**³³, the Court had to answer the question whether persons who had been issued temporary residence cards while the decision on their application for asylum was pending in one Member State, were allowed to re-enter the Schengen area after they had left the territory of the Member State examining their request. The ECJ held that such persons cannot cross the external borders on the strength of their temporary residence documents alone. The border authorities must refuse them entry (Article 13 Reg. 562/2006) unless they are covered by an exception laid down in Article 5(4) Reg. 562/2006. Article 5(4)(c) expressly authorises Member States to grant entry on humanitarian grounds, grounds of national interest or because of international obligations even to a person who does not fulfil all the entry conditions in Article 5. Even though the Court also stressed that the SBC is without prejudice to the rights of refugees and persons requesting international protection, in particular as regards non-refoulement (Article 3(b) Reg. 562/2006), it did not give a clear answer on the issue whether Member States are allowed to refuse asylum seekers entry at their borders or must grant them a right of entry³⁴.

17

The conclusion must be drawn that **neither the provisions of the Schengen Borders Code nor of the Asylum Procedures Directive 2013/32 can be interpreted in the sense of a ‘right of entry’** in order to request international protection. The non-refoulement principle nevertheless demands that national authorities at the external borders must 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 the **Dublin III Regulation (EU) No 604/2013**³⁵ 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 purpose³⁶. Once the person entered into the territory of a Member State - notwithstanding the exception in Article 43(3) Asylum Procedures Directive -, Article 9(1) Asylum Procedures Directive 2013/32 applies and grants the person a **right to remain** during the examination of his or her application.

³³ ECJ, ANAFE, C-606/10, EU:C:2012:348, paras. 39-41.

³⁴ See *Cornelisse*, CML Rev 51(2014), p.766.

³⁵ Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, OJ 2013 L 180/31.

³⁶ Cf. ECtHR, *Hirsi Jamaa and Others v. Italy* [GC], No. 27765/09, 23 February 2012.

4. Judicial protection

18

Before the Treaty of Lisbon entered into force on 1 December 2009, **judicial protection used to be 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 **Article 68(1) EC Treaty**, only the 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.

19

Fortunately, the **Treaty of Lisbon** improved the judicial protection in this area. The Treaty on the Functioning of the European Union (TFEU) does not contain any provision similar to Article 68 EC Treaty and the general rules on the jurisdiction of the ECJ therefore now also apply to Part III Title V TFEU ('Area of Freedom, Security and Justice'). The exceptions mentioned in Article 276 TFEU do not include the area of border controls.

II. Drafting history of Regulation 562/2006

20

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 (Article 17) and the **Schengen Implementation Convention** of 1990 (hereinafter: SIC; Title II, Article 2–8).

Article 2(1) SIC provided for the abolition of controls at internal borders, **whereas Article 2(2)** left the possibility of Member States to reinstate border controls for public policy or national security reasons unaffected.

The rules on the **crossing of the external borders** were found in **Article 3–8 SIC**. Article 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 Article 6(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 Article 6(2). Article 7 SIC established an obligation of cooperation between the participating States, and Article 8 SIC conferred the power to adopt decisions on the practical aspects of carrying out the border checks unto the Schengen Executive Committee.

21

Making use of these powers, the Executive Committee adopted the **Common Manual**³⁷ detailing in its Part I the conditions for entering the Schengen area and giving practical

³⁷ 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 2000 L 239/317. The Common Manual was first published in OJ 2002 C 313/97. It was considered as a confidential document until the Council took the

guidance for the implementation of Article 3–5 SIC, and in Part II the carrying out of border checks at the external borders and therewith supplementing Article 6–7 SIC.³⁸

22

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 designated Article 62(1) and (2) EC Treaty as the new legal basis for Article 2–7 SIC, the Decision of the Executive Committee establishing the Common Manual³⁹ and five more decisions of the Committee.⁴⁰

23

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.⁴¹ 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 Article 288 TFEU (formerly Article 249 EC Treaty), which lead to some ambiguity about its legal effect. The legal 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.⁴²

24

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**.⁴³

necessary decisions to declassify it; Council Decision 2000/751/EC, OJ 2000 L 303/29, and Council Decision 2002/535/EC, OJ 2002 L 123/49.

³⁸ See *Peers*, EJML 2006, p. 324 ff.

³⁹ See above FN 44.

⁴⁰ Cf. *Peers*, EJML 2006, p. 324.

⁴¹ 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 2001 L 116/5. An action for annulment by the Commission was unsuccessful, ECJ, C-257/01, EU:C:2005:25. .

⁴² 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.

⁴³ Cf. COM (2004) 391 final, p. 6 ff.; see also *Peers*, EJML 2006, 326 ff.

The Commission drafted and released a proposal for a regulation in May 2004.⁴⁴ With effect from 1 January 2005, the decision-making rules for measures adopted on the basis of Article 62(1) and (2)(a) EC Treaty were amended⁴⁵ and provided for the application of the co-decision procedure pursuant to Article 251 EC Treaty and qualified majority voting. The Council and the European Parliament reached a final agreement in the first reading in June 2005,⁴⁶ and the **Schengen Borders Code Regulation 562/2006 was formally adopted on 15 March 2006.**

25

Regulation 562/2006 entered into force on 13 October 2006 with the exception of Article 34. Article 34 establishes obligations of the Member States to notify certain facts to the Commission and entered into force already on 14 April 2006 (Article 40). With its entry into force, the following provisions and measures were **repealed** (Art. 39):

- art 2–8 SIC;
- the Common Manual and its annexes;
- the relevant decisions of the Schengen Executive Committee;
- Annex 7 of the Common Consular Instructions which was also part of the Common Manual;
- the Council Regulation conferring the implementing powers in the area of border control on the Council;
- Council Decision 2004/581/EC on signs at external borders;
- a Council Decision amending the Common Manual; and
- Council Regulation 2133/2004 on the systematic stamping of travel documents of third country nationals.

26

Regulation 562/2006 has since been **amended by six regulations**:

- Regulation 296/2008⁴⁷ amending the existing rules on the implementing powers of the Commission;

⁴⁴ COM (2004) 391 final.

⁴⁵ 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 2004 L 396/45, Article 1(1).

⁴⁶ See *Peers*, EJML 2006, p. 329 for possible reasons for the first-reading agreement.

⁴⁷ 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 2008 L 97/60.

- Regulation 81/2009 regarding the use of the VIS under the Schengen Code⁴⁸;
- the Visa Code Regulation (EC) No 810/2009⁴⁹;
- Regulation 265/2010 concerning the movement of persons with a long-stay visa⁵⁰;
- Regulation 610/2013⁵¹ which introduced a number of amendments and clarifications which had become necessary through several years of practical experience, the adoption of the Visa Code Regulation and the ECJ's jurisprudence; this regulation also brought Reg. 562/2006 in alignment with Article 290 TFEU and delegated the power to adopt additional measures concerning border surveillance and the amendments of the annexes to the Commission; and
- Regulation 1015/2013⁵² providing for more detailed rules on the temporary reintroduction of border control at internal borders in exceptional circumstances as well as a new evaluation mechanism.

27

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-called '**Schengen Handbook**'⁵³ 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.

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;

⁴⁸ OJ 2009 L 35/56.

⁴⁹ OJ 2009 L 243/1.

⁵⁰ OJ 2010 L 85/1.

⁵¹ OJ 2013 L 182/1.

⁵² OJ 2013 L 295/1.

⁵³ Above FN 7.

(c) sea, river and lake ports of the Member States for regular internal 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 internal ferry connection' means any ferry connection between the same two or more ports situated on the territory of the Member States, not calling at any ports situated 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 right of free movement under Union law' means:

(a) Union citizens within the meaning of Article 20(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⁽¹⁵⁾ applies;

(b) third-country nationals and their family members, whatever their nationality, who, under agreements between the Union 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 20(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;

8. 'border crossing point' means any crossing-point authorised by the competent authorities for the crossing of external borders;

8a. 'shared border crossing point' means any border crossing point situated either on the territory of a Member State or on the territory of a third country, at which Member State border guards and third-country border guards carry out exit and entry checks one after another in accordance with their national law and pursuant to a bilateral agreement;

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;

⁽¹⁵⁾ OJ L 158, 30.4.2004, p. 77.

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⁽¹⁶⁾ and residence cards issued in accordance with Directive 2004/38/EC;

(b) all other documents issued by a Member State to third-country nationals authorising a stay on its territory, that have been the subject of a notification and subsequent publication in accordance with Article 34, with the exception of:

(i) temporary permits issued pending examination of a first application for a residence permit as referred to in point (a) or an application for asylum and

(ii) visas issued by the Member States in the uniform format laid down by Council Regulation (EC) No 1683/95 of 29 May 1995 laying down a uniform format for visas⁽¹⁷⁾;

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;

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;

⁽¹⁶⁾ OJ L 157, 15.6.2002, p. 1.

⁽¹⁷⁾ OJ L 164, 14.7.1995, p. 1.

18a. ‘offshore worker’ means a person working on an offshore installation located in the territorial waters or in an area of exclusive maritime economic exploitation of the Member States as defined by international maritime law, and who returns regularly by sea or air to the territory of the Member States;

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.

I. General remarks

1

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

II. Internal borders (para. 1)

2

Article 2(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.⁵⁴ As a logical consequence of not being bound by this piece of legislation, Article 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)⁵⁵ entitles the United Kingdom and Ireland to maintain controls at their borders to other Member States. Said protocol thereby modifies the legal scope of Article 26 TFEU⁵⁶ with respect to the United Kingdom and Ireland.

3

Furthermore, the Schengen acquis has been extended to some Non-member States (Norway, Iceland, Switzerland and Liechtenstein), 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, Switzerland and Liechtenstein that are applying the Schengen acquis on the basis of association agreements.

⁵⁴ See commentary on Article 1 MN 6.

⁵⁵ OJ 2006 C 321 E/196 .

⁵⁶ According to the jurisprudence of the ECJ, Article 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, *Wijzenbeek*, C-378/97, EU:C:1999:439. See on the significance of this ruling in the present context *Peers*, Justice and Home Affairs, p.156, 158.

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

4

Article 2(5),(6) define the notions of ‘persons enjoying the right of free movement under Union law’ and ‘third country national’. It is remarkable that the latter notion is defined more narrowly than the notion of ‘alien’ in Article 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 an equivalent right of free movement based on bilateral agreements as for example the EEC Agreement or the Agreement on the free movement of persons concluded with Switzerland.⁵⁷

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.

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 nationals are concerned, in comparison with persons enjoying the right of free movement laid down in EU law (for example in Article 5 in relation to the entry).

7

The larger definition of ‘aliens’ according to Article 1 SIC remains pertinent for the provisions of the SIC that are not repealed by Reg. 562/2006.⁵⁸ According to Article 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.

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 right of free movement under Union law;

⁵⁷ 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 2002 L 114/6.

⁵⁸ As for example Article 22 SIC concerning the obligation of aliens to register with the authorities. According to Article 39(1), Regulation No.562/2006 does only repeal Articles 2–8 SIC.

(b) the rights of refugees and persons requesting international protection, in particular as regards non-refoulement.

I. General remarks

1

Article 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

Article 3(a) 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 Article 5. The European Court of Justice ruled in *MRAX*⁵⁹ 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 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 Article 96 SIC. In such a case, the 'automatic' refusal of entry according to Article 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 Article 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 Article 3(a), it is to be assumed that the conclusions drawn from this jurisprudence are also applicable and pertinent on the basis of the Schengen Borders Code 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.⁶⁰ In this context, it should further be recalled that pursuant to the findings of the ECJ in the *Metock* case⁶¹ the right of stay of third-country nationals that are family members

⁵⁹ ECJ, *MRAX*, C-459/99, EU:C:2002:461.

⁶⁰ 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 ff.

⁶¹ ECJ, *Metock*, C-127/08, EU:C:2008:449.

of a Union citizen is not (or no longer)⁶² dependent on a previous legal sojourn in the EU territory.⁶³

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

3

According to **Article 3(b)** 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.⁶⁴

Article 3a

Fundamental Rights

When applying this Regulation, Member States shall act in full compliance with relevant Union law, including the Charter of Fundamental Rights of the European Union ('the Charter of Fundamental Rights'); relevant international law, including the Convention Relating to the Status of Refugees done at Geneva on 28 July 1951 ('the Geneva Convention'); obligations related to access to international protection, in particular the principle of non-refoulement; and fundamental rights. In accordance with the general principles of Union law, decisions under this Regulation shall be taken on an individual basis.

1

Art. 3a contains an express **safeguard clause for the protection of fundamental rights** and was introduced into the Schengen Borders Code in 2013. It calls upon the Member States to fully respect their obligations flowing from the EU Charter of Fundamental Rights, the Geneva Refugee Convention and other relevant international law – in particular the international human rights treaties and the ECHR –, and stresses the importance of the principle of non-refoulement⁶⁵.

2

With the entry into force of the Lisbon Treaty on 1 December 2009, the **EU Charter of Fundamental Rights** became legally binding. Of particular relevance in the framework of border control are Article 1 (Human Dignity)⁶⁶, Article 4 (Prohibition of Torture), Article 18

⁶² Cf. the previous different findings in the Court's judgment in the *Akrich* case, ECJ, *Akrich*, C-109/01, EU:C:2003:491.

⁶³ Cf. the detailed analysis of the *Metock* judgment and its embedding in the previous jurisprudence of the Court of *Epiney*, EuR 2008, p.840 ff.

⁶⁴ Cf. the detailed comments on Article 1 MN 12-17.

⁶⁵ On the protection of the rights of persons seeking international protections see above Article 1, MN 12-17.

⁶⁶ See ECJ, *Zakira*, C-23/12, EU:C:2013:24.

(Right to Asylum), Article 19 (Prohibition of Refoulement) as well as the guarantee to an effective remedy in Art. 47.

3

The ECJ considers provisions of Reg. 562/2006 that might significantly interfere with the fundamental rights of the persons concerned as “**essential elements**” and requires the involvement of the Union legislature in their amendment⁶⁷.

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 fixed opening hours may be allowed:

(a) for individuals or groups of persons, where there is a requirement of a special nature for the occasional crossing of external borders outside border crossing points or outside fixed opening hours, 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. Member States may make specific arrangements in bilateral agreements. General exceptions provided for by national law and bilateral agreements shall be notified to the Commission pursuant to Article 34;

(b) for individuals or groups of persons in the event of an unforeseen emergency situation;

(c) in accordance with the specific rules set out in Articles 18 and 19 in conjunction with Annexes VI and VII.

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

⁶⁷ ECJ, *European Parliament v. Council*, C-355/10, EU:C:2012:516, paras. 76-77.

crossing points or at times other than the fixed opening hours. These penalties shall be effective, proportionate and dissuasive.

I. General principles on the crossing of external borders (Article 4(1))

1

Title II (Article 4–19a) regulates the controls at external borders.

2

Article 4 establishes that **external borders** may only be **crossed at the designated border crossing points and during the fixed opening hours** (Article 4(1)). This article replaces Article 3 SIC and points 1.2 and 1.3 of part I of the Common Manual. According to Article 34(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.⁶⁸ The competent national authorities have to carry out border surveillance pursuant to **Article 12** in order to prevent unauthorised border crossings.

II. Possible derogations (Article 4(2))

3

Article 4(2) provides for **derogations** from Article 4(1) in the event of an **unforeseen emergency situation** (lit. b) and for **certain categories of borders and persons** (e.g. Heads of State, pilots, seamen, offshore workers) that are subject to the specific rules set out in Annexes VI and VII (lit. c).

Derogations to para. 1 are also permitted where there is a **‘requirement of a special nature’** for the occasional crossing of external borders outside border crossing points or outside fixed opening hours (lit. a). Although this exception has been amended by Reg. 610/2013 in an attempt to clarify it, its exact meaning still 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 persons must hold the required permits and 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 as a possible example for the application of Article 4(2)(c).

In situations that fall under Article 4(2)(a),(b), Member States are also allowed to provide for **derogations from the rules set out in Article 7** (border checks on persons) (Article 7(8) Reg. 562/2006).

4

⁶⁸ The notifications can also be accessed on the website of the Directorate-General for Migration and Home Affairs http://ec.europa.eu/dgs/home-affairs/e-library/documents/categories/notifications/index_en.htm (last accessed: 24 February 2015).

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 borders⁶⁹ and/or under bilateral agreements.⁷⁰ According to Article 15(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 Article 4(1) Regulation 562/2006.

III. Penalties for the illegal crossing of external borders (Article 4(3))

5

Article 4(3) takes over Article 3(2) SIC and concerns the introduction of penalties for violations of Article 4(1). Article 4(3) is without prejudice to Article 31 of the Geneva Convention on the status of refugees of 21 June 1951 which prohibits the imposing of criminal sanctions solely on account of the illegal entry or presence of a refugee in the sense of Article 1 of the Convention, as long as the persons comes directly from a country where he was at a risk of being persecuted and presents himself without delay to the authorities and gives good reasons for his illegal entry or presence.⁷¹

Article 5

Entry conditions for third-country nationals

1. For intended stays on the territory of the Member States of a duration of no more than 90 days in any 180-day period, which entails considering the 180-day period preceding each day of stay, the entry conditions for third-country nationals shall be the following:

(a) they are in possession of a valid travel document entitling the holder to cross the border satisfying the following criteria:

(i) its validity shall extend at least three months after the intended date of departure from the territory of the Member States. In a justified case of emergency, this obligation may be waived;

(ii) it shall have been issued within the previous 10 years;

(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

⁶⁹ 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 2006 L 405/1; Corrigendum, OJ 2007 L 29/3.

⁷⁰ Article 35 Regulation 562/2006, at 3.4 of Part Two, Section 1 of the Schengen Handbook.

⁷¹ For a detailed commentary on Article 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, Article 1 MN 12-17.

of visas when crossing the external borders and those whose nationals are exempt from that requirement⁽¹⁸⁾, except where they hold a valid residence permit or a valid long-stay visa;

(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.

1a. For the purposes of implementing paragraph 1, the date of entry shall be considered as the first day of stay on the territory of the Member States and the date of exit shall be considered as the last day of stay on the territory of the Member States. Periods of stay authorised under a residence permit or a long-stay visa shall not be taken into account in the calculation of the duration of stay on the territory of the Member States.

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 who hold a residence permit or a long-stay visa shall be authorised to enter the territory of the other Member States for transit purposes so that they may reach the territory of the Member State which issued the residence permit or the long-stay 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;

⁽¹⁸⁾ OJ L 81, 21.3.2001, p. 1.

(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 territory of the Member States, if a visa is issued at the border in accordance with Articles 35 and 36 of Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code)⁽¹⁹⁾.

Member States shall compile statistics on visas issued at the border in accordance with Article 46 of Regulation (EC) No 810/2009 and Annex XII thereto.

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⁽²⁰⁾, 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.

I. General remarks

1

Article 5 lists the **conditions of entry for third-country nationals** and certain derogations thereof. This article 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 Article 5 found in point 1.1 of Part Two, Section 1 of the Schengen Handbook. Article 5 replaces Article 5 SIC and points 2 to 4 of Part 1 of the Common Manual.

II. Individual right of entry

2

Whereas Article 5 SIC stipulated that aliens ‘**may** be granted entry’ if the conditions mentioned were fulfilled, Article 5 Regulation 562/2006 is worded differently and states that ‘the entry conditions for third-country nationals **shall** be the following’. The change of wording in Article 5 was made at the behest of the European Parliament and the question has to be raised if Article 5 Regulation 562/2006 stipulates an **individual right of entry** into the Schengen area also for third-country nationals within the meaning of Article 2(6) Regulation 562/2006 if these persons fulfil all the conditions listed.⁷²

⁽¹⁹⁾ OJ L 243, 15.9.2009, p. 1.

⁽²⁰⁾ OJ L 53, 23.2.2002, p. 4.

* OJ L 53, 23.2.2002, p.4.

3

In this respect, Article 5 needs to be considered in conjunction with **Article 13 Regulation 562/2006** according to which entry shall be refused if a third-country national does not fulfil the conditions of Article 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: Article 13(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 Article 5(1). Persons refused entry shall have the right to appeal (Article 13(3) Regulation 562/2006).

4

The explicit possibility to appeal the refusal decision speaks clearly in favour of the conclusion that Article 5 does grant individual rights and if the conditions of this provision are fulfilled third-country nationals have an individual right of entry. 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 Article 5(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 Visa Code Regulation (EC) No 810/2009 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 States⁷³. Furthermore, the indeterminate legal notions used in Article 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

Article 5(1) lists five conditions of entry into the Schengen area for stays of up to three months in a six month period⁷⁴.

⁷² Peers, EJML 2006, p.332.

⁷³ Although the Visa Code Regulation also limits the possible grounds for refusal of a visa, the ECJ stressed that the competent authorities of a Member States still have “a **wide discretion** in the examination of that application so far as concerns the conditions for the application of those provisions and the assessment of the relevant facts, with a view to ascertaining whether one of those grounds for refusal can be applied to the applicant” [emphasis added], ECJ, *Koushkaki*, C-84/12, EU:C:2013:862, para. 63.

⁷⁴ How to calculate the maximum possible stay in a six-month period was clarified in ECJ, Bot, C-241/05, EU:C:2006:634 and introduced in the Schengen Borders Code by Reg. 610/2013, OJ 2013 L 182/1.

1. Possession of valid travel documents (para. 1(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.⁷⁵ 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 Article 5(1)(a). According to Article 7(3)(a)(i),(ii) Regulation 562/2006 border guards shall examine whether this condition is fulfilled by verifying that the travel document is not expired and does not bear signs of falsification or counterfeiting.

The validity of the documents must in general extend at least three months after the planned date of departure from the Schengen area and the documents must not be older than ten years (Article 5(1)(a)(i),(ii)).

2. Possession of a valid visa if required pursuant to Regulation 539/2001 (para. 1(b))

8

The identity of the person and the authenticity of the visa must in general be verified by consulting the VIS unless one of the grounds of derogation from this rule apply (Article 7(3)(aa),(ab) 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 (Article 7(3)(iii) Regulation 562/2006).

10

Article 5(1)(b) provides for an exception from the visa requirement according to the EU visa list if the third-country national is in possession of a valid residence permit of a Schengen state or valid long-stay visa. A valid residence permit⁷⁶ can either be a permit issued on the basis of EU law (as for example the Family Reunification Directive 2003/86,⁷⁷ or the Long Term Residents' Directive 2003/109)⁷⁸ or any other document issued by a Member State pursuant to national law authorizing a stay in its territory with the exception of temporary permits that

⁷⁵ The lists have since been updated in accordance with Regulation (EC) No. 789/2001.

⁷⁶ Cf. the definition in Article 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).

⁷⁷ Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, OJ L 251/12 (2003).

⁷⁸ 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).

were issued pending the examination of an application for asylum or residence⁷⁹. A list of the national residence permits has to be notified to the Commission pursuant to Article 34(1)⁸⁰.

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

11

Article 5(1)(c) is to be read in conjunction with Article 5(2),(3) in conjunction with Annex I and Article 7(3)(iv),(v) Regulation 562/2006.

12

Whether the conditions of Article 5(1)(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 to the purpose and the duration of stay (Article 5(3) subpara.1). The Member States have to notify their reference amounts to the Commission (Article 5(3) subpara.2, Article 34(1)⁸¹: 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 50-70 € 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 (Article 5(3) subpara.3 Regulation 562/2006).

15

By and large, it is to be welcomed that the criteria for the assessment of sufficient means have been stated more precisely than in Article 5 SIC and that the discretion of the authorities in assessing the means has been further limited. The specifications in Article 5(3) Regulation

⁷⁹ Cf. Article 2(15)(b)(i) and also ECJ, ANAFE, C-606/10, EU:C:2012:348, para. 39-41.

⁸⁰ The notifications can be accessed on the website of the Directorate-General for Migration and Home Affairs at http://ec.europa.eu/dgs/home-affairs/e-library/documents/categories/notifications/index_en.htm (last accessed: 24 February 2015).

⁸¹ For an updated list of the reference amounts notified visit the website of the Directorate-General for Migration and Home Affairs at http://ec.europa.eu/dgs/home-affairs/e-library/documents/categories/notifications/index_en.htm (last accessed: 24 February 2015).

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.

16

It is surprising that pursuant to Article 5(1)(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 Article 5(1) Regulation 562/2006 – and if there is an actual right of entry if the requirements of Article 5(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 Article 5(1)(c) – whereas the standard of ‘proof’ should be quite low in order not to impede the right of entry – should be interpreted 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 Article 5(1)(e).

4. No Article 96 SIC alert in the SIS for the purpose of refusing entry (para. 1(d))

18

It should be recalled⁸² that a third-country national who is married to a Union citizen may not be refused entry solely because of an Article 96 SIC alert.⁸³ 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.

5. 5. No threat to public policy, internal security, public health or international relations (para. 1(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 mentioned in Article 5(1).

20

⁸² See already the comments made above, Article 3 MN 2.

⁸³ ECJ, *Commission v. Spain*, C-503/03, EU:C:2006:74.

The condition that the person may not constitute a **threat to public health** is new compared to Article 5 SIC.⁸⁴ The notion is defined in Article 2(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.

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

22

Article 5(4) provides for three **possible derogations from Article 5(1)**.

1. Right of transit when in possession of a residence permit or a long-stay visa (para. 4(a))

23

If a third-country national is in **possession of a residence permit or a long-stay 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 Article 5(1).

24

Article 5(4)(a) 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 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(b))

25

To a third-country national who fulfils all the conditions in Article 5(1) except that he does not have the necessary visa, a **visa** can be **issued at the border pursuant to the Visa Code Regulation 810/2009**.

⁸⁴ Cf. Peers, EJML 2006, p.332.

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

26

Third-country nationals who do not fulfil the conditions of Article 5(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

Article 5(4)(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 refoulement are of mandatory nature and under certain conditions prohibit the rejection of a person at the border⁸⁵.

CHAPTER II

Control of external borders and refusal of entry

Article 6

Conduct of border checks

1. Border guards shall, in the performance of their duties, fully respect human dignity, in particular in cases involving vulnerable persons.

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.

⁸⁵ On the question of a right of entry for asylum seekers see ECJ, *ANAFE*, C-606/10, EU:C:2012:348, paras. 39-41; and the detailed comments on refugees, asylum seekers and persons in need of international protection above Article 1 MN 12-17.

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 right of free movement under Union law.

However, on a non-systematic basis, when carrying out minimum checks on persons enjoying the right of free movement under Union law, 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 right of free movement under Union law 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)⁽²¹⁾;

(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

⁽²¹⁾ OJ L 218/60 (2008).

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. Without prejudice to the second subparagraph, third-country nationals subject to a thorough second line check shall be given written information in a language which they understand or may reasonably be presumed to understand, or in another effective way, on the purpose of, and the 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 right of free movement under Union law 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.

8. Where points (a) or (b) of Article 4(2) apply, Member States may also provide derogations from the rules set out in this Article.

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 right of free movement under Union law are entitled to use the lanes indicated by the sign in part A ('EU, EEA, CH') of Annex III. They may also use the lanes indicated by the sign in part B1 ('visa not required') and part B2 ('all passports') of Annex III.

Third-country nationals who are not obliged to possess a visa when crossing the external borders of the Member States in accordance with Regulation (EC) No 539/2001 and third-country nationals who hold a valid residence permit or long-stay visa may use the lanes indicated by the sign in part B1 ('visa not required') of Annex III to this Regulation. They may also use the lanes indicated by the sign in part B2 ('all passports') of Annex III to this Regulation.

(b) All other persons shall use the lanes indicated by the sign in part B2 ('all passports') 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.

The provision of separate lanes indicated by the sign in part B1 ('visa not required') of Annex III is not obligatory. Member States shall decide whether to do so and at which border crossing points in accordance with practical needs.

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.

Article 10

Stamping of the travel documents

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 that Directive, shall be stamped on entry and exit.

The travel documents of nationals of third countries who are members of the family of nationals of third countries enjoying the right of free movement under Union law, but who do not present the residence card provided for in Directive 2004/38/EC, shall be stamped on entry and 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;

(f) to the travel documents of crews of passengers and goods trains on international connections;

(g) to the travel documents of nationals of third countries who present a residence card provided for in Directive 2004/38/EC.

3. 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 that person's name and passport number. That sheet shall be given to the third-country national. The competent authorities of the Member States may keep statistics of such exceptional cases and may provide those statistics to the Commission.

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 returned in accordance with Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals⁽²²⁾ and with national law respecting that Directive.

4. The relevant provisions of paragraph 1 and 2 shall apply mutatis mutandis in the absence of an exit stamp.

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. A person who has crossed a border illegally and who has no right to stay on the territory of the Member State concerned shall be apprehended and made subject to procedures respecting Directive 2008/115/EC.

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.

⁽²²⁾ OJ L 348/98 (2008), p. 98.

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. The Commission shall be empowered to adopt delegated acts in accordance with Article 33 concerning additional measures governing surveillance.

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

1

Article 6 codifies **basic principles** that shall be respected by the border guards when **conducting border checks** explained in detail in Article 7. This article was inserted at the behest of the European Parliament.⁸⁶

1. Human dignity (Article 6(1))

2

According to Article 6(1) (and in compliance with Article 1 EU Charter) 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. In cases involving **vulnerable persons** like e.g. children, unaccompanied minors and persons with serious health concerns, the border guards are urged to pay particular attention to these principles⁸⁷.

In compliance with Article 47 EU Charter, the Member States have to provide appropriate legal remedies against alleged infringements of this provision⁸⁸.

2. Prohibition of discrimination (Article 6(2))

3

Article 6(2) prohibits any discriminatory treatment by border guards on grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. The **explicit prohibition of discrimination** in Article 6(2) is a significant improvement; the SIC and the Common Manual did not contain a similar provision. It is worth pointing out that Article 6(2) does not prohibit differential treatment on grounds of nationality. Furthermore, the national authorities generally have rather broad discretionary powers when applying 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 Article 6 Regulation 562/2006.

⁸⁶ See *Peers*, EJML 2006, p.335 with further references.

⁸⁷ Cf. also recital (7) Reg. 562/2006.

⁸⁸ Cf. ECJ, *Zakira*, C-23/12, EU:C:2013:24, para. 40.

The **principle of non-discrimination** on the grounds mentioned in Article 6(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 Article 21(2) of the EU Charter of Fundamental Rights⁸⁹. The prohibition of discrimination on the grounds mentioned in Article 6(2) 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 anti-discrimination directives that were adopted on the basis of Article 19 TFEU (formerly Article 13 EC Treaty) - in particular Directive 2000/43⁹⁰ and Directive 2000/78⁹¹ - are, however, not applicable to the entry of third-country nationals into the EU territory since this area does not fall within the scope of application of these instruments.⁹²

II. Detailed guidelines for the conduction of border checks (Article 7)

Article 7 states in detail the **guidelines that have to be respected by the Member States when conducting border checks**. In comparison to Article 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 Article 7 are self-explanatory and need no further analysis. As a matter of principle, all persons – including EU citizens 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'; Article 7(2)). Third country nationals not enjoying the right of free movement shall be subjected to thorough checks ('second-line checks') on entry (Article 7(3)(a) and on exit (Article 7(3)(b) and (c)). The third-country nationals subjected to a 'second-line check' are to be informed in writing in a language they understand or may be expected to understand, or in another effective way, of the purpose and the procedure of such a check. The written information has to be available in all official EU languages and the language of the neighbouring countries of the Member State concerned and must in particular indicate that the third-country nationals have an explicit right to request the name or identification number of the border guards carrying out the check (Article 7(5)).

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

⁸⁹ See above Article 3a.

⁹⁰ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ 2000 L 180/22.

⁹¹ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ 2000 L 303/16.

⁹² See for example Article 3(2) Directive 2000/43/EC 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/EC 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.

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 (**Article 9**), making use of the signs set out in Annex III.⁹³

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

7

In the event of exceptional and unforeseen circumstances, **Article 8** allows the **exceptional and temporary relaxation of border checks** in order to avoid excessive waiting times (Article 8(1)). Such a relaxation is only permissible if both exceptional *and* unforeseen circumstances exist. It can be concluded *e contrario* that Article 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 (Article 8(2)), leaving the obligation to systematically stamp the travel documents according to **Article 10** unaffected⁹⁴ (Article 8(3)).

V. Unstamped travel documents (Article 11)

8

Article 11 concerns cases where the travel document does not bear an entry stamp. As a rule, the competent authorities may presume that the person does not or no longer fulfill the conditions of maximum duration of stay (Article 11(1)). This presumption can be rebutted under certain conditions (Article 11(2)).

9

If the presumption is not rebutted, the authorities **may return the third-country national** in accordance with the Return Directive 2008/115/EC and the relevant national law. The ECJ has, however, clarified that Article 11(3) does not constitute a mandatory obligation to expel the person⁹⁵.

VI. Principles on border surveillance (Article 12)

9

⁹³ Article 9 took over Council Decision 2004/581/EC, OJ 2004 L 261/36.

⁹⁴ Article 10 and Article 11 (presuming the non-fulfilment of the conditions of stay when the document is not stamped) took over the rules of Regulation 2133/2004, OJ 2004 L 369/5.

⁹⁵ ECJ, *Garcia and Cabrera*, C-261/08 and C-348/08, EU:C:2009:648.

Article 12 formulates some rather broad **principles for the carrying out of border surveillance**.⁹⁶ With regards to **sea border surveillance**, the Council adopted some additional rules and guidelines in the form of Council Decision 2010/252/EU in 2010. The Council based its decision on former Article 12(5) Reg. 562/006 which provided for the possibility for additional measures to be adopted, following the so-called regulatory procedure with scrutiny (formerly in Article 33 (2) Reg. 562/2006), as long as the amendments concerned non-essential elements of the regulation. The Parliament brought an action for annulment against the Council, arguing that the Council had exceeded its implementing powers. The Court followed the Parliament's reasoning and annulled the decision on procedural grounds⁹⁷.

Article 12(5) has since been amended⁹⁸. The content of much of the annulled Council decision was taken over by a later Commission proposal – this time following the ordinary legislative procedure – and adopted as the **Sea Borders Regulation (EU) 565/2014** in May 2014⁹⁹.

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.

⁹⁶ Cf. the definition in Article 2(11).

⁹⁷ ECJ, *European Parliament v. Council*, C-355/10, EU:C:2012:516; see *Cornelisse*, CML Rev 51 (2014), p. 763-765.

⁹⁸ Cf. the remarks on Reg. 610/2013, above Article 1 MN 24.

⁹⁹ See the extensive commentary on this regulation by *Ryan*, in this volume.

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 who were refused entry and the type of border (land, air or sea) at which they were refused entry and submit them yearly to the Commission (Eurostat) in accordance with Regulation (EC) No 862/2007 of the European Parliament and of the Council of 11 July 2007 on Community statistics on migration and international protection⁽²³⁾.

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

I. Refusal of entry (para. 1)

1

Article 13 is the correlate to Article 5 and establishes the **obligation of Member States to refuse entry** if the conditions of the latter provision are not fulfilled (Article 13(1)). This obligation is without prejudice to special provisions in the context of the right of asylum and the prohibition of refoulement¹⁰⁰ and for holder of national visas authorising a longer stay.¹⁰¹

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

2

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

The explicit inclusion of procedural guarantees in the Schengen Borders Code was an important achievement of the European Parliament during negotiations¹⁰² and a significant improvement compared to the rules contained in the SIC. The Common Manual contained rules similar to the ones codified in Article 13 but they were not legally binding.¹⁰³

⁽²³⁾ OJ L 199, 31.7.2007, p. 23.

¹⁰⁰ Such cases are also already covered by the derogation provided for in Article 5 para. 4 lit. c) Regulation (EC) no. 562/2006.

¹⁰¹ Peers, EJML 2006, p. 337 et seqq.

¹⁰² Cf. Brouwer, Effective remedies, p. 290.

¹⁰³ Cf. Peers, EJML 2006, p. 338 et seq.

1. Substantiated decision

3

Article 13(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.¹⁰⁴ According to part A of Annex V(1)(a) the third-country national has to sign the form and shall be given a copy.¹⁰⁵

2. Right to appeal

4

The refusal decision will take immediate effect, but according to Article 13 (3) subpara. 1, the person refused entry has the **right to appeal**. 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.¹⁰⁶ The appeal may only be addressed against the decision to refuse entry, and not against other alleged infringements in relation to the refusal decision.¹⁰⁷

5

Such an appeal will, however, have **no suspensive effect** (Article 13(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 Article 13(4) 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

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

CHAPTER III

Staff and resources for border control and cooperation between Member States

Article 14

¹⁰⁴ Cf. *Brouwer*, Effective remedies, p.290 et seq.

¹⁰⁵ Cf. *Brouwer*, Effective remedies, p.290.

¹⁰⁶ Cf. *Brouwer*, Effective remedies, p.290.

¹⁰⁷ ECJ, *Zakaria*, C-23/12, EU:C:2013:24, paras. 40, 42.

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, taking into account common core curricula for border guards established and developed by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States established by Council Regulation (EC) No 2007/2004. Training curricula shall include specialised training for detecting and dealing with situations involving vulnerable persons, such as unaccompanied minors and victims of trafficking. Member States, with the support of the Agency, shall encourage border guards to learn the languages 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 4 and 5 and Articles 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;

(g) rescue services, police and fire brigades and border guards;

(h) offshore workers.

1. Those specific rules may contain derogations from Articles 4 and 5 and Articles 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.

Article 19a

By way of derogation from the provisions of this Regulation relating to the establishment of border crossing points, and until the entry into force of a decision by the Council on the full application of the provisions of the Schengen acquis in Croatia pursuant to Article 4(2) of the Act of Accession or until this Regulation is amended to include provisions governing border control at common border crossing points, whichever is the earlier, Croatia may maintain the common border crossing points at its border with Bosnia and Herzegovina. At these common border crossing points, border guards of one party shall carry out entry and exit checks on the territory of the other party. All entry and exit checks by Croatian border guards shall be carried out in compliance with the acquis of the Union, including Member States' obligations as regards international protection and non-refoulement. The relevant bilateral agreements establishing the common border crossing points in question shall, if necessary, be amended to that end.

1

Article 14–17, 19a Regulation 562/2006 provide rules on the necessary staff and resources for border control (**Article 14**), the implementation of the controls by national border guards and the obligation of Member States to properly train them (**Article 15**), on the cooperation between Member States and between Member States and FRONTEX (**Article 16**) as well as rules on the common control of land borders of States that are not yet full Schengen Members and have therefore not yet abolished the checks at internal borders pursuant to Article 20 Regulation 562/2006. **Article 19a** allows Croatia to make certain derogations from Reg. 562/2006 with regards to its common border crossing points with Bosnia-Herzegovina until it becomes a full Schengen Member State.

2

Article 18 and 19 contain specific rules on various types of borders and certain categories of persons that are explained in greater detail in the annexes VI and VII.

CHAPTER IVa

Specific measures in the case of serious deficiencies relating to external border control

Article 19a

Measures at external borders and support by the Agency

1. Where serious deficiencies in the carrying out of external border control are identified in an evaluation report drawn up pursuant to Article 14 of Council Regulation (EU) No 1053/2013 of 7 October 2013 establishing an evaluation and monitoring mechanism to verify the application of the Schengen acquis⁽²⁴⁾, and with a view to ensuring compliance with the recommendations referred to in Article 15 of that Regulation, the Commission may recommend, by means of an implementing act, that the evaluated Member State take certain specific measures, which may include one or both of the following:

(a) initiating the deployment of European border guard teams in accordance with Regulation (EC) No 2007/2004;

(b) submitting its strategic plans, based on a risk assessment, including information on the deployment of personnel and equipment, to the Agency for its opinion thereon.

That implementing act shall be adopted in accordance with the examination procedure referred to in Article 33a(2).

2. The Commission shall inform the committee established pursuant to Article 33a(1) on a regular basis of the progress in the implementation of the measures referred to in paragraph 1 of this Article and on its impact on the deficiencies identified.

It shall also inform the European Parliament and the Council.

3. Where an evaluation report as referred to in paragraph 1 has concluded that the evaluated Member State is seriously neglecting its obligations and must therefore report on the implementation of the relevant action plan within three months in accordance with Article 16(4) of Regulation (EU) No 1053/2013, and where, following that three-month period, the Commission finds that the situation persists, it may trigger the application of the procedure provided for in Article 26 of this Regulation where all the conditions for doing so are fulfilled.

1

Article 19a was introduced as part of the so-called “Schengen Governance package” in November 2013¹⁰⁸. It needs to be **read in conjunction with the new rules on the temporary reintroduction of internal border controls** (Art. 23-30).

2

If an **evaluation report** drawn up pursuant Article 37a in conjunction with Regulation 1053/2013 identifies that a Schengen State seriously neglects its obligations with regard to external borders control, the **Commission may recommend** to the Member State concerned

⁽²⁴⁾ OJ L 295, 6.11.2013, p. 27.

¹⁰⁸ See Article 23-30 MN 3.

certain measures, including in particular the deployment of European border guard teams in accordance with the FRONTEX Regulation 2007/2004 and the submission of the Commissions strategic plans to FRONTEX for its opinion thereon.

3

The Commission has to **inform** the Committee established pursuant to Article 33a(1) as well as the Parliament and the Council on the progress and the impact of these measures.

4

If the evaluated Member State is seriously neglecting its external border control obligations, it has to report on the implementation of the drawn-up action plan after three months. **If the problems still persist** and put the overall functioning of the area without internal border control at risk, **Article 26 Reg. 562/2006 may apply**. According to that provision, the Council may exceptionally and as a last resort recommend that one or more Member State(s) may reintroduce internal border control for up to six months¹⁰⁹.

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,

¹⁰⁹ See in more detail the comments on Art. 23-31 below.

(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 possibility for a Member State to provide by law for an obligation on third-country nationals to report their presence on its territory 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.

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

1

Title III (Article 20-31) concerns internal border control or rather the absence thereof.

2

Article 20 states the principle that internal borders may be crossed at any point without border checks on persons. This principle was previously codified in Article 2(1) SIC. Closely connected to the elimination of internal border controls is the obligation to remove all obstacles to traffic in Article 22.

II. Checks within the territory of Member States (Article 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).¹¹⁰ 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.

They may therefore especially not have **effects equivalent to border checks**, which is **explicitly prohibited in Article 21(a)**. 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 are not in conformity with Article 20 since their effect is similar to actual border controls and compromise the effectiveness of the prohibition of internal border controls.

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

4

Article 21(b) 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. **Article 21(c)** 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 a possible obligation of third-country nationals according to national law to report their presence in the territory of a Schengen state pursuant to Article 22 SIC (**Article 21(d)**).

3. Jurisprudence of the ECJ

5

The ECJ has had the opportunity to clarify the **meaning of police checks which are of equivalent effects to border checks**. The joint cases of *Melki and Abdeli*,¹¹¹ concerned a French law which allowed the French police authorities to check the identity of anyone in the border area irrespective of the behaviour of the person concerned and of specific circumstances. Even though the Court acknowledged that these provision did not have the same objective as border controls but aimed at establishing whether the obligations to hold, carry and produce identity papers were fulfilled (see Article 21(c)), it held that the French law did not contain enough safeguards “in particular in relation to the intensity and frequency of the controls”, and that those checks might have effects equivalent to border checks in practice and were therefore precluded by Article 21(a).

¹¹⁰ 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.

¹¹¹ ECJ, *Melki and Abdeli*, C-188/10 and C-189/10, EU:C:2010:206, paras. 70-75.

In *Adil*¹¹², the Court considered a Dutch law to be in compliance with the requirements of the Schengen Borders Code. The law permitted officials responsible for border surveillance to carry out checks near the border with a view to establishing whether the persons stopped satisfied the requirements for lawful residence in the Netherlands. The ECJ held that these checks which were aimed at combatting illegal residence had a different objective than border checks. Since the law in question contained detailed rules and limitations in order to define the intensity, frequency and selectivity of the checks, the Court was satisfied that such checks did not have an equivalent effect to border checks.

CHAPTER II

Temporary reintroduction of border control at internal borders

Article 23

General framework for the temporary reintroduction of border control at internal borders

1. Where, in the area without internal border control, there is a serious threat to public policy or internal security in a Member State, that Member State may exceptionally reintroduce border control at all or specific parts of its internal borders for a limited period of up to 30 days or for the foreseeable duration of the serious threat if its duration exceeds 30 days. 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. Border control at internal borders shall only be reintroduced as a last resort, and in accordance with Articles 24, 25 and 26. The criteria referred to, respectively, in Articles 23a and 26a shall be taken into account in each case where a decision on the reintroduction of border control at internal borders is considered pursuant, respectively, to Article 24, 25 or 26.
3. If the serious threat to public policy or internal security in the Member State concerned persists beyond the period provided for in paragraph 1 of this Article, that Member State may prolong border control at its internal borders, taking account of the criteria referred to in Article 23a and in accordance with Article 24, on the same grounds as those referred to in paragraph 1 of this Article and, taking into account any new elements, for renewable periods of up to 30 days.
4. The total period during which border control is reintroduced at internal borders, including any prolongation provided for under paragraph 3 of this Article, shall not exceed six months. Where there are exceptional circumstances as referred to in Article 26, that total period may be extended to a maximum length of two years, in accordance with paragraph 1 of that Article.

Article 23a

¹¹² ECJ, *Adil*, C-278/12, EU:C:2012:508, paras. 72-87.

Criteria for the temporary reintroduction of border control at internal borders

Where a Member State decides, as a last resort, on the temporary reintroduction of border control at one or more of its internal borders or at parts thereof, or decides to prolong such reintroduction, in accordance with Article 23 or Article 25(1), it shall assess the extent to which such a measure is likely to adequately remedy the threat to public policy or internal security, and shall assess the proportionality of the measure in relation to that threat. In making such an assessment, the Member State shall, in particular, take the following into account:

- (a) the likely impact of any threats to its public policy or internal security, including following terrorist incidents or threats and including those posed by organised crime;
- (b) the likely impact of such a measure on free movement of persons within the area without internal border control.

Article 24

Procedure for the temporary reintroduction of border control at internal borders under Article 23(1) 1. Where a Member State plans to reintroduce border control at internal borders under Article 23(1), it shall notify the other Member States and the Commission at the latest four weeks before the planned reintroduction, or within a shorter period where the circumstances giving rise to the need to reintroduce border control at internal borders become known less than four weeks before the planned reintroduction. To that end, the Member State shall supply the following information:

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

A notification under the first subparagraph may also be submitted jointly by two or more Member States.

If necessary, the Commission may request additional information from the Member State(s) concerned.

2. The information referred to in paragraph 1 shall be submitted to the European Parliament and to the Council at the same time as it is notified to the other Member States and to the Commission pursuant to that paragraph.

3. Member States making a notification under paragraph 1 may, where necessary and in accordance with national law, decide to classify parts of the information.

Such classification shall not preclude information from being made available by the Commission to the European Parliament. The transmission and handling of information and documents transmitted to the European Parliament under this Article shall comply with rules concerning the forwarding and handling of classified information which are applicable between the European Parliament and the Commission.

4. Following notification by a Member State under paragraph 1 of this Article and with a view to consultation provided for in paragraph 5 of this Article, the Commission or any other Member State may, without prejudice to Article 72 of the Treaty on the Functioning of the European Union, issue an opinion.

If, based on the information contained in the notification or on any additional information it has received, the Commission has concerns as regards the necessity or proportionality of the planned reintroduction of border control at internal borders, or if it considers that a consultation on some aspect of the notification would be appropriate, it shall issue an opinion to that effect.

5. The information referred to in paragraph 1 and any Commission or Member State opinion under paragraph 4 shall be the subject of consultation, including, where appropriate, joint meetings between the Member State planning to reintroduce border control at internal borders, the other Member States, especially those directly affected by such measures, 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 threat to public policy or internal security.

6. The consultation referred to in paragraph 5 shall take place at least ten days before the date planned for the reintroduction of border control.

Article 25

Specific procedure for cases requiring immediate action

1. Where a serious threat to public policy or internal security in a Member State requires immediate action to be taken, the Member State concerned may, on an exceptional basis, immediately reintroduce border control at internal borders, for a limited period of up to ten days.

2. Where a Member State reintroduces border control at internal borders, it shall at the same time notify the other Member States and the Commission accordingly, and shall supply the information referred to in Article 24(1), including the reasons that justify the use of the procedure set out in this Article. The Commission may consult the other Member States immediately upon receipt of the notification.

3. If the serious threat to public policy or internal security persists beyond the period provided for in paragraph 1, the Member State may decide to prolong the border control at internal borders for renewable periods of up to 20 days. In doing so, the Member State concerned shall take into account the criteria referred to in Article 23a, including an updated assessment of the necessity and the proportionality of the measure, and shall take into account any new elements.

In the event of such a prolongation, the provisions of Article 24(4) and (5) shall apply mutatis mutandis, and the consultation shall take place without delay after the decision to prolong has been notified to the Commission and to the Member States.

4. Without prejudice to Article 23(4), the total period during which border control is reintroduced at internal borders, on the basis of the initial period under paragraph 1 and any prolongations under paragraph 3, shall not exceed two months.

5. The Commission shall inform the European Parliament without delay of notifications made under this Article.

Article 26

Specific procedure where exceptional circumstances put the overall functioning of the area without internal border control at risk

1. In exceptional circumstances where the overall functioning of the area without internal border control is put at risk as a result of persistent serious deficiencies relating to external border control as referred to in Article 19a, and insofar as those circumstances constitute a serious threat to public policy or internal security within the area without internal border control or within parts thereof, border control at internal borders may be reintroduced in accordance with paragraph 2 of this Article for a period of up to six months. That period may be prolonged, no more than three times, for a further period of up to six months if the exceptional circumstances persist.

2. The Council may, as a last resort and as a measure to protect the common interests within the area without internal border control, where all other measures, in particular those referred to in Article 19a(1), are ineffective in mitigating the serious threat identified, recommend that one or more Member States decide to reintroduce border control at all or at specific parts of their internal borders. The Council's recommendation shall be based on a proposal from the Commission. The Member States may request the Commission to submit such a proposal to the Council for a recommendation.

In its recommendation, the Council shall at least indicate the information referred to in points (a) to (e) of Article 24(1).

The Council may recommend a prolongation in accordance with the conditions and procedure set out in this Article.

Before a Member State reintroduces border control at all or at specific parts of its internal borders under this paragraph, it shall notify the other Member States, the European Parliament and the Commission accordingly.

3. In the event that the recommendation referred to in paragraph 2 is not implemented by a Member State, that Member State shall without delay inform the Commission in writing of its reasons.

In such a case, the Commission shall present a report to the European Parliament and to the Council assessing the reasons provided by the Member State concerned and the

consequences for protecting the common interests of the area without internal border control.

4. On duly justified grounds of urgency relating to situations where the circumstances giving rise to the need to prolong border control at internal borders in accordance with paragraph 2 become known less than 10 days before the end of the preceding reintroduction period, the Commission may adopt any necessary recommendations by means of immediately applicable implementing acts in accordance with the procedure referred to in Article 33a(3). Within 14 days of the adoption of such recommendations, the Commission shall submit to the Council a proposal for a recommendation in accordance with paragraph 2.

5. This Article shall be without prejudice to measures that may be adopted by the Member States in the event of a serious threat to public policy or internal security under Articles 23, 24 and 25.

Article 26a

Criteria for the temporary reintroduction of border control at internal borders where exceptional circumstances put the overall functioning of the area without internal border control at risk

1. Where, as a last resort, the Council recommends in accordance with Article 26(2) the temporary reintroduction of border control at one or more internal borders or at parts thereof, it shall assess the extent to which such a measure is likely to adequately remedy the threat to public policy or internal security within the area without internal border control, and shall assess the proportionality of the measure in relation to that threat. That assessment shall be based on the detailed information submitted by the Member State(s) concerned and by the Commission and any other relevant information, including any information obtained pursuant to paragraph 2 of this Article. In making such an assessment, the following considerations shall in particular be taken into account:

(a) the availability of technical or financial support measures which could be or have been resorted to at national or Union level, or both, including assistance by Union bodies, offices or agencies, such as the Agency, the European Asylum Support Office, established by Regulation (EU) No 439/2010 of the European Parliament and of the Council⁽²⁵⁾ or the European Police Office ('Europol'), established by Council Decision 2009/371/JHA⁽²⁶⁾, and the extent to which such measures are likely to adequately remedy the threat to public policy or internal security within the area without internal border control;

(b) the current and likely future impact of any serious deficiencies relating to external border control identified in the context of the evaluations carried out pursuant to Regulation (EU) No 1053/2013 and the extent to which such serious deficiencies constitute a serious threat to public policy or internal security within the area without internal border control;

⁽²⁵⁾ OJ L 132, 29.5.2010, p. 11.

⁽²⁶⁾ OJ L 121, 15.5.2009, p. 37.

(c) the likely impact of the reintroduction of border control on the free movement of persons within the area without internal border control.

2. Before adopting a proposal for a Council recommendation, in accordance with Article 26(2), the Commission may:

(a) request Member States, the Agency, Europol or other Union bodies, offices or agencies to provide it with further information;

(b) carry out on-site visits, with the support of experts from Member States and of the Agency, Europol or any other relevant Union body, office or agency, in order to obtain or verify information relevant for that recommendation.

Article 27

Informing the European Parliament and the Council

The Commission and the Member State(s) concerned shall inform the European Parliament and the Council as soon as possible of any reasons which might trigger the application of Articles 19a and 23 to 26a.

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

Within four weeks of the lifting of border control at internal borders, the Member State which has carried out border control at internal borders shall 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 initial assessment and the respect of the criteria referred to in Articles 23a, 25 and 26a, the operation of the checks, the practical cooperation with neighbouring Member States, the resulting impact on the free movement of persons, the effectiveness of the reintroduction of border control at internal borders, including an ex-post assessment of the proportionality of the reintroduction of border control.

The Commission may issue an opinion on that ex-post assessment of the temporary reintroduction of border control at one or more internal borders or at parts thereof.

The Commission shall present to the European Parliament and to the Council, at least annually, a report on the functioning of the area without internal border control. The report shall include a list of all decisions to reintroduce border control at internal borders taken during the relevant year.

Article 30

Informing the public

The Commission and the Member State concerned shall inform the public in a coordinated manner on a decision to reintroduce border control at internal borders and indicate in particular the start and end date of such a measure, 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.

I. Overview

1

Article 23 provides for the **possibility to temporarily reintroduce internal border controls** in order to safeguard public policy or internal security or the overall functioning of the area without internal border control.¹¹³ If controls are temporarily reinstated, the rules for external border control in Titel II of Reg. 562/2006 apply *mutatis mutandis* (**Article 28**).

2

Article 23a–26a contain the criteria for the temporary reintroduction as well as the corresponding procedural regulations. If there are any indication that the reintroduction of internal border controls might become necessary, the Commission and the Member State(s) concerned must inform the European Parliament and the Council (**Article 27**). In principle, the public has to be informed fully of the reasons for the re-instatement of controls (**Article 30**), and the Member State concerned needs to present a report after the controls have been lifted again, detailing in particular the initial assessment, the impact of the controls on the free movement of person and the effectiveness of the controls (**Article 29**).

II. Background

3

In the first half of 2011, 30'000 Tunisians arrived at Italy's shores following the upheavals of the 'Arab Spring'. After unsuccessfully appealing for support from the EU and the other Schengen States, Italy issued temporary residence cards – in violation of the Schengen Borders Code - that allowed these Tunisian citizens to travel onwards to other Schengen states. As a response, France reintroduced internal border controls on its border to Italy.

¹¹³ See in this context the analysis of temporary re-instatement of internal border controls under the SIC in *Groenendijk*, EUJ 2004, p.150–170.

France and Italy then jointly requested a revision of the rules on the reintroduction of internal border controls as well as the modification of the existing evaluation mechanism. The Commission presented two proposals in September 2011. Two years later – and after a lot of political tensions between the Member States and the Commission as well as the European Parliament and the Council - the so called “**Schengen Governance Package**” was adopted in the form of Regulation 1051/2013 and Regulation 1053/2013¹¹⁴. It entered into force in November 2013 with a one year transitional period for implementation.

III. The new rules on the temporary reintroduction of internal border controls

4

The new rules set out in more detail and with stricter time limits the criteria and the procedures for the reintroduction of internal border controls. Three different situations may be distinguished and shall be discussed in turn.

1. Temporary internal border controls in the case of foreseeable events (Articles 23, 23a, 24)

5

Member States may exceptionally and as a last resort reintroduce border control for up to 30 days in the case of a foreseeable **serious threat to public policy or internal security (e.g. major political or sport events)**. If the threat persists, the internal border controls may be prolonged up to a maximum of six months (**Article 23**).

The substantive requirements of Article 23 are rather strict, although it is obvious that the reference to the notions of public policy and internal security will give the Member States a **certain margin of discretion**.

6

When deciding on the reintroduction of border controls, the Member State concerned needs to assess the necessity (whether the controls are likely to address threat) as well as their proportionality in relation to the threat. The impact on the measures on the free movement of persons must be taken into account when making the assessment (**Article 23a**).

7

The Commission, the Parliament, the Council and the other Member States shall be notified of the planned reintroduction of internal border controls at least four weeks ahead of time (**Article 24(1),(2)**). The Commission and any Member State may issue an opinion and consultation and joint meetings shall be held before the controls are introduced (**Article 24(4)-(6)**)¹¹⁵.

¹¹⁴ The different positions of the institution can be found in detail in *Peers, The Future of Schengen*, p. 30-41.

¹¹⁵ Cf. in more detail Pascouau, p.4

2. Temporary internal border controls in the case of unforeseeable circumstances (Article 25)

8

If the **serious threat to public policy or internal security (e.g. a terrorist attack) requires immediate action**, the Member States concerned may immediately reintroduce border controls for up to ten days (para. 1).

If the threat persist, the period for the controls may be prolonged by periods of 20 days (para. 3), the maximum duration is, however, limited to two months (para. 4). In case of a prolongation of the controls, the criteria set out in Art. 23a and the procedural provision of Art. 24 (4) and (5) apply mutatis mutandis.

3. Temporary internal border controls in the case of exceptional circumstances (Art. 26, 26a)

9

If a Member State is seriously neglecting its obligation of external border controls, the measures recommended by the Commission pursuant to Article 19a have remained without effect, and the **overall functioning of the area without internal border control is put at risk**, the Commission may recommend that the Council, as a last resort, proposes controls at the internal borders for a period of up to six months. The controls may be prolonged for three additional six month periods, if the risk persists (**Article 26**).

The criteria for the reintroduction of controls pursuant to Art. 26 are found in **Article 26a**. When deciding on the reintroduction, the Council shall assess the necessity and proportionality of such measures, as well as alternative measures like the assistance by Union bodies and agencies such as Europol, the impact of the serious deficiencies in external border controls on the public policy and internal security of Member States, and the likely impact of the internal border controls on the free movement of persons.

The conditions that need to be fulfilled before the Council can make a recommendation to reintroduce border controls are many and it remains to be seen whether this provision will ever be implemented.¹¹⁶

IV. Judicial control and the rights of Union citizens and their family members

10

Since the entry into force of the Treaty of Lisbon on 1 December 2009, the lawfulness of such measures can be examined by the Court of Justice. The former restriction on the Court's jurisdiction in Article 68(2) EC Treaty¹¹⁷ had not allowed such an examination by the Court.

11

¹¹⁶ Cf. *Pascouau*, p. 6-7; *Peers*, *The Future of Schengen*, p. 44-45.

¹¹⁷ See the comments on judicial protection above, Article 1 MN 16-17.

It has to be stressed that even the temporary reintroduction of internal border checks pursuant to Article 23 ff. does **not affect the right of free movement of Union citizens and their family members**, which already results from Article 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.

TITLE IV

FINAL PROVISIONS

Article 32

Amendments to the Annexes

The Commission shall be empowered to adopt delegated acts in accordance with Article 33 concerning amendments to Annexes III, IV and VIII.

Article 33

Exercise of the delegation

1. The power to adopt delegated acts is conferred on the Commission subject to the conditions laid down in this Article.
2. The power to adopt delegated acts referred to in Article 12(5) and Article 32 shall be conferred on the Commission for an indeterminate period of time from 19 July 2013.
3. The delegation of powers referred to in Article 12(5) and Article 32 may be revoked at any time by the European Parliament or by the Council. A decision to revoke shall put an end to the delegation of the power specified in that decision. It shall take effect the day following the publication of the decision in the Official Journal of the European Union or at a later date specified therein. It shall not affect the validity of any delegated acts already in force.
4. As soon as it adopts a delegated act, the Commission shall notify it simultaneously to the European Parliament and to the Council.
5. A delegated act adopted pursuant to Article 12(5) and Article 32 shall enter into force only if no objection has been expressed either by the European Parliament or the Council within a period of two months of notification of that act to the European Parliament and the Council or if, before the expiry of that period, the European Parliament and the Council have both informed the Commission that they will not object. That period shall be extended by two months at the initiative of the European Parliament or of the Council.

Article 33a

Committee procedure

1. The Commission shall be assisted by a committee. That committee shall be a committee within the meaning of Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning

mechanisms for control by Member States of the Commission's exercise of implementing powers⁽²⁷⁾.

2. Where reference is made to this paragraph, Article 5 of Regulation (EU) No 182/2011 shall apply. Where the committee delivers no opinion, the Commission shall not adopt the draft implementing act and the third subparagraph of Article 5(4) of Regulation (EU) No 182/2011 shall apply.

3. Where reference is made to this paragraph, Article 8 of Regulation (EU) No 182/2011, in conjunction with Article 5 thereof, shall apply.

Article 34

Notifications

1. Member States shall notify the Commission of:

(a) the list of residence permits, distinguishing between those covered by point (a) of point 15 of Article 2 and those covered by point (b) of point 15 of Article 2 and accompanied by a specimen for permits covered by point (b) of point 15 of Article 2. Residence cards issued in accordance with Directive 2004/38/EC shall be specifically highlighted as such and specimens shall be provided for those residence cards which have not been issued in accordance with the uniform format laid down by Regulation (EC) No 1030/2002;

(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;

(ea) the exceptions to the rules regarding the crossing of the external borders referred to in point (a) of Article 4(2);

(eb) the statistics referred to in Article 10(3).

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.

⁽²⁷⁾ OJ L 55/13 (2011).

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⁽²⁸⁾.

Article 37

Notification of information by the Member States

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 agreements authorised by this Regulation. 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 37a

Evaluation mechanism

1. In accordance with the Treaty on the Functioning of the European Union and the Treaty on European Union and without prejudice to their provisions on infringement procedures, the implementation by each Member State of this Regulation shall be evaluated through an evaluation mechanism.

2. The rules on the evaluation mechanism are specified in Regulation (EU) No 1053/2013. In accordance with that evaluation mechanism, the Member States and the Commission are, jointly, to conduct regular, objective and impartial evaluations in order to verify the correct application of this Regulation and the Commission is to coordinate the evaluations in close cooperation with the Member States. Under that mechanism, every Member State is evaluated at least every five years by a small team consisting of Commission representatives and of experts designated by the Member States.

Evaluations may consist of announced or unannounced on-site visits at external or internal borders.

In accordance with that evaluation mechanism, the Commission is responsible for adopting the multiannual and annual evaluation programmes and the evaluation reports.

3. In the case of possible deficiencies recommendations for remedial action may be addressed to the Member States concerned.

⁽²⁸⁾ OJ L 239, 22.9.2000, p. 73.

Where serious deficiencies in the carrying out of external border control are identified in an evaluation report adopted by the Commission in accordance with Article 14 of Regulation (EU) No 1053/2013, Articles 19a and 26 of this Regulation shall apply.

4. The European Parliament and the Council shall be informed at all stages of the evaluation and be transmitted all the relevant documents, in accordance with the rules on classified documents.

5. The European Parliament shall be immediately and fully informed of any proposal to amend or to replace the rules laid down in Regulation (EU) No 1053/2013.

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);

(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⁽²⁹⁾;

(e) Council Decision 2004/581/EC of 29 April 2004 determining the minimum indications to be used on signs at external border crossing points⁽³⁰⁾;

⁽²⁹⁾ OJ L 116, 26.4.2001, p. 5. Regulation amended by Decision 2004/927/EC (OJ L 396, 31.12.2004, p. 45).

⁽³⁰⁾ OJ L 261, 6.8.2004, p. 119.

(f) Council Decision 2004/574/EC of 29 April 2004 amending the Common Manual⁽³¹⁾;

(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⁽³²⁾.

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 (**Article 32–40**) consists of the **final provisions**.

2

Article 32 provides the procedure for the revision of annexes III, IV and VIII, and delegates this power to the Commission. The other annexes as well as other amendments of the regulation have to be made by following the regular legislative procedure. Pursuant to **Article 33**, the power to adopt delegated acts is conferred on the Commission. In certain cases, the Commission is assisted by a committee and the rules of Reg. 182/2011¹¹⁸ apply (**Article 33a**).

3

Article 34 imposes notification obligations on the Member States with respect to the seven points listed in Article 34(1). The notified information is to be published in the Official Journal, C series or by any other appropriate means¹¹⁹. **Article 37** contains a further notification

⁽³¹⁾ OJ L 261, 6.8.2004, p. 36.

⁽³²⁾ OJ L 369, 16.12.2004, p. 5.

¹¹⁸ Regulation (EU) 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers, OJ 2011 L 55/13.

¹¹⁹ All notifications can also be found on the website of the Directorate-General for Migration and Home Affairs http://ec.europa.eu/dgs/home-affairs/e-library/documents/categories/notifications/index_en.htm (last accessed: 24 February 2015).

obligation of the Member States, and **Article 38** required the Commission to submit a report on the application of Title III by 13 October 2009.

4

With the entry into force of Regulation 1051/2013¹²⁰ in November 2013, a **new evaluation and monitoring mechanism** was introduced giving the Commission a more important role to play (**Article 37a**). The purpose, scope and functioning of this mechanism is specified in detail in Council Regulation (EU) No. 1053/2013¹²¹. Every Member State is evaluated at least every five years with regard to the implementation of Regulation 562/2006. The Commission is now jointly responsible with the Member States for the evaluation and the monitoring, and shall establish annual as well as multiannual evaluation programmes, submit a yearly Frontex risk analysis and conduct on-site visits at external or internal borders. The Member States and the Commission may both draft recommendations to remedy any problems and deficiencies identified during the evaluations.

¹²⁰ OJ 2013 L 295/1.

¹²¹ OJ 2013 L 295/27; see also Pascouau, p. 9-11.

ANNEX I

Supporting documents to verify the fulfilment of entry conditions

The documentary evidence referred to in Article 5(2) may include the following:

(a) for business trips:

(i) an invitation from a firm or an authority to attend meetings, conferences or events connected with trade, industry or work;

(ii) other documents which show the existence of trade relations or relations for work purposes;

(iii) entry tickets for fairs and congresses if attending one;

(b) for journeys undertaken for the purposes of study or other types of training:

(i) a certificate of enrolment at a teaching institute for the purposes of attending vocational or theoretical courses in the framework of basic and further training;

(ii) student cards or certificates for the courses attended;

(c) for journeys undertaken for the purposes of tourism or for private reasons:

(i) supporting documents as regards lodging:

— an invitation from the host if staying with one,

— a supporting document from the establishment providing lodging or any other appropriate document indicating the accommodation envisaged;

(ii) supporting documents as regards the itinerary:

confirmation of the booking of an organised trip or any other appropriate document indicating the envisaged travel plans;

(iii) supporting documents as regards return:

a return or round-trip ticket;

(d) for journeys undertaken for political, scientific, cultural, sports or religious events or other reasons:

invitations, entry tickets, enrolments or programmes stating wherever possible the name of the host organisation and the length of stay or any other appropriate document indicating the purpose of the visit.

ANNEX II

Registration of information

[...]

ANNEX III

Model signs indicating lanes at border crossing points

[...]

ANNEX IV

Affixing stamps

[...]

ANNEX V

PART A

Procedures for refusing entry at the border

1. When refusing entry, the competent border guard shall:

(a) fill in the standard form for refusing entry, as shown in Part B. The third-country national concerned shall sign the form and shall be given a copy of the signed form. Where the third-country national refuses to sign, the border guard shall indicate this refusal in the form under the section 'comments';

(b) affix an entry stamp on the passport, cancelled by a cross in indelible black ink, and write opposite it on the right-hand side, also in indelible ink, the letter(s) corresponding to the reason(s) for refusing entry, the list of which is given on the abovementioned standard form for refusing entry;

(c) annul or revoke the visas, as appropriate, in accordance with the conditions laid down in Article 34 of Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community code on visas (Visa Code)⁽³⁷⁾;

(d) record every refusal of entry in a register or on a list stating the identity and nationality of the third-country national concerned, the references of the document authorising the third-country national to cross the border and the reason for, and date of, refusal of entry;

3. If a third-country national who has been refused entry is brought to the border by a carrier, the authority responsible locally shall:

(a) order the carrier to take charge of the third-country national and transport him or her without delay to the third country from which he or she was brought, to the third country which issued the document authorising him or her to cross the border, or to any other third country where he or she is guaranteed admittance, or to find means of onward transportation in accordance with Article 26 of the Schengen Convention and Council Directive 2001/51/EC

← **Formatiert:** Block

of 28 June 2001 supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985⁽³⁸⁾;

(b) pending onward transportation, take appropriate measures, in compliance with national law and having regard to local circumstances, to prevent third-country nationals who have been refused entry from entering illegally;

4. If there are grounds both for refusing entry to a third-country national and arresting him or her, the border guard shall contact the authorities responsible to decide on the action to be taken in accordance with national law.

PART B

Standard form for refusal of entry at the border

| | |
|--|--|
| Name of State _____ Logo of State (Name of Office) _____ _____ |  (¹) |
| REFUSAL OF ENTRY AT THE BORDER | |
| On _____ at (time) _____ at the border crossing point _____ | |
| We, the undersigned, _____ have before us: Surname _____ First name _____ | |
| Date of birth _____ Place of birth _____ Sex _____ | |
| Nationality _____ Resident in _____ | |
| Type of identity document _____ number _____ | |
| Issued in _____ on _____ | |
| Visa number _____ type _____ issued by _____ | |
| valid from _____ until _____ | |
| For a period of _____ days on the following grounds: _____ | |
| Coming from _____ by means of _____ (indicate means of transport used, e.g. flight number), he/she is hereby informed that he/she is refused entry into the country pursuant to (indicate references to the national law in force), for the following reasons: | |
| <input type="checkbox"/> (A) has no valid travel document(s) | |
| <input type="checkbox"/> (B) has a false/counterfeit/forged travel document | |
| <input type="checkbox"/> (C) has no valid visa or residence permit | |
| <input type="checkbox"/> (D) has a false/counterfeit/forged visa or residence permit | |
| <input type="checkbox"/> (E) has no appropriate documentation justifying the purpose and conditions of stay. | |
| The following document(s) could not be provided: _____ | |
| <input type="checkbox"/> (F) has already stayed for 90 days in the preceding 180-day period on the territory of the Member States of the European Union ◀ | |
| <input type="checkbox"/> (G) does not have sufficient means of subsistence in relation to the period and form of stay, or the means to return to the country of origin or transit | |
| <input type="checkbox"/> (H) is a person for whom an alert has been issued for the purposes of refusing entry | |
| <input type="checkbox"/> in the SIS | |
| <input type="checkbox"/> in the national register | |
| <input type="checkbox"/> (I) is considered to be a <i>threat to public policy, internal security, public health or the international relations</i> of one or more of the Member States of the European Union (each State must indicate the references to national law relating to such cases of refusal of entry). | |
| Comments The person concerned may appeal against the decision to refuse entry as provided for in national law. The person concerned receives a copy of this document (each State must indicate the references to the national law and procedure relating to the right of appeal). | |
| Person concerned | Officer responsible for checks |

(¹) No logo is required for Norway and Iceland.

ANNEX VI

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

1. Land borders

1.1. Checks on road traffic

1.1.1. To ensure effective checks on persons, while ensuring the safety and smooth flow of road traffic, movements at border crossing points shall be regulated in an appropriate manner. Where necessary, Member States may conclude bilateral agreements to channel and block traffic. They shall inform the Commission thereof pursuant to Article 37.

1.1.2. At land borders, Member States may, where they deem appropriate and if circumstances allow, install or operate separate lanes at certain border crossing points, in accordance with Article 9.

Separate lanes may be dispensed with at any time by the Member States' competent authorities, in exceptional circumstances and where traffic and infrastructure conditions so require.

Member States may cooperate with neighbouring countries with a view to the installation of separate lanes at external border crossing points.

1.1.3. As a general rule, persons travelling in vehicles may remain inside them during checks. However, if circumstances so require, persons may be requested to alight from their vehicles. Thorough checks will be carried out, if local circumstances allow, in areas designated for that purpose. In the interests of staff safety, checks will be carried out, where possible, by two border guards.

1.1.4. Shared border crossing points

[...]

1.2. Checks on rail traffic

1.2.1. Checks shall be carried out both on train passengers and on railway staff on trains crossing external borders, including those on goods trains or empty trains. Member States may conclude bilateral or multilateral agreements on how to conduct those checks respecting the principles set out in point 1.1.4. Those checks shall be carried out in one of the following ways:

- in the first station of arrival or last station of departure on the territory of a Member State,
- on board the train, during transit between the last station of departure in a third country and the first station of arrival on the territory of a Member State or vice versa,
- in the last station of departure or the first station of arrival on the territory of a third country.

1.2.2. In addition, in order to facilitate rail traffic flows of high-speed passenger trains, the Member States on the itinerary of these trains from third countries may also decide, by common agreement with third countries concerned respecting the principles set out in point 1.1.4., to carry out entry checks on persons on trains from third countries in either one of the following ways:

- in the stations in a third country where persons board the train,
- in the stations where persons disembark within the territory of the Member States,

— on board the train during transit between stations on the territory of a third country and stations on the territory of the Member States, provided that the persons stay on board the train.

1.2.3. With respect to high-speed trains from third countries making several stops in the territory of the Member States, if the rail transport carrier is in a position to board passengers exclusively for the remaining part of the journey within the territory of the Member States, such passengers shall be subject to entry checks either on the train or at the station of destination except where checks have been carried out pursuant to points 1.2.1 or 1.2.2 first indent.

Persons who wish to take the train exclusively for the remaining part of the journey within the territory of the Member States shall receive clear notification prior to the train's departure that they will be subject to entry checks during the journey or at the station of destination.

1.2.4. When travelling in the opposite direction, the persons on board the train shall be subject to exit checks under similar arrangements.

1.2.5. The border guard may order the cavities of carriages to be inspected if necessary with the assistance of the train inspector, to ensure that persons or objects subject to border checks are not concealed in them.

1.2.6. Where there are reasons to believe that persons who have been reported or are suspected of having committed an offence, or third-country nationals intending to enter illegally, are hiding on a train, the border guard, if he or she cannot act in accordance with his national provisions, shall notify the Member States towards or within whose territory the train is moving.

2. Air borders

2.1. Procedures for checks at international airports

2.1.1. The competent authorities of the Member States shall ensure that the airport operator takes the requisite measures to physically separate the flows of passengers on internal flights from the flows of passengers on other flights. Appropriate infrastructures shall be set in place at all international airports to that end.

2.1.2. The place where border checks are carried out shall be determined in accordance with the following procedure:

(a) passengers on a flight from a third country who board an internal flight shall be subject to an entry check at the airport of arrival of the flight from a third country. Passengers on an internal flight who board a flight for a third country (transfer passengers) shall be subject to an exit check at the airport of departure of the latter flight;

(b) for flights from or to third countries with no transfer passengers and flights making more than one stop-over at the airports of the Member States where there is no change of aircraft:

(i) passengers on flights from or to third countries where there is no prior or subsequent transfer within the territory of the Member States shall be subject to an entry check at the airport of entry and an exit check at the airport of exit;

(ii) passengers on flights from or to third countries with more than one stop-over on the territory of the Member States where there is no change of aircraft (transit passengers), and provided that passengers cannot board the aircraft for the leg situated within the territory of the Member States, shall be subject to an entry check at the airport of arrival and an exit check at the airport of departure;

(iii) where an airline may, for flights from third countries with more than one stop-over within the territory of the Member States, board passengers only for the remaining leg within that territory, passengers shall be subject to an exit check at the airport of departure and an entry check at the airport of arrival.

Checks on passengers who, during those stop-overs, are already on board the aircraft and have not boarded in the territory of the Member States shall be carried out in accordance with point (b)(ii). The reverse procedure shall apply to that category of flights where the country of destination is a third country.

2.1.3. Border checks will normally not be carried out on the aircraft or at the gate, unless it is justified on the basis of an assessment of the risks related to internal security and illegal immigration. In order to ensure that, at the airports designated as border crossing points, persons are checked in accordance with the rules set out in Articles 6 to 13, Member States shall ensure that the airport authorities take the requisite measures to channel passenger traffic to facilities reserved for checks.

Member States shall ensure that the airport operator takes the necessary measures to prevent unauthorised persons entering and leaving the reserved areas, for example the transit area. Checks will normally not be carried out in the transit area, unless it is justified on the basis of an assessment of the risks related to internal security and illegal immigration; in particular checks in this area may be carried out on persons subject to an airport transit visa in order to check that they are in possession of such a visa.

2.1.4. Where, in cases of force majeure or imminent danger or on the instructions of the authorities, an aircraft on a flight from a third country has to land on a landing ground which is not a border crossing point, that aircraft may continue its flight only after authorisation from the border guards and from customs. The same shall apply where an aircraft on a flight from a third country lands without permission. In any event, Articles 6 to 13 shall apply to checks on persons on those aircraft.

2.2. Procedures for checks in aerodromes

[...]

2.3. Checks on persons on private flights

[...]

3. Sea borders

[...]

3.2. Specific check procedures for certain types of shipping

Cruise ships

[...]

Pleasure boating

[...]

Coastal fishing

[...]

Ferry connections

[...]

Cargo connections between Member States

[...]

4. Inland waterways shipping

[...]

ANNEX VII

Special rules for certain categories of persons

1. Heads of State

[...]

2. Pilots of aircraft and other crew members

[...]

3. Seamen

[...]

4. Holders of diplomatic, official or service passports and members of international organisations

[...]

5. Cross-border workers

[...]

6. Minors

[...]

7. Rescue services, police, fire brigades and border guards

[...]

8. Offshore workers

[...]

ANNEX VIII

[...]