



**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 15 February 2008

**6273/08
ADD 1**

LIMITE
FRONT 21
VISA 50
CODEC 175
COMIX 121

NOTE

from:	Presidency
to:	Visa Working Party /Mixed Committee
Subject:	Draft Regulation of the European Parliament and of the Council establishing a Community Code on Visas – Articles 32, 33 and Annexes IX, XII

Following the discussions on Articles 32, 33 and Annexes IX, XII of the Draft Regulation establishing a Community Code on Visas at the meeting of the Working Party on Frontiers/Mixed Committee on 23 January 2008, the Presidency invited delegations to send further comments to the General Secretariat of the Council (CM 293/08).

Delegations will find attached the written contributions from Germany, Italy, Latvia, Lithuania, Austria, Poland and Slovenia on the above mentioned subject.

GERMANY

1. Article 32 - Visas issued at the external borders

- 1.1. Special emphasis should be placed on the fact that visas are issued at the border by way of exception, as well as on the strict conditions that apply, given that visas are issued at the border in special circumstances which are usually characterised by time pressure and limited possibilities for verification in the specific control situation.
- 1.2. Pursuant to Article 32(1)(c), an unforeseeable and imperative reason for entry can only be substantiated by the submission of supporting documents. This is more restrictive than the provisions of Article 1(1)(c) of Council Regulation (EC) No 415/2003 of 27 February 2003 on the issue of visas at the border, including the issue of such visas to seamen in transit, according to which unforeseeable reasons for entry had to be substantiated by "if required, supporting documents". The version in Regulation (EC) No 415/2003 should be retained as reasons can be substantiated by means other than supporting documents.
- 1.3. The waiver of the requirement to take out travel medical insurance pursuant to Article 32(2) should be kept. A third-country national who was already unable to apply for a visa by the regular visa procedure "due to lack of time" will not have time to obtain travel medical insurance either. In practice, the issue of visas at the border would be almost completely ruled out on grounds of lack of travel medical insurance. Moreover, making it possible to conclude travel medical insurance directly at border crossing points would entail disproportionately serious and inappropriate practical difficulties in terms of implementation and for the conduct of border checks. Furthermore, the border control authorities would hardly be able to fulfil their obligation to carry out the proper checks because, given the different languages and the variety of documents used, they would be unable to check whether the document submitted really did constitute travel medical insurance.

2. Article 33 - Visas issued to seafarers in transit at the external border

- 2.1. Doing away with the possibility of issuing group visas will make it much more cumbersome to issue visas in the future. This is particularly true for cases in which entire crews embark or disembark.

In some cases visas have to be issued for several hundred people when a crew changes at the beginning of a ship's docking period. Considering that in the future not only photographs but also prints from all fingers will have to be stored, border authorities, in particular at ports and airports, will face a much greater organisational and technical burden and possibly much greater demands on human resources than for the current procedure.

As it will be very time-consuming to issue visas in the above cases in the future, ship owners should be obliged in their own interest to transmit the data necessary for issuing visas in time for preparatory steps to be taken. Experience so far has shown that there would otherwise be a considerable number of complaints.

- 2.2. In order to avoid visa fraud using fictitious changes of crew, an unambiguous check must be run on the ships. Such a check can be guaranteed only by the ship's IMO number. A newly built vessel is assigned an IMO number by the International Maritime Organisation in the construction phase and remains registered under that number throughout its existence. Even when a ship transfers to another flag or changes name following a change of owner, chartering or sale, it retains the same IMO number.

During entry checks on aliens recognised as seamen it is therefore possible to consult international databases worldwide which record the existence, history, shipowner, ship's data and movements of registered ships.

Germany would therefore suggest including the IMO number in Annex XII, Part 2.

ITALY

Annex IX on the refusal of a visa even at borders cites, in the seventh box, reasons relating to a "threat" to one or more Member States as grounds for refusal.

In that connection it is obvious that the foreigner concerned could ask to be informed of the assumptions of substance that have led to the adoption of that measure, and that could be a problem at a border. In fact the relevant information is set out in a confidential European Union document.

Such a question could also be the source of difficulties in any appeal.

The eighth box should provide not only for "urgency" but also for "exceptionality" in order to protect the border guard in connection with his actions in the event of a refusal to grant a visa.

LATVIA

- Article 32, paragraph 2 (Travel medical insurance): According to the view already expressed by Latvian delegation at the Visa Working Party and Working Party on Frontiers, Latvia would like to reconfirm its position that in general the requirement to be in possession of travel medical insurance should not be waived when applying for a visa at the external border. Latvia is of the opinion that it is still useful to oblige the persons who apply for a visa at the external border to prove that they benefit a travel medical insurance. Exemptions can be tolerated, but any such an exemption must be assessed on a case by case basis only. Based on the mentioned above Latvia proposes to replace “shall” by “may” in 32 (2).
 - Reacting to the discussions at the Working Party on Frontiers on visa fee to be charged when issuing visas at the external border Latvia holds the view that no general exemption from the visa fee should be granted for visas applied for at the external borders. Such visas could be issued free of charge in exceptional cases in accordance with national law.
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LITHUANIA

1. As regards Article 32:

1) part 1 point C.

Lithuania suggests after the words „the applicant submits“ insert the words „if required“. Lithuania thinks that not in every each case the applicant could submit supporting documents substantiating unforeseeable and imperative reasons for entry. Because it can be exceptional cases when the applicant has not been in a position to apply for a visa in advance but he does not have the documents proving that the reasons were unforeseeable and imperative. In addition to that in the Article 1 part 1 point C of the Council Regulation (EC) No 415/2003 of 27 February 2003 on the issue of visas at the border, including the issue of such visas to seamen in transit it is foreseen that “he or she shall submit, if required, supporting documents substantiating unforeseeable and imperative reasons for entry”.

2) part 3 point A.

Lithuania suggests changing the words „in all Member States“ into the words „valid for all Member States“. This formulation is used in the part 3 point B and is quite the same in the meaning mentioned in part 4 (“validity for the territory of the issuing Member State only”). Lithuania thinks that in order to achieve legal certainty the definitions should be the same if the content is the same. In addition to that in the Council Regulation (EC) No 415/2003 the definition used is “valid for all Member States”.

3) part 6.

Lithuania agrees that the provisions on justification and notification of refusals and possibilities of appeal as regards visas issued at the external borders should be fortified in the proposal.

4) Lithuania thinks that the applicant should still be obliged to prove that he benefits a travel medical insurance. But in the same time exemptions from this rule should be foreseen.

2. As regards Article 32 :

1) Lithuania suggests using the wording „seafarers“ or „seaman“ in the whole document. Because now in Article 32 seafarers are mentioned and in Annex XII seaman. Lithuania thinks that in order to achieve legal certainty the definitions should be the same if the content is the same.

2) Lithuania thinks that it would be useful to fortify the norm that before issuing a visa at the border to a seafarers, the competent national authorities shall comply with the operational instructions set in Annex XII and when carrying out these operational instructions, the competent national authorities of the Member States shall exchange the necessary information concerning the seafarers in question by means of a duly completed form for seafarers as set out in Annex XII. Because if we would not foresee the backgrounds for using operation instructions we cannot draw these norms in the Annex XII. In addition to that the same legal construction is used in the Council Regulation (EC) No 415/2003.

3) Lithuania is of the opinion that the possibility of issuing collective visas should be foreseen.

3. As regards ANNEX IX:

- 1) Lithuania suggests the addition of a reference to border authorities.
- 2) For the practical application reasons Lithuania suggests formulate the last reason for the refusal of visa according to conditions, set in the Article 32 part 1 point B and C.
- 3) Lithuania suggests to add one more reason for the refusal of visa as „do not have valid travel document“.

4. As regards ANNEX XII Part 1:

The fourth paragraph end with the word „and“. Lithuania suggests deleting it, because there are no norms after this sentence.

5. As regards ANNEX XII Part 2:

- 1) It is not clear why some points are formulated in the table and some of them are formulated in free form. The unification is needed.
- 2) the second paragraph of point 13 should be deleted because it is related with seafarers travelling in a group but in the text there are no norms about seafarers travelling in a group.

AUSTRIA

Art. 32:

Austria would refer to what it said in both the Visa Working Party and the Working Party on Frontiers and in particular stands by its reservation on Art. 32(6). To summarise, we would say that the requirement to take out travel medical insurance where a visa is applied for at the border seems neither sensible nor practicable. However, the French compromise proposal to amend "shall" to "may" in Art. 32(2) would seem a feasible approach. On the question of fees, Austria maintains that a fee should normally be charged at the border as well, otherwise applications at the border would be likely to increase. It must remain possible to issue visas free of charge on humanitarian grounds, however. As already made clear in the reservation, Austria unequivocally rejects any possibility of appeal against failure to issue a visa at the border.

Art. 33:

On the question of continuing to issue group visas for seafarers in transit, Austria would refer to the proposal for a Regulation of the European Parliament and of the Council establishing a Community Code on Visas (COM(2006) 403 final/2), which clearly states that, for reasons of security and given the fact that all individual visa applicants must submit individual application forms and all first time applicants must provide biometric identifiers upon submission (under the VIS), group visas are no longer acceptable.

Annex XII:

Reference should be made to the seafarer's photograph.

POLAND

- 1) The obligation submitting a medical insurance policy while applying for the visa at the border should be maintained.

According to the Council Decision of December 22nd 2003, changing part V art. 1.4 of the Common Consular Instructions and part I art. 4.1.2 of the Common handbook with respect to incorporating the requirement of possessing travel medical insurance as one of the supplementary documents for the issuing the Schengen entrance visa, in justifiable cases the above mentioned requirement could be waived:

- if there will be stated, that due to the applicant professional situation there is a appropriate insurance level is maintained,
- relate to the service, diplomatic and other formal passports holders,
- due to protection of national foreign and development policy matters, and other areas fundamental for the public interest,
- if there will be stated, that the purchase of the medical insurance by the some third country nationals is impossible.

- 2) Poland sustains its objection relating to the possibility of appealing from the visa refusal decision (both in consulates and border checkpoints).
- 3) Collecting the fee for the visa issued at the border remains as a rule.

It could be accepted that in individual, exceptional cases e.g. for humanitarian reasons it will be a possibility of exempting an alien from the visa fee, can not be a general rule.

Exemptions from the visa fees are regulated in Annex 12 of Common Consular Instruction . In connection with it the proposition of note that the visa issued at the border is free of charge is acceptable, with indicating in which cases the exemption is possible.

- 4) In case of entry refusal as well as visa refusal it is legitimated to issue only one decision of entry refusal.
- 5) The proposal of canceling the possibility of issuing such visas is well – grounded. The opinion presented by German party which suggests obliging the ship owners to forward seamen' data in advance – seems to be worth mentioning.

SLOVENIA

Slovenia suggests the following changes of Article 32:

Article 32, paragraph 1:

- after the word "issued" the sentence »at the border crossing points defined by Member States« should be added”.

Explanations:

Visas can only be issued at the external border crossing points, where adequate equipment for their issuance is provided . Term "border crossing point " is well defined in the Schengen Borders Code.

- after the word "borders" sentence »in exceptional cases« should be added.

Explanation:

In the introduction to Article 32 it should be clearly stated that the issuance of visas at external border crossing points can be provided only in exceptional cases ,

Article 32, paragraph 1, point (a):

- after the word »Article 5(1)« letters: »(a), (c), (d) and (e)« should be added.

Explanation:

With explicit quotation of points, the conditions for visa issuance at the external border crossing points according to the Schengen Borders Code will be defined more precisely. On the other hand point (b), refers to the possession of valid visa in accordance with Council Regulation (ES) no. 539/2001, of 15 March 2001, and therefore does not fall within the scope of Article 5(1).

Article 32, paragraph 6:

Slovenian position:

Slovenia would like to draw attention to the duplication of refusal of entry procedures, which could occur in the light of the current proposal of Article 32, paragraph 6 of the Visa Code and the provisions of the Schengen Borders Code (no. 562/2006) already in force. In both cases (for example refusal to issue a visa at the border on the basis of provisions of Visa code and refusal to enter the EU on the basis of provision of the Schengen Borders Code), there is a duplication of refusal of entry procedures at the external borders.

Slovenia is of the opinion that in this case there is only one procedure for the refusal of entry at the external border crossing border points for which the Article 13 of the Schengen Borders Code could be used accordingly. At the same time the standard form for refusal to entry, as already defined in Annex V of the Schengen Borders Code, should be used sensibly for the refusal to issue a visa at the border. In this case the letter (c) should be marked in the form.

According to the above, Slovenian experts propose to:

- Amend the text of Article 32, paragraph 6, as follows: "In the case of a refusal to issue a visa at the border, the standard form for refusal of entry at the border is used, as defined in Annex V of the Schengen Borders Code"
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