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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 France, and Romania, as well as a revised reply from Italy on the above mentioned subject.

FRANCE

Article 32 and Annex IX: the conditions for the issue of visas at the border

Article 32(1):

Confirming the comment made by the French delegation to the Visa Working Party, found in footnote 2 on page 2, "*in exceptional cases*" should be added to the introductory phrase "*Short-stay visas or transit visas may only be issued at the external borders if the following conditions are satisfied*" so as to make it quite clear that applicants have no right to the issue of such a visa, and that this method cannot habitually be used as a substitute for issue by the consular authorities in the normal manner.

Article 32(1)(a):

The reference to Article 5(1) of the Schengen Borders Code should be expanded and made more precise: in fact, subparagraph (b) of Article 5(1) states that one of the conditions for entry is that a person must be in possession of a valid visa, which is of course not relevant when considering visa issue at the border, since that procedure comes into play specifically when a visa is lacking. The text should therefore read "*the applicant fulfils the conditions laid down in Articles 5(1)(a), (c), (d) and (e) of the Schengen Borders Code*".

Article 32(2):

The waiver of the **medical insurance** requirement for those applying for visas at the border, which the Commission justifies by the difficulty in obtaining such insurance at the border crossing, cannot take the form of an absolute exoneration from this requirement. Firstly, it is possible, even if not everywhere, to obtain such insurance in some airports; and secondly, this would lead to an evident lack of equal treatment for those who have applied for a visa from the authorities, and would risk making more attractive a procedure which was designed to be used in exceptional circumstances (as with the question of issuing visas at the border free of charge).

To ensure that the requirement for medical insurance appears as a condition in Article 32(2), but to enable border guards to assess each situation and exempt certain applicants if appropriate, "*shall be waived*" should be replaced by "*may be waived*".

Article 32(6):

The requirement for specific justification to be given for decisions to refuse to issue a visa at the border must absolutely be removed.

The administrative decision taken in relation to a national of a third country, for whom issue of a visa at the border is refused, is in fact a **refusal of entry**. The procedure laid down in Article 13 of the Schengen Borders Code, referring to Article 5(1), lists the lack of a visa as one of the grounds for refusal: which is indeed the case for someone who has presented himself at border control without a visa, has requested a visa at the border as an exceptional case, but has not been able to show that he fulfils the conditions for one to be issued. At the end of the border guard's examination, this decision to refuse entry is necessary and sufficient, and a justification referring to the lack of a visa gives a sound legal basis for that decision.

There is then no need for that decision to refuse entry to be preceded by a prior decision, which would complicate the legal situation, would double the work involved for the border guards (without affecting the essence of the case), and would open the way for separate appeals; whereas the lack of a visa is expressly referred to in the refusal of entry and may be raised before the court, if the case is referred there, so the applicant would not be deprived in this way of any **possibility of appeal**.

Paragraph (6) of Article 32, which refers formally to Article 23 on motivating refusal of a visa by the consular authorities, should therefore simply **be deleted**.

Annex IX:

To be consistent with the above reasoning regarding Article 32(6), there is no reason to use Annex IX, as it is a copy of the form used for refusing a consular visa and also refers expressly to Article 23 of the Community Code on Visas.

Article 33 and Annex XII: seafarers in transit

Article 33(1):

The term used in the text varies between "*seamen*" and "*seafarers*". For the sake of consistency within the text and consistency with the Schengen Borders Code, it would appear to be desirable to use the term "*seamen*" throughout.

Article 33(2):

Application of the one person/one document principle, and the introduction of biometric data in visas, mean that **collective visas** issued to seamen in transit will be abolished.

Currently, when several seamen from the same crew present themselves at border controls together, they are issued with a collective transit visa; such documents cannot hold all the individual biometric data of the individuals concerned and it will therefore no longer be possible to issue them: they are no longer mentioned in Annex XII.

Nonetheless, some delegations have put forward some practical arguments to suggest that collective visas for seamen in transit should be maintained, at least provisionally. The French delegation has not commented on this position, which is not consistent with our involvement in biometrics.

However, if this idea were to take root, and subject to a more detailed technical examination, it could be proposed that, as a possible alternative to issuing individual visas, which of course would remain the desired standard method, the following approach might be taken: given that the main issue is to collect and keep biometric data about seamen in transit in the appropriate database, as for any other third-country national requesting a visa at the border, this requirement could perhaps be satisfied by the **collection of individual biometric data** for each seaman from the same crew, but then the subsequent issue of a collective visa to the crew as a whole. This procedure could be presented as a possibility, to be implemented subject to the discretion of the border guard, for example in particularly busy periods, not as a habitual practice; the condition of collecting individual biometric data and entering them in the database would remain an absolute requirement.

Article 33(3):

Contrary to what is proposed in footnote 12 on page 4, there is no case for adding a reference to Article 32(6), of which we have requested the deletion (see above).

Annex XII (Parts 1 and 2):

There are no particular comments on these Annexes; they are reproductions of the corresponding Annex to Regulation (EC) No 415/2003, with the deletion of collective visas.

ITALY

Annex IX (form for refusing a visa, to be used also at the border) 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 its actions in the event of a refusal to grant a visa.

Italy wishes to add that since the issue of a visa at the border is an exception (correlating with the considerable discretion exercised by the Border Guard), it is unwise to use the same reasons for refusing to issue a visa as are used for refusing entry in the similar, Schengen Code form.

To do so would clearly create difficulties for the Border Guard, both operationally and in terms of interpretation, as it would have two legal instruments to hand for dealing with the same situation.

In light of the above, Italy proposes doing away with the use of the form in question at the border as provided for in Article 32 in conjunction with Annex IX.

ROMANIA

Article 32 point 1: add “**in exceptional cases**” (Short- stay visas issued at the external borders **in exceptional cases** if the following.....)

Article 32 point 2: “Where a visa is applied for at the external border, the requirement be in possession of travel medical insurance shall be waived”

Comments: Taking to account that we are talking about an **exceptional case**, the applicant is not obliged to be in possession of travel medical insurance (TMI). TMI must be procured during the process of entering. There are facilities for procuring a TMI in Romanian Border Crossing Points. This TMI should be free of charge.

Article 32 point 6: ” The provisions on justification and notification of refusals **and possibilities of appeal ... shall apply**”

Short – stay visas **may** be issued, is not mandatory. We should renounce to the “right of appeal”, taking to account that same EU legislation, including Romanian legislation don’t stipulate this right. The effect of not issuing a visa in Border Crossing Point is materialized after that into a refusal decision for applicant. There are two distinct administrative acts. They could not be treated as the same procedure.

Article 33

Comments: Romania is of the opinion that the possibility of issuing collective visas should **not** be foreseen.

Annex IX: Standard form for notifying and motivating refusal of a visa (in accordance with article 23 of the Community Code on visas)

Comments: This form should specify only the reasons which prevent the issue of a visa related to not fulfilling the conditions of exceptional case for entering.

Annex XII Part 1: „The objective of these operational instructions the competent authorities of the Member States **applying the Community acquis....**”

Comments: add „**fully applying the Schengen acquis** ” instead of „**applying the Community acquis**”