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Committee on Civil Liberties, Justice and Home Affairs

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WORKING DOCUMENT

on the proposal for a Council regulation establishing a Community Code on the rules governing the movement of persons across borders:
The Commission's proposal

Committee on Civil Liberties, Justice and Home Affairs

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The objectives of the present working document are to summarise the complex proposal of the Commission in light of two working sessions which were held by the rapporteur with the Commission services (part I) and to present some guiding principles, which can later be translated into concrete amendments, for discussion in committee (part II). At the end a work programme is presented (part III).

Part I - the Commission's proposal

The voluminous and complex proposal of the Commission has two main objectives: firstly, to consolidate the existing acquis as regards the crossing of external borders as developed in the Schengen framework and secondly, to develop this acquis further, in particular as regards the crossing of internal borders. Following the incorporation of the Schengen cooperation into the Union framework with the Treaty of Amsterdam it is the very first occasion for Parliament to deal with this topic in its entirety.[1]

The proposal is based on Article 62(1) [measures with a view to ensuring, in compliance with Article 14, the absence of any controls on persons, be they citizens of the Union or nationals of third countries, when crossing internal borders] and 62(2)(a) [measures on the crossing of the external borders of the Member States which shall establish: standards and procedures to be followed by Member States in carrying out checks on persons at such borders] of the Treaty establishing the European Community. Following the adoption of the "The Hague Programme" by the European Council on 5 November 2004 these two legal basis will change to the codecision procedure.

Title I of the proposal (the general provisions) gives mainly a series of definitions, some taken from the existing acquis, some new ones. Title II on external borders in divided into four chapters: Chapter I deals with the crossing of external borders and the conditions for entry into the Schengen area; Chapter II deals with the control of external borders and the refusal of entry; Chapter III deals with the resources for border checks and the cooperation between Member States; and Chapter IV deals with some specific procedures for exceptional cases. Title III on internal borders confirms the abolition of internal border controls and outlines the cases in which and how internal border controls can be reintroduced. Following Title IV (final provisions) 13 annexes contain detailed provisions on certain aspects like for example the list of authorised border crossing-points, the documents establishing the likelihood of the reasons for entry or the way in which border controls are effectively handled. According to the proposal these annexes should in the future be subject to change by comitology[2] using the regulatory procedure.

External Borders

Besides the clarification of a series of technical questions two issues were discussed in more depth: the temporary external borders and other legislative proposals having an impact on this proposal.

[1] For an introduction on the Schengen acquis see:
http://www.europa.eu.int/comm/justice_home/fsj/freetravel/frontiers/fsj_freetravel_schengen_en.htm
for data protection and the Schengen Information System see: http://www.schengen-jsa.dataprotection.org/
[2] Decision 1999/468/EC, OJ L 184, 17.7.1999, p. 23

temporary external borders: In the meetings with the Commission the question was raised as to the special rules on the temporary external land borders. These are the borders between, on the one hand, a Member State fully implementing the Schengen acquis and a neighbouring Member State not yet implementing such acquis in full (for instance, the border between Germany and Poland); and, on the other hand, two neighbouring Member States not fully implementing the Schengen acquis (for instance, the border between Slovakia and Hungary).[1] It was stressed that there are in principle no special rules for temporary external borders in comparison to external borders. The proposed Article 15, however, allows the concerned Member States to control such borders jointly subject to the respect of the rules governing external border controls. This provision is inspired by current practice according to which Member States are encouraged to conclude bilateral agreements "so that a person will be stopped only once for the carrying out of both entry and exit control procedures."[2] (one-stop-principle)

A consequence of the two-stage implementation procedure of the Schengen acquis is also that this common manual only applies for new Member States as regards the parts on external borders (Title II and related Annexes plus corresponding parts of Title I and IV) but not as regards internal border controls (Title III plus corresponding parts of Title I and IV).

Legislative files with impact on the current proposal: Due to the comprehensive nature of the proposal a series of other proposals influence the present one. Currently under discussion in Council are:

- Draft Council Regulation on the establishment of a regime of local border traffic at the external borders of the Member States; and Draft Council Regulation on the establishment of a regime of local border traffic at the temporary external land borders between Member States (COM (2003) 502 final)

  Current state of play of discussion: discussions are advanced, however, due to the modified legal bases after 1.5.2004, the Commission must submit two new proposals taking the new role of the Parliament into account (codecision procedure applied to parts of the two proposals, however, following the Hague Programme, codecision procedure will apply on all parts of the proposals).

Instrument adopted by Council before the adoption of the Border Code and thus incorporated

[1] This definition is taken from the Commission proposal on local border traffic (COM(2003)502), p.15-16; this document also describes the legal situation:
"Article 3 of the Act of Accession contains an article describing that the provisions of the Schengen acquis, the acts building upon it or otherwise related to it, listed in the annex referred to in that article, shall be binding on and applicable in the new Member States as from accession. The provisions and acts not referred to in that annex shall, while binding on the new Member States as from accession, be applicable in the new Member States following a special Council decision to that effect, made in accordance with that article.
This is the so-called 'Schengen two-phase implementation procedure', whereby some provisions of the Schengen acquis shall be binding and applicable upon accession to the EU, while others - namely those intrinsically linked to the lifting of internal border controls - shall be binding upon accession but applicable in the new Member States only following the Council decision referred to above.
With regard to the Schengen provisions on external borders (Articles 3-8 of the Schengen Convention and the related implementing decisions, including the Common Manual), they are (...) binding and applicable in the new Member States as from accession." (ibid., p.8-9)
One of the reasons for this two-phase procedure is the need to firstly develop the second-generation Schengen Information System. See COM(2003)771.

[2] Council document 15013/03, p.4

in the Code, but published only after the adoption of the Code by COM:

- Council Decision 2004/581/EC of 29 April 2004 determining the minimum indications to be used on signs at external border crossing points (OJ L 261, 6.8.2004, p. 119);

- Council decision 2004/574/EC of 29 April 2004 amending the Common Manuel (*it concerns the establishment of a uniform form for refusal of entry*), OJ L 261, 6.8.2004, p. 36;

Instrument adopted by Council after the adoption of the Border Code by COM, the relevant parts of the final version need thus to be incorporated in the Code:

- Council Regulation 2007/2004/EC 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*)*

- Council Regulation [ ] 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 (OJ L *not yet published*)