

I. Procedural texts**Page**

1. Rules of Procedure of the Court of Justice (already in documentation folder, background documentation, page 50)	
2.. Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings	2
5. Report on the use of the urgent preliminary ruling procedure by the Court of Justice	9

II. Substantive legislation

1. Framework decision 2002/584/JHA	22
2. Directive 2008/115 (Return directive)	39
3. Regulation 562/2006 (Schengen Border Code)	49
4. Regulation 810/2009 (Visa Code)	81

III. The Charter of Fundamental Rights

139

IV. Explanations relating to the Charter of Fundamental Rights

156

V. ECJ Cases (in English)

C-450/09 Schröder	175
C- 32/11 Allianz Hungária Biztosító and others	183

VI. UK Supreme Court case

Her Majesty's Revenue and Customs (Appellant) v Aimia Coalition Loyalty UK Limited (formerly known as Loyalty Management UK Limited) (Respondent) (No. 2) [2013] UKSC 42	194
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I

(Resolutions, recommendations and opinions)

RECOMMENDATIONS

COURT OF JUSTICE OF THE EUROPEAN UNION

These recommendations follow on from the adoption on 25 September 2012 in Luxembourg of the new Rules of Procedure of the Court of Justice (OJ L 265, 29.9.2012, p. 1). They replace the information note on references from national courts for a preliminary ruling (OJ C 160, 28.5.2011, p. 1) and reflect innovations introduced by those Rules which may affect both the principle of a reference for a preliminary ruling to the Court of Justice and the procedure for making such a reference.

RECOMMENDATIONS

to national courts and tribunals in relation to the initiation of preliminary ruling proceedings

(2012/C 338/01)

I — GENERAL PROVISIONS

The Court's jurisdiction in preliminary rulings

1. The reference for a preliminary ruling is a fundamental mechanism of European Union law aimed at enabling the courts and tribunals of the Member States to ensure uniform interpretation and application of that law within the European Union.
2. Under Article 19(3)(b) of the Treaty on European Union ('TEU') and Article 267 of the Treaty on the Functioning of the European Union ('TFEU'), the Court of Justice of the European Union has jurisdiction to give preliminary rulings on the interpretation of Union law and on the validity of acts adopted by the institutions, bodies, offices or agencies of the Union.
3. Article 256(3) TFEU provides that the General Court is to have jurisdiction to hear and determine questions referred for a preliminary ruling under Article 267 TFEU, in specific areas laid down by the Statute. However, since no provisions have been introduced into the Statute in that regard, the Court of Justice alone currently has jurisdiction to give preliminary rulings.
4. While Article 267 TFEU confers on the Court of Justice a general jurisdiction in that regard, a number of primary law provisions exist which lay down exceptions to or temporary restrictions on that jurisdiction. This is true, in particular, of Articles 275 TFEU and 276 TFEU and Article 10 of Protocol (No 36) on Transitional Provisions of the Treaty of Lisbon (OJEU 2010 C 83, p. 1) ⁽¹⁾.

⁽¹⁾ Article 10(1) to (3) of Protocol No 36 provides that the powers of the Court of Justice in relation to acts of the Union adopted in the field of police cooperation and judicial cooperation in criminal matters before the entry into force of the Treaty of Lisbon, and which have not since been amended, are to remain the same for a maximum period of five years from the date of entry into force of the Treaty of Lisbon (1 December 2009). During that period, such acts may, therefore, form the subject-matter of a reference for a preliminary ruling only where the order for reference is made by a court or tribunal of a Member State which has accepted the jurisdiction of the Court of Justice, it being a matter for each of those States to determine whether the right to refer a question to the Court is to be available to all of its national courts and tribunals or is to be reserved to the courts or tribunals of last instance.

5. Since the preliminary ruling procedure is based on cooperation between the Court of Justice and the courts and tribunals of the Member States, it may be helpful, in order to ensure that that procedure is fully effective, to provide those courts and tribunals with the following recommendations.

6. While in no way binding, these recommendations are intended to supplement Title III of the Rules of Procedure of the Court of Justice (Articles 93 to 118) and to provide guidance to the courts and tribunals of the Member States as to whether it is appropriate to make a reference for a preliminary ruling, as well as practical information concerning the form and effect of such a reference.

The role of the Court of Justice in the preliminary ruling procedure

7. As stated above, under the preliminary ruling procedure the Court's role is to give an interpretation of European Union law or to rule on its validity, not to apply that law to the factual situation underlying the main proceedings. That is the task of the national court or tribunal and it is not, therefore, for the Court either to decide issues of fact raised in the main proceedings or to resolve any differences of opinion on the interpretation or application of rules of national law.

8. When ruling on the interpretation or validity of European Union law, the Court makes every effort to give a reply which will be of assistance in resolving the dispute in the main proceedings, but it is for the referring court or tribunal to draw specific conclusions from that reply, if necessary by disapplying the rule of national law in question.

The decision to make a reference for a preliminary ruling

The originator of the request for a preliminary ruling

9. Under Article 267 TFEU, any court or tribunal of a Member State, in so far as it is called upon to give a ruling in proceedings intended to arrive at a decision of a judicial nature, may as a rule submit a request for a preliminary ruling to the Court of Justice. Status as a court or tribunal is interpreted by the Court of Justice as a self-standing concept of European Union law, the Court taking account of a number of factors such as whether the body making the reference is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent.

10. Whether or not the parties to the main proceedings have expressed the wish that it do so, it is for the national court or tribunal alone to decide whether to refer a question to the Court of Justice for a preliminary ruling.

References on interpretation

11. Article 267 TFEU provides that any court or tribunal may submit a request for a preliminary ruling to the Court of Justice on the interpretation of a rule of European Union law if it considers it necessary to do so in order to resolve the dispute brought before it.

12. However, courts or tribunals against whose decisions there is no judicial remedy under national law must bring such a request before the Court, unless the Court has already ruled on the point (and there is no new context that raises any serious doubt as to whether that case-law may be applied in that instance), or unless the correct interpretation of the rule of law in question is obvious.

13. Thus, a national court or tribunal may, in particular when it considers that sufficient guidance is given by the case-law of the Court of Justice, itself decide on the correct interpretation of European Union law and its application to the factual situation before it. However, a reference for a preliminary ruling may prove particularly useful when there is a new question of interpretation of general interest for the uniform application of European Union law, or where the existing case-law does not appear to be applicable to a new set of facts.

14. In order to enable the Court of Justice properly to identify the subject-matter of the main proceedings and the questions that arise, it is helpful if, in respect of each question referred, the national court or tribunal explains why the interpretation sought is necessary to enable it to give judgment.

References on determination of validity

15. Although the courts and tribunals of the Member States may reject pleas raised before them challenging the validity of acts of an institution, body, office or agency of the Union, the Court of Justice has exclusive jurisdiction to declare such an act invalid.

16. All national courts or tribunals **must** therefore submit a request for a preliminary ruling to the Court when they have doubts about the validity of such an act, stating the reasons for which they consider that the act may be invalid.

17. However, if a national court or tribunal has serious doubts about the validity of an act of an institution, body, office or agency of the Union on which a national measure is based, it may exceptionally suspend application of that measure temporarily or grant other interim relief with respect to it. It must then refer the question of validity to the Court of Justice, stating the reasons for which it considers the act to be invalid.

The appropriate stage at which to make a reference for a preliminary ruling

18. A national court or tribunal may submit a request for a preliminary ruling to the Court as soon as it finds that a ruling on the interpretation or validity of European Union law is necessary to enable it to give judgment. It is that court or tribunal which is in fact in the best position to decide at what stage of the proceedings such a request should be made.

19. It is, however, desirable that a decision to make a reference for a preliminary ruling should be taken when the national proceedings have reached a stage at which the referring court or tribunal is able to define the legal and factual context of the case, so that the Court of Justice has available to it all the information necessary to check, where appropriate, that European Union law applies to the main proceedings. In the interests of the proper administration of justice, it may also be desirable for the reference to be made only after both sides have been heard.

The form and content of the request for a preliminary ruling

20. The decision by which a court or tribunal of a Member State refers one or more questions to the Court of Justice for a preliminary ruling may be in any form allowed by national law as regards procedural steps. However, it must be borne in mind that it is that document which will serve as the basis of the proceedings before the Court and that it must therefore contain such information as will enable the Court to give a reply which is of assistance to the referring court or tribunal. Moreover, it is only the request for a preliminary ruling which is notified to the parties to the main proceedings and to the other interested persons referred to in Article 23 of the Statute, including the Member States, in order to obtain any written observations.

21. Owing to the need to translate it into all the official languages of the European Union, the request for a preliminary ruling should therefore be drafted simply, clearly and precisely, avoiding superfluous detail.

22. About 10 pages is often sufficient to set out in a proper manner the context of a request for a preliminary ruling. That request must be succinct but sufficiently complete and must contain all the relevant information to give the Court and the interested persons entitled to submit observations a clear understanding of the factual and legal context of the main proceedings. In accordance with Article 94 of the Rules of Procedure, the request for a preliminary ruling must contain, in addition to the text of the questions referred to the Court for a preliminary ruling:

- a summary of the subject-matter of the dispute and the relevant findings of fact as determined by the referring court or tribunal, or, at least, an account of the facts on which the questions referred are based;
- the tenor of any national provisions applicable in the case and, where appropriate, the relevant national case-law ⁽¹⁾;

⁽¹⁾ The referring court or tribunal is requested to provide precise references for those texts and their publication, such as a page of an official journal or a specific law report, or a reference to an internet site.

— a statement of the reasons which prompted the referring court or tribunal to inquire about the interpretation or validity of certain provisions of European Union law, and the relationship between those provisions and the national legislation applicable to the main proceedings.

23. The European Union law provisions relevant to the case should be identified as accurately as possible in the request for a preliminary ruling, which should include, if need be, a brief summary of the relevant arguments of the parties to the main proceedings.

24. If it considers itself able to do so, the referring court or tribunal may, finally, briefly state its view on the answer to be given to the questions referred for a preliminary ruling. That information may be useful to the Court, particularly where it is called upon to give a preliminary ruling in an expedited or urgent procedure.

25. In order to make the request for a preliminary ruling easier to read, it is essential that the Court receive it in typewritten form. To enable the Court to refer to the request it is also very helpful if the pages and paragraphs of the order for reference – which must be dated and signed – are numbered.

26. The questions themselves should appear in a separate and clearly identified section of the order for reference, preferably at the beginning or the end. It must be possible to understand them on their own terms, without referring to the statement of the grounds for the request, which will however provide the necessary background for a proper understanding of the implications of the case.

27. Under the preliminary ruling procedure, the Court will, as a rule, use the information contained in the order for reference, including nominative or personal data. It is therefore for the referring court or tribunal itself, if it considers it necessary, to delete certain details in its request for a preliminary ruling or to render anonymous one or more persons or entities concerned by the dispute in the main proceedings.

28. After the request for a preliminary ruling has been lodged, the Court may also render such persons or entities anonymous of its own motion, or at the request of the referring court or tribunal or of a party to the main proceedings. In order to maintain its effectiveness, such a request for anonymity must, however, be made at the earliest possible stage of the proceedings, and in any event prior to publication in the *Official Journal of the European Union* of the notice relating to the case concerned, and to service of the request for a preliminary ruling on the interested persons referred to in Article 23 of the Statute.

The effects of the reference for a preliminary ruling on the national proceedings

29. Although the national court or tribunal may still order protective measures, particularly in connection with a reference on determination of validity (see point 17 above), the lodging of a request for a preliminary ruling nevertheless calls for the national proceedings to be stayed until the Court of Justice has given its ruling.

30. In the interests of the proper conduct of the preliminary ruling proceedings before the Court and in order to maintain their effectiveness, it is incumbent on the referring court or tribunal to inform the Court of Justice of any procedural step that may affect the referral and, in particular, if any new parties are admitted to the national proceedings.

Costs and legal aid

31. Preliminary ruling proceedings before the Court of Justice are free of charge and the Court does not rule on the costs of the parties to the proceedings pending before the referring court or tribunal; it is for the referring court or tribunal to rule on those costs.

32. If a party to the main proceedings has insufficient means and where it is possible under national rules, the referring court or tribunal may grant that party legal aid to cover the costs, including those of lawyers' fees, which it incurs before the Court. The Court itself may also grant legal aid where the party in question is not already in receipt of aid under national rules or to the extent to which that aid does not cover, or covers only partly, costs incurred before the Court.

Communication between the Court of Justice and the national courts and tribunals

33. The request for a preliminary ruling and the relevant documents (including, where applicable, the case file or a copy of it) are to be sent by the national court or tribunal making the reference directly to the Court of Justice. They must be sent by registered post to the Registry of the Court of Justice (Rue du Fort Niedergrünewald, L-2925 Luxembourg).

34. Until the decision containing the Court's ruling on the referring court's or tribunal's request for a preliminary ruling is served on that court or tribunal, the Court Registry will stay in contact with the referring court or tribunal, and will send it copies of the procedural documents.

35. The Court of Justice will send its ruling to the referring court or tribunal. It would welcome information from that court or tribunal on the action taken upon its ruling in the main proceedings, and communication of the referring court's or tribunal's final decision.

II — SPECIAL PROVISIONS IN RELATION TO URGENT REFERENCES FOR A PRELIMINARY RULING

36. As provided in Article 23a of the Statute and Articles 105 to 114 of the Rules of Procedure, a reference for a preliminary ruling may, in certain circumstances, be determined pursuant to an expedited procedure or an urgent procedure.

Conditions for the application of the expedited and urgent procedures

37. The Court of Justice decides whether these procedures are to be applied. Such a decision is generally taken only on a reasoned request from the referring court or tribunal. Exceptionally, the Court may, however, decide of its own motion to determine a reference for a preliminary ruling under an expedited procedure or an urgent procedure where that appears to be required by the nature or the particular circumstances of the case.

38. Article 105 of the Rules of Procedure provides that a reference for a preliminary ruling may be determined pursuant to an **expedited procedure** derogating from the provisions of those Rules, where the nature of the case requires that it be dealt with within a short time. Since that procedure imposes significant constraints on all those involved in it, and, in particular, on all the Member States called upon to lodge their observations, whether written or oral, within much shorter time-limits than would ordinarily apply, its application should be sought only in particular circumstances that warrant the Court giving its ruling quickly on the questions referred. The large number of persons or legal situations potentially affected by the decision that the referring court or tribunal has to deliver after bringing a matter before the Court for a preliminary ruling does not, in itself, constitute an exceptional circumstance that would justify the use of the expedited procedure ⁽¹⁾.

39. The same applies *a fortiori* to the **urgent preliminary ruling procedure**, provided for in Article 107 of the Rules of Procedure. That procedure, which applies only in the areas covered by Title V of Part Three of the TFEU, relating to the area of freedom, security and justice, imposes even greater constraints on those concerned, since it limits in particular the number of parties authorised to lodge written observations and, in cases of extreme urgency, allows the written part of the procedure before the Court to be omitted altogether. The application of the urgent procedure should therefore be requested only where it is absolutely necessary for the Court to give its ruling very quickly on the questions submitted by the referring court or tribunal.

40. Although it is not possible to provide an exhaustive list of such circumstances, particularly because of the varied and evolving nature of the rules of European Union law governing the area of freedom, security and justice, a national court or tribunal might, for example, consider submitting a request for the urgent preliminary ruling procedure to be applied in the case, referred to in the fourth paragraph of Article 267 TFEU, of a person in custody or deprived of his liberty, where the answer to the question raised is decisive as to the assessment of that person's legal situation, or in proceedings concerning parental authority or custody of children, where the identity of the court having jurisdiction under European Union law depends on the answer to the question referred for a preliminary ruling.

⁽¹⁾ For an insight into circumstances that have resulted in the approval or refusal of requests for the application of the accelerated procedure, made on the basis of Article 104a of the Rules of Procedure of the Court of Justice of 19 June 1991, as amended, see the orders made by the President of the Court of Justice, available at www.curia.europa.eu (the orders can be found under 'Case-law', by selecting each of the following in turn in the search form: Documents – Documents not published in the ECR – Orders – Expedited procedure).

The request for application of the expedited procedure or the urgent procedure

41. To enable the Court to decide quickly whether the expedited procedure or the urgent preliminary ruling procedure should be applied, the request must set out precisely the matters of fact and law which establish the urgency and, in particular, the risks involved in following the ordinary procedure.

42. In so far as it is able to do so, the referring court should briefly state its view on the answer to be given to the questions referred. Such a statement makes it easier for the parties to the main proceedings and the other interested persons participating in the procedure to define their positions and facilitates the Court's decision, thereby contributing to the rapidity of the procedure.

43. The request for the application of the expedited procedure or the urgent procedure must be submitted in an unambiguous form that enables the Court Registry to establish immediately that the file has to be dealt with in a particular way. Accordingly, the referring court or tribunal is asked to specify which of the two procedures is required in that particular case, and to mention in its request the relevant article of the Rules of Procedure (Article 105 for the expedited procedure or Article 107 for the urgent procedure). That mention must be included in a clearly identifiable place in its order for reference (for example, at the head of the page or in a separate judicial document). Where appropriate, a covering letter from the referring court or tribunal can usefully refer to that request.

44. As regards the order for reference itself, it is particularly important that it should be succinct where the matter is urgent, as this will help to ensure the rapidity of the procedure.

Communication between the Court of Justice, the referring court or tribunal and the parties to the main proceedings

45. In order to expedite and facilitate communication with the referring court or tribunal and the parties before it, a court or tribunal submitting a request for the expedited procedure or the urgent procedure to be applied is asked to state the e-mail address and any fax number which may be used by the Court of Justice, together with the e-mail addresses and any fax numbers of the representatives of the parties to the proceedings.

46. A copy of the signed order for reference together with a request for the expedited procedure or the urgent procedure to be applied can initially be sent to the Court by e-mail (ECJ-Registry@curia.europa.eu) or by fax (+352 43 37 66). Processing of the reference and of the request can then begin upon receipt of the e-mailed or faxed copy. The originals of those documents must, however, be sent to the Court Registry as soon as possible.

Luxembourg, 31 January 2012

*Mr Villy Søvndal
President
Council of the European Union
Rue de la Loi, 175*

B – 1048 BRUSSELS

Dear President,

Further to the statement annexed to the Council's decision of 20 December 2007, I hereby enclose a report on the use of the urgent preliminary ruling procedure by the Court of Justice.

The report is enclosed in all the official languages.

Yours faithfully,

Vassilios SKOURIS

Report on the use of the urgent preliminary ruling procedure by the Court of Justice ¹

As of 1 March 2008, a reference for a preliminary ruling which raises one or more questions concerning the area of freedom, security and justice may, at the request of the national court or tribunal or, exceptionally, of the Court's own motion, be dealt with under an urgent procedure. ² This report on the Court's application of that procedure is its first review and covers the period 1 March 2008 to 6 October 2011 ('the reference period'), which includes three full judicial years.

It may be recalled that that procedure was introduced in response to the Presidency Conclusions of the European Council inviting the Commission to bring forward, after consultation of the Court of Justice, a proposal to '*enable the Court to respond quickly*' by creating a solution '*for the speedy and appropriate handling of requests for preliminary rulings concerning the area of freedom, security and justice*'. ³ The Commission considered that it was necessary to '*trust in the proper functioning of the Court of Justice*' and stated that '*where necessary, special rules allowing immediate treatment of particularly urgent cases might be inserted in the Statute of the Court of Justice ... and in its Rules of Procedure.*' ⁴

In the proposal ultimately drawn up by the Court, as endorsed by the Council, the Court opted for the introduction of an urgent preliminary ruling procedure which has, in essence, three specific features distinguishing it from the ordinary preliminary ruling procedure (and, therefore, from the accelerated procedure, which reproduces in all respects the procedural rules of an ordinary procedure, while significantly accelerating it). First, only the parties to the main proceedings, the Member State of the referring court or tribunal, the Commission, and the other institutions if one of their measures is at issue, may participate in the written

¹ Report delivered to the Council in accordance with the statement annexed to its decision of 20 December 2007 (OJ L 24 of 29 January 2008, p. 44).

² Council Decision of 20 December 2007 amending the Protocol on the Statute of the Court of Justice, OJ L 24 of 29 January 2008, p. 42; Amendments to the Rules of Procedure of the Court of Justice, OJ L 24 of 29 January 2008, p. 39, and OJ L 92 of 13 April 2010, p. 12.

³ Presidency Conclusions, Brussels European Council, 4 and 5 November 2004, 14292/1/04, paragraph 3.1.

⁴ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, the Committee of the Regions and the Court of Justice of the European Communities Adaptation of the provisions of Title IV of the Treaty establishing the European Community relating to the jurisdiction of the Court of Justice with a view to ensuring more effective judicial protection, 28 June 2006, COM(2006) 346 final.

procedure. Since these have a command of the language of the case, the written procedure can be initiated immediately, without any need to await the translation of the reference for a preliminary ruling into all the official languages. Second, cases that may be dealt with under an urgent procedure are referred to a Chamber specifically designated for that purpose, which gives its ruling without first going through the General Meeting of the Court. Third, communications in the urgent procedure (both internal and those involving the parties and interested persons) are, as far as possible, entirely electronic. These measures were expected to achieve substantial savings in terms of the duration of proceedings.

1. Average duration of proceedings in cases dealt with under the urgent preliminary ruling procedure

The cases dealt with under the urgent preliminary ruling procedure were completed, on average, within 66 days (see Table 1 annexed). In no case did proceedings exceed three months. The Court's principal intended and declared objective – to dispose of that type of case speedily, in approximately two to four months, with possible variations depending on the level of urgency – has thus been fully achieved.

2. Volume and nature of litigation affected by the urgent preliminary ruling procedure

Before the entry into force of the Treaty of Lisbon, the urgent preliminary ruling procedure was applicable in the areas covered by Title VI of the Union Treaty or Title IV of Part Three of the EC Treaty. Since 1 December 2009, the procedure has been applicable in the areas covered by Title V of Part Three of the Treaty on the Functioning of the European Union, which brought together the previous provisions.⁵ In particular, since the entry into force of the Treaty of Lisbon, the Court's jurisdiction has been substantially extended by virtue of the number of national courts and tribunals which may now refer questions to the Court in the areas concerned.

During the reference period, the Court received **126** requests for a preliminary ruling relating to the area of freedom, security and justice which were thus capable of being dealt with under

⁵ Amendments to the Rules of Procedure of the Court of Justice, OJ L 92 of 13 April 2010, p. 12.

the urgent procedure. That figure represents **11.64%** of all references for a preliminary ruling made during that period, that is 1 082.

It is interesting to note that after the introduction of the urgent preliminary ruling procedure, but before the entry into force of the Treaty of Lisbon, only 4.85% of references for a preliminary ruling concerned the area of freedom, security and justice.⁶

Of the 126 cases falling within the scope of the urgent preliminary ruling procedure, more than half (68 cases, or 54%) concerned judicial cooperation in civil matters, of which two thirds (42 cases) related to Regulation No 44/2001.⁷ Ten of those cases concerned the interpretation of Regulations No 1347/2000 and No 2201/2003.⁸

One third of the 126 cases capable of being dealt with under the urgent preliminary ruling procedure concerned the area of ‘visas, asylum and immigration’ (43 cases, or 34%), of which 22 related specifically to Directive 2008/115/EC⁹ and 14 to Directive 2004/83/EC.¹⁰

Lastly, 18 of those 126 cases (that is 14%) related to cooperation in criminal matters, of which 10 related to Framework Decision 2002/584/JHA.¹¹

Of those 126 cases, 21 were accompanied by a request for application of the urgent preliminary ruling procedure from the national court or tribunal, and in one case,

⁶ 25 cases out of a total of 515 references for a preliminary ruling made between 1 March 2008 and 30 November 2009.

⁷ Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 12 of 16 January 2001, p. 1.

⁸ Council Regulation (EC) No 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses, OJ L 160 of 30 June 2000, p. 19, and Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, OJ L 338 of 23 December 2003, p. 1.

⁹ 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, OJ L 348 of 24 December 2008, p. 98.

¹⁰ Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, OJ L 304 of 30 September 2004, p. 2 or 12.

¹¹ Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJ L 190 of 18 July 2002, p. 1.

exceptionally, that procedure was applied of the Court's own motion, following a request by the President of the Court.¹²

Thus, during the reference period, almost **one fifth (17.5%) of cases capable of being dealt with under the urgent preliminary ruling procedure were the subject of a request to that effect.**

Of those 22 requests, 12 were granted, including that of the President of the Court, **that is more than half** (around 55%). 8 were refused (see Table 2 annexed) and 2 did not proceed.¹³

Half of the 12 cases dealt with under the urgent preliminary ruling procedure concerned the jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility.¹⁴ One quarter related to the European arrest warrant.¹⁵ The remaining cases fell within the area of 'visas, asylum and immigration' and concerned, in particular, the interpretation of Directive 2008/115/EC.¹⁶

Two main conclusions can be drawn from these figures.

First, although in absolute terms the number of requests has remained modest,¹⁷ the proportion of those requests in comparison with cases that could potentially fall within the scope of the urgent preliminary ruling procedure (almost one fifth) is not negligible.

Second, the reasons which the national courts and tribunals put forward in support of their requests for application of the urgent procedure were for the most part valid, since more than half of those requests were successful.

¹² The first and third subparagraphs of Article 104b(1) of the Rules of Procedure allow the Court, exceptionally, of its own motion to deal with a reference for a preliminary ruling under the urgent procedure. It is for the President of the Court to ask the designated Chamber to consider whether it is necessary to deal with the reference under the urgent preliminary ruling procedure, if the application of that procedure appears, prima facie, to be required, even though it has not been requested by the national court or tribunal. That provision has been used only once, in Case C-491/10 *Aguirre Zarraga*.

¹³ The cases in question are Cases C-140/11 *Ngagne* and C-156/11 *Music*, in which the references were withdrawn by the referring courts after delivery of the judgment in related Case C-61/11 PPU *El Dridi Hassen*, and which were removed from the register before the designated Chamber had determined the request for application of the urgent preliminary ruling procedure.

¹⁴ See footnote 8.

¹⁵ See footnote 11.

¹⁶ See footnote 9.

¹⁷ It is unlikely that the relative restraint on the part of national courts and tribunals can be attributed to any lack of awareness of the procedure established, since the requests submitted during the reference period were made by courts at various levels of the court hierarchy, in various locations throughout a number of Member States.

3. Conduct of the written and oral procedure

The Court has never availed itself of the possibility afforded by Article 104b(4) of the Rules of Procedure of omitting the written procedure in cases of extreme urgency.

On average, the duration of the written procedure in cases dealt with under the urgent preliminary ruling procedure was more than 16 days¹⁸ (see Table 3 annexed). The Court has thus ensured that the Member States are allowed the time necessary for drafting written observations, the Court having been called upon by the Council not to reduce the time allowed to less than 10 working days.¹⁹

The same concern has governed the fixing of the date for the hearing, which has been held, on average, a little over 16 days after written observations lodged, together with their translations, have been communicated to the parties and interested persons (see Table 3 annexed).

Participation in the hearing of Member States other than the Member State of the referring court or tribunal has been comparatively high: on average, three Member States have attended to submit oral observations (see Table 4 annexed), whereas, based on a representative sample of hearings held in preliminary ruling proceedings,²⁰ on average, just one Member State (over and above that of the referring court or tribunal) takes part in the hearing.

Views of the Advocate General in urgent preliminary ruling procedures have been delivered on average in a little over three days after the hearing (see Table 3), and, with just one exception,²¹ have all been published.²²

4. Designation of the Chamber responsible for cases in which the urgent preliminary ruling procedure is requested

¹⁸ The second subparagraph of Article 104b(2) of the Rules of Procedure provides that the decision to deal with the reference under the urgent procedure is to prescribe the period within which the parties and interested persons entitled to participate in the written procedure may lodge statements of case or written observations.

¹⁹ Statement of the Council, annexed to its decision of 20 December 2007, OJ L 24 of 29 January 2008, p. 44.

²⁰ That is all hearings held, before any and all formations of the Court, in the month of October 2011.

²¹ In Case C-388/08 PPU *Leymann and Pustovarov*.

²² In accordance with the Court's practice, Views, where presented in writing, are published unless the formation of the Court decides otherwise after hearing the Advocate General.

Pursuant to the second and third subparagraphs of Article 9(1) of the Rules of Procedure, the Court has designated the Chambers responsible for cases in which the urgent preliminary ruling procedure is requested. It has never designated more than one Chamber of five Judges for that purpose.

During the reference period, the four Chambers of five Judges currently within the Court have each been designated in turn.²³ Thus, the great majority of Judges of the Court have had occasion to sit in a case in which the urgent preliminary ruling procedure has been requested.

Successive designated Chambers have always sat with five Judges.²⁴ Only once has the designated Chamber decided to refer the case back to the Court in order for it to be assigned to a formation composed of a greater number of Judges.²⁵

While the number of requests for application of the urgent preliminary ruling procedure – which have largely been consecutive and have only rarely needed to be dealt with concurrently by the designated Chamber – has not justified the designation of several Chambers ruling simultaneously, the management of cases dealt with under the urgent procedure has proved to be particularly demanding for the Chamber concerned.

5. The Court's practice with regard to decisions as to whether or not to initiate the urgent procedure

Owing to the extreme urgency with which the designated Chamber is obliged to rule on requests for application of the urgent preliminary ruling procedure – which, during the reference period, it did in a little more than an average of 8 days²⁶ (see Table 3 annexed) – decisions as to whether or not to initiate the urgent procedure do not include a statement of reasons.

²³ The Third Chamber for the period 1 March 2008 to 6 October 2008; the Second Chamber for the period 7 October 2008 to 6 October 2009; the new Third Chamber (former Fourth Chamber) for the period 7 October 2009 to 6 October 2010; the First Chamber for the period 7 October 2010 to 6 October 2011.

²⁴ Under Article 104b(5) of the Rules of Procedure, the designated Chamber may decide to sit in a formation of three Judges.

²⁵ In Case C-357/09 PPU *Kadzoev*, which the Court referred to the Grand Chamber.

²⁶ This period includes the necessary time for translation of the request before it is dealt with.

However, it is possible, on the basis of an analysis of the circumstances of fact and of law in which the urgent preliminary ruling procedure has been approved, to isolate two types of situation which have resulted in the Court delivering a ruling in the shortest possible time:

- where there is a risk of an irreparable change for the worse in the parent/child relationship, for example, where what is at stake is the return of a child who has been deprived of contact with one of its parents (C-195/08 PPU *Rinau*; C-403/09 PPU *Detiček*; C-211/10 PPU *Povse*; C-400/10 PPU *McB*; C-491/10 PPU *Aguirre Zarraga*; C-497/10 PPU *Mercredi*) or family reunification (C-155/11 PPU *Imran*);
- where a person is being detained and further detention depends on the answer to be given by the Court (C-296/08 PPU *Santesteban Goicoechea*; C-388/08 PPU *Leymann and Pustovarov*; C-357/09 PPU *Kadzoev*; C-105/10 PPU *Gataev and Gataeva*; C-61/11 PPU *El Dridi Hassen*).

This practice is consistent with the scenarios envisaged by the Court in its Information note on references from national courts for a preliminary ruling²⁷ and with the Council's request that the urgent preliminary ruling procedure be applied in situations involving deprivation of liberty,²⁸ which has been enshrined in the fourth paragraph of Article 267 of the Treaty on the Functioning of the European Union.

6. Method of communication

Documents have been communicated, both internally and with the parties and interested persons, electronically, by virtue of the creation of 'functional mailboxes' specifically dedicated to communication in relation to the urgent preliminary ruling procedure.

Since the establishment in the Court of a general system of lodging and service of procedural documents by electronic means,²⁹ the relative advantage of these 'functional mailboxes' has been reduced, as regards the anticipated acceleration of the transmission of information. Nevertheless, they have enabled communications in relation to an urgent preliminary ruling

²⁷ OJ C 160 of 28 May 2011, p. 1, point 37: '... a national court or tribunal might, for example, consider submitting a request for the urgent preliminary ruling procedure to be applied in the following situations: in the case, referred to in the fourth paragraph of Article 267 TFEU, of a person in custody or deprived of his liberty, where the answer to the question raised is decisive as to the assessment of that person's legal situation or, in proceedings concerning parental authority or custody of children, where the identity of the court having jurisdiction under European Union law depends on the answer to the question referred for a preliminary ruling.'

²⁸ Statement of the Council, annexed to its decision of 20 December 2007, OJ L 24 of 29 January 2008, p. 44.

²⁹ Decision of the Court of Justice of 13 September 2011 on the lodging and service of procedural documents by means of e-Curia, OJ C 289 of 1 October 2011, p. 7.

procedure to be put on a separate track that is subject to special and continuous monitoring, thereby helping to ensure that all involved are kept on standby.

The reference period has been a good running-in period for the application of the urgent preliminary ruling procedure by the Court. The modest flow of requests has facilitated its smooth application, while at the same time providing an opportunity to gauge the constraints associated with the procedure, which weigh not only on the designated Chamber but also on the Court's services, in particular the translation, Registry and interpreting services. With the same resources, considerable efforts would be required to maintain the objectives set, in the event of an appreciable increase in reasoned requests, and would probably have an impact on the handling of other cases.

Table 1
Duration of proceedings in cases dealt with under the urgent preliminary ruling procedure

Case	Duration (in days)
1. C-195/08 PPU Rinau <i>Referring court or tribunal: Lietuvos Aukščiausiasis Teismas, Lithuania</i> <i>Re: Jurisdiction, recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility</i>	58 ³⁰
2. C-296/08 PPU Santesteban Goicoechea <i>Referring court or tribunal: Cour d'appel de Montpellier, France</i> <i>Re: European arrest warrant</i>	40
3. C-388/08 PPU Leymann and Pustovarov <i>Referring court or tribunal: Korkein oikeus, Finland</i> <i>Re: European arrest warrant</i>	87
4. C-357/09 PPU Kadzoev ³¹ <i>Referring court or tribunal: Administrativen sad Sofia-grad, Bulgaria</i> <i>Re: Return of illegally staying third-country nationals</i>	84
5. C-403/09 PPU Detiček <i>Referring court or tribunal: Višje sodišče v Mariboru, Slovenia</i> <i>Re: Jurisdiction, recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility</i>	64
6. C-105/10 PPU Gataev and Gataeva ³² <i>Referring court or tribunal: Korkein oikeus, Finland</i> <i>Re: European arrest warrant and refugee status</i>	/
7. C-211/10 PPU Povse <i>Referring court or tribunal: Oberster Gerichtshof, Austria</i> <i>Re: Jurisdiction, recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility</i>	59
8. C-400/10 PPU McB. <i>Referring court or tribunal: Supreme Court, Ireland</i> <i>Re: Jurisdiction, recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility</i>	60
9. C-491/10 PPU Aguirre Zarraga <i>Referring court or tribunal: Oberlandesgericht Celle, Germany</i> <i>Re: Jurisdiction, recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility</i>	68
10. C-497/10 PPU Mercredi <i>Referring court or tribunal: Court of Appeal (England & Wales) (Civil Division), United Kingdom</i> <i>Re: Jurisdiction, recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility</i>	65
11. C-61/11 PPU El Dridi Hassen <i>Referring court or tribunal: Corte di Appello di Trento, Italy</i> <i>Re: Return of illegally staying third-country nationals</i>	77
12. C-155/11 PPU Imran ³³ <i>Referring court or tribunal: Rechtbank 's-Gravenhage, zittinghoudende te Zwolle-Lelystad, Netherlands</i> <i>Re: Right to family reunification</i>	/

³⁰ 50 days from the request for the case to be dealt with under the urgent preliminary ruling procedure.

³¹ This case was referred to the Grand Chamber.

³² In this case the reference was withdrawn by the referring court and the case was removed from the register by order of 3 April 2010.

	Average 66.2
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³³ This case was concluded by order of 10 June 2011 declaring that there was no need to adjudicate.

Table 2

List of cases in which the request for an urgent preliminary ruling procedure was refused

	Traitement procédural ultérieur
1. C-123/08 Wolzenburg <i>Referring court or tribunal:</i> Rechtbank Amsterdam, Netherlands <i>Re:</i> European arrest warrant	/
2. C-261/08 Zurita García <i>Referring court or tribunal:</i> Tribunal Superior de Justicia de Murcia, Spain <i>Re:</i> Schengen Borders Code	/
3. C-375/08 Pontini <i>Referring court or tribunal:</i> Tribunale di Treviso, Italy <i>Re:</i> does not fall within the area covered by the urgent preliminary ruling procedure	/
4. C-261/09 Mantello <i>Referring court or tribunal:</i> Oberlandesgericht Stuttgart, Germany <i>Re:</i> European arrest warrant	/
5. C-264/10 Kita ³⁴ <i>Referring court or tribunal:</i> Inalta Curte de Casație și Justiție, Roumanie <i>Re:</i> European arrest warrant	/
6. C-175/11 HID and BA <i>Referring court or tribunal:</i> High Court of Ireland, Ireland <i>Re:</i> Refugee status	/
7. C-277/11 MM ³⁵ <i>Referring court or tribunal:</i> High Court of Ireland, Ireland <i>Re:</i> Refugee status	Priority treatment
8. C-329/11 Achughbabian <i>Referring court or tribunal:</i> Cour d'appel de Paris, France <i>Re:</i> Return of illegally staying third-country nationals	Accelerated procedure ³⁶

³⁴ This case was removed from the register as a result of the referring court's withdrawal of the reference.

³⁵ In this case, the referring court twice submitted a request for the urgent preliminary ruling procedure; in each case it was refused.

³⁶ See order of the President of the Court of 30 September 2011 (in particular, paragraphs 9 to 12).

Table 3
Duration of particular stages of the procedure

Case	Time between the submission of the request and the decision (days)	Duration of the written procedure (days)	Time between service of pleadings and the hearing (days)	Time between the hearing and the Advocate General's View (days)
1. C-123/08 Wolzenburg	12			
2. C-195/08 PPU Rinau	1	17	10	5
3. C-261/08 Zurita García	6			
4. C-296/08 PPU Santesteban Goicoechea	4	15	13	0
5. C-375/08 Pontini	3			
6. C-388/08 PPU Leymann and Pustovarov	6	19	33	0
7. C-261/09 Mantello	6			
8. C-357/09 PPU Kadzoev	15	15	18	14
9. C-403/09 PPU Detiček	7	16	21	2
10. C-105/10 PPU Gataev and Gataeva	5	15		
11. C-211/10 PPU Povse	8	15	11	2
12. C-264/10 Kita	11			
13. C-400/10 PPU McB.	5	16	19	2
14. C-491/10 PPU Aguirre Zarraga	9	18	17	1
15. C-497/10 PPU Mercredi	10	17	8	5
16. C-61/11 PPU El Dridi Hassen	7	17	15	2
17. C-155/11 PPU Imran	3	21		
18. C-175/11 HID and BA	19			
19. C-277/11 MM	16 (10 ³⁷)			
20. C-329/11 Achughbalian	12			
Average	8.3	16.75	16.5	3.3

³⁷ On the second request for application of the urgent preliminary ruling procedure.

Table 4
Participation of Member States
(other than the Member State of the referring court or tribunal)
in the oral procedure in cases dealt with under the urgent preliminary ruling procedure

Case
1. C-195/08 PPU Rinau <i>Germany, France, Latvia, Netherlands, United Kingdom</i>
2. C-296/08 PPU Santesteban Goicoechea <i>Spain</i>
3. C-388/08 PPU Leymann and Pustovarov <i>Spain, Netherlands</i>
4. C-357/09 PPU Kadzoev <i>Lithuania</i>
5. C-403/09 PPU Detiček <i>Czech Republic, Germany, France, Italy, Latvia, Poland</i>
6. <i>C-105/10 PPU Gataev and Gataeva</i> ³⁸
7. C-211/10 PPU Povse <i>Czech Republic, Germany, France, Italy, Latvia, Slovenia, United Kingdom</i>
8. C-400/10 PPU McB. <i>Germany</i>
9. C-491/10 PPU Aguirre Zarraga <i>Greece, Spain, France, Latvia</i>
10. C-497/10 PPU Mercredi <i>Germany, Ireland, France</i>
11. C-61/11 PPU El Dridi Hassen /
12. <i>C-155/11 PPU Imran</i> ³⁹

³⁸ The referring court's withdrawal of the reference reached the Court before the hearing was held.

³⁹ No hearing was held in this case which was concluded by an order declaring that there was no need to adjudicate.

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2002/584/JHA: Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States - Statements made by certain Member States on the adoption of the Framework Decision

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Council Framework Decision

of 13 June 2002

on the European arrest warrant and the surrender procedures between Member States

(2002/584/JHA)

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on European Union, and in particular Article 31(a) and (b) and Article 34(2)(b) thereof,

Having regard to the proposal from the Commission(1),

Having regard to the opinion of the European Parliament(2),

Whereas:

(1) According to the Conclusions of the Tampere European Council of 15 and 16 October 1999, and in particular point 35 thereof, the formal extradition procedure should be abolished among the Member States in respect of persons who are fleeing from justice after having been finally sentenced and extradition procedures should be speeded up in respect of persons suspected of having committed an offence.

(2) The programme of measures to implement the principle of mutual recognition of criminal decisions envisaged in point 37 of the Tampere European Council Conclusions and adopted by the Council on 30 November 2000(3), addresses the matter of mutual enforcement of arrest warrants.

(3) All or some Member States are parties to a number of conventions in the field of extradition, including the European Convention on extradition of 13 December 1957 and the European Convention on the suppression of terrorism of 27 January 1977. The Nordic States have extradition laws with identical wording.

(4) In addition, the following three Conventions dealing in whole or in part with extradition have been agreed upon among Member States and form part of the Union acquis: the Convention of 19 June 1990 implementing the Schengen Agreement of 14 June 1985 on the gradual abolition of checks at their common borders(4) (regarding relations between the Member States which are parties to that Convention), the Convention of 10 March 1995 on simplified extradition procedure between the Member States of the European Union(5) and the Convention of 27 September 1996 relating to extradition between the Member States of the European Union(6).

(5) The objective set for the Union to become an area of freedom, security and justice leads to abolishing extradition between Member States and replacing it by a system of surrender between judicial authorities. Further, the introduction of a new simplified system of surrender of sentenced or suspected persons for the purposes of execution or prosecution of criminal sentences makes it possible to remove the complexity and potential for delay inherent in the present extradition procedures. Traditional cooperation relations which have prevailed up till now between Member States should be replaced by a system of free movement of judicial decisions in criminal matters, covering both pre-sentence and final decisions, within an area of freedom, security and justice.

(6) The European arrest warrant provided for in this Framework Decision is the first concrete

measure in the field of criminal law implementing the principle of mutual recognition which the European Council referred to as the "cornerstone" of judicial cooperation.

(7) Since the aim of replacing the system of multilateral extradition built upon the European Convention on Extradition of 13 December 1957 cannot be sufficiently achieved by the Member States acting unilaterally and can therefore, by reason of its scale and effects, be better achieved at Union level, the Council may adopt measures in accordance with the principle of subsidiarity as referred to in Article 2 of the Treaty on European Union and Article 5 of the Treaty establishing the European Community. In accordance with the principle of proportionality, as set out in the latter Article, this Framework Decision does not go beyond what is necessary in order to achieve that objective.

(8) Decisions on the execution of the European arrest warrant must be subject to sufficient controls, which means that a judicial authority of the Member State where the requested person has been arrested will have to take the decision on his or her surrender.

(9) The role of central authorities in the execution of a European arrest warrant must be limited to practical and administrative assistance.

(10) The mechanism of the European arrest warrant is based on a high level of confidence between Member States. Its implementation may be suspended only in the event of a serious and persistent breach by one of the Member States of the principles set out in Article 6(1) of the Treaty on European Union, determined by the Council pursuant to Article 7(1) of the said Treaty with the consequences set out in Article 7(2) thereof.

(11) In relations between Member States, the European arrest warrant should replace all the previous instruments concerning extradition, including the provisions of Title III of the Convention implementing the Schengen Agreement which concern extradition.

(12) This Framework Decision respects fundamental rights and observes the principles recognised by Article 6 of the Treaty on European Union and reflected in the Charter of Fundamental Rights of the European Union⁽⁷⁾, in particular Chapter VI thereof. Nothing in this Framework Decision may be interpreted as prohibiting refusal to surrender a person for whom a European arrest warrant has been issued when there are reasons to believe, on the basis of objective elements, that the said arrest warrant has been issued for the purpose of prosecuting or punishing a person on the grounds of his or her sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation, or that that person's position may be prejudiced for any of these reasons.

This Framework Decision does not prevent a Member State from applying its constitutional rules relating to due process, freedom of association, freedom of the press and freedom of expression in other media.

(13) No person should be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.

(14) Since all Member States have ratified the Council of Europe Convention of 28 January 1981 for the protection of individuals with regard to automatic processing of personal data, the personal data processed in the context of the implementation of this Framework Decision should be protected in accordance with the principles of the said Convention,

HAS ADOPTED THIS FRAMEWORK DECISION:

CHAPTER 1

GENERAL PRINCIPLES

Article 1

Definition of the European arrest warrant and obligation to execute it

1. The European arrest warrant is a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order.

2. Member States shall execute any European arrest warrant on the basis of the principle of

mutual recognition and in accordance with the provisions of this Framework Decision.

3. This Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union.

Article 2

Scope of the European arrest warrant

1. A European arrest warrant may be issued for acts punishable by the law of the issuing Member State by a custodial sentence or a detention order for a maximum period of at least 12 months or, where a sentence has been passed or a detention order has been made, for sentences of at least four months.

2. The following offences, if they are punishable in the issuing Member State by a custodial sentence or a detention order for a maximum period of at least three years and as they are defined by the law of the issuing Member State, shall, under the terms of this Framework Decision and without verification of the double criminality of the act, give rise to surrender pursuant to a European arrest warrant:

- participation in a criminal organisation,
- terrorism,
- trafficking in human beings,
- sexual exploitation of children and child pornography,
- illicit trafficking in narcotic drugs and psychotropic substances,
- illicit trafficking in weapons, munitions and explosives,
- corruption,
- fraud, including that affecting the financial interests of the European Communities within the meaning of the Convention of 26 July 1995 on the protection of the European Communities' financial interests,
- laundering of the proceeds of crime,
- counterfeiting currency, including of the euro,
- computer-related crime,
- environmental crime, including illicit trafficking in endangered animal species and in endangered plant species and varieties,
- facilitation of unauthorised entry and residence,
- murder, grievous bodily injury,
- illicit trade in human organs and tissue,
- kidnapping, illegal restraint and hostage-taking,
- racism and xenophobia,
- organised or armed robbery,
- illicit trafficking in cultural goods, including antiques and works of art,
- swindling,
- racketeering and extortion,
- counterfeiting and piracy of products,
- forgery of administrative documents and trafficking therein,
- forgery of means of payment,

- illicit trafficking in hormonal substances and other growth promoters,
- illicit trafficking in nuclear or radioactive materials,
- trafficking in stolen vehicles,
- rape,
- arson,
- crimes within the jurisdiction of the International Criminal Court,
- unlawful seizure of aircraft/ships,
- sabotage.

3. The Council may decide at any time, acting unanimously after consultation of the European Parliament under the conditions laid down in Article 39(1) of the Treaty on European Union (TEU), to add other categories of offence to the list contained in paragraph 2. The Council shall examine, in the light of the report submitted by the Commission pursuant to Article 34(3), whether the list should be extended or amended.

4. For offences other than those covered by paragraph 2, surrender may be subject to the condition that the acts for which the European arrest warrant has been issued constitute an offence under the law of the executing Member State, whatever the constituent elements or however it is described.

Article 3

Grounds for mandatory non-execution of the European arrest warrant

The judicial authority of the Member State of execution (hereinafter "executing judicial authority") shall refuse to execute the European arrest warrant in the following cases:

1. if the offence on which the arrest warrant is based is covered by amnesty in the executing Member State, where that State had jurisdiction to prosecute the offence under its own criminal law;
2. if the executing judicial authority is informed that the requested person has been finally judged by a Member State in respect of the same acts provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing Member State;
3. if the person who is the subject of the European arrest warrant may not, owing to his age, be held criminally responsible for the acts on which the arrest warrant is based under the law of the executing State.

Article 4

Grounds for optional non-execution of the European arrest warrant

The executing judicial authority may refuse to execute the European arrest warrant:

1. if, in one of the cases referred to in Article 2(4), the act on which the European arrest warrant is based does not constitute an offence under the law of the executing Member State; however, in relation to taxes or duties, customs and exchange, execution of the European arrest warrant shall not be refused on the ground that the law of the executing Member State does not impose the same kind of tax or duty or does not contain the same type of rules as regards taxes, duties and customs and exchange regulations as the law of the issuing Member State;
2. where the person who is the subject of the European arrest warrant is being prosecuted in the executing Member State for the same act as that on which the European arrest warrant is based;
3. where the judicial authorities of the executing Member State have decided either not to prosecute for the offence on which the European arrest warrant is based or to halt proceedings, or where a final judgment has been passed upon the requested person in a Member State, in respect of the same acts, which prevents further proceedings;

4. where the criminal prosecution or punishment of the requested person is statute-barred according to the law of the executing Member State and the acts fall within the jurisdiction of that Member State under its own criminal law;

5. if the executing judicial authority is informed that the requested person has been finally judged by a third State in respect of the same acts provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing country;

6. if the European arrest warrant has been issued for the purposes of execution of a custodial sentence or detention order, where the requested person is staying in, or is a national or a resident of the executing Member State and that State undertakes to execute the sentence or detention order in accordance with its domestic law;

7. where the European arrest warrant relates to offences which:

(a) are regarded by the law of the executing Member State as having been committed in whole or in part in the territory of the executing Member State or in a place treated as such; or

(b) have been committed outside the territory of the issuing Member State and the law of the executing Member State does not allow prosecution for the same offences when committed outside its territory.

Article 5

Guarantees to be given by the issuing Member State in particular cases

The execution of the European arrest warrant by the executing judicial authority may, by the law of the executing Member State, be subject to the following conditions:

1. where the European arrest warrant has been issued for the purposes of executing a sentence or a detention order imposed by a decision rendered in absentia and if the person concerned has not been summoned in person or otherwise informed of the date and place of the hearing which led to the decision rendered in absentia, surrender may be subject to the condition that the issuing judicial authority gives an assurance deemed adequate to guarantee the person who is the subject of the European arrest warrant that he or she will have an opportunity to apply for a retrial of the case in the issuing Member State and to be present at the judgment;

2. if the offence on the basis of which the European arrest warrant has been issued is punishable by custodial life sentence or life-time detention order, the execution of the said arrest warrant may be subject to the condition that the issuing Member State has provisions in its legal system for a review of the penalty or measure imposed, on request or at the latest after 20 years, or for the application of measures of clemency to which the person is entitled to apply for under the law or practice of the issuing Member State, aiming at a non-execution of such penalty or measure;

3. where a person who is the subject of a European arrest warrant for the purposes of prosecution is a national or resident of the executing Member State, surrender may be subject to the condition that the person, after being heard, is returned to the executing Member State in order to serve there the custodial sentence or detention order passed against him in the issuing Member State.

Article 6

Determination of the competent judicial authorities

1. The issuing judicial authority shall be the judicial authority of the issuing Member State which is competent to issue a European arrest warrant by virtue of the law of that State.

2. The executing judicial authority shall be the judicial authority of the executing Member State which is competent to execute the European arrest warrant by virtue of the law of that State.

3. Each Member State shall inform the General Secretariat of the Council of the competent judicial authority under its law.

Article 7

Recourse to the central authority

1. Each Member State may designate a central authority or, when its legal system so provides, more than one central authority to assist the competent judicial authorities.
2. A Member State may, if it is necessary as a result of the organisation of its internal judicial system, make its central authority(ies) responsible for the administrative transmission and reception of European arrest warrants as well as for all other official correspondence relating thereto.

Member State wishing to make use of the possibilities referred to in this Article shall communicate to the General Secretariat of the Council information relating to the designated central authority or central authorities. These indications shall be binding upon all the authorities of the issuing Member State.

Article 8

Content and form of the European arrest warrant

1. The European arrest warrant shall contain the following information set out in accordance with the form contained in the Annex:

- (a) the identity and nationality of the requested person;
- (b) the name, address, telephone and fax numbers and e-mail address of the issuing judicial authority;
- (c) evidence of an enforceable judgment, an arrest warrant or any other enforceable judicial decision having the same effect, coming within the scope of Articles 1 and 2;
- (d) the nature and legal classification of the offence, particularly in respect of Article 2;
- (e) a description of the circumstances in which the offence was committed, including the time, place and degree of participation in the offence by the requested person;
- (f) the penalty imposed, if there is a final judgment, or the prescribed scale of penalties for the offence under the law of the issuing Member State;
- (g) if possible, other consequences of the offence.

2. The European arrest warrant must be translated into the official language or one of the official languages of the executing Member State. Any Member State may, when this Framework Decision is adopted or at a later date, state in a declaration deposited with the General Secretariat of the Council that it will accept a translation in one or more other official languages of the Institutions of the European Communities.

CHAPTER 2

SURRENDER PROCEDURE

Article 9

Transmission of a European arrest warrant

1. When the location of the requested person is known, the issuing judicial authority may transmit the European arrest warrant directly to the executing judicial authority.
2. The issuing judicial authority may, in any event, decide to issue an alert for the requested person in the Schengen Information System (SIS).
3. Such an alert shall be effected in accordance with the provisions of Article 95 of the Convention of 19 June 1990 implementing the Schengen Agreement of 14 June 1985 on the gradual abolition of controls at common borders. An alert in the Schengen Information System shall be equivalent to a European arrest warrant accompanied by the information set out in Article 8(1).

For a transitional period, until the SIS is capable of transmitting all the information described in

Article 8, the alert shall be equivalent to a European arrest warrant pending the receipt of the original in due and proper form by the executing judicial authority.

Article 10

Detailed procedures for transmitting a European arrest warrant

1. If the issuing judicial authority does not know the competent executing judicial authority, it shall make the requisite enquiries, including through the contact points of the European Judicial Network(8), in order to obtain that information from the executing Member State.
2. If the issuing judicial authority so wishes, transmission may be effected via the secure telecommunications system of the European Judicial Network.
3. If it is not possible to call on the services of the SIS, the issuing judicial authority may call on Interpol to transmit a European arrest warrant.
4. The issuing judicial authority may forward the European arrest warrant by any secure means capable of producing written records under conditions allowing the executing Member State to establish its authenticity.
5. All difficulties concerning the transmission or the authenticity of any document needed for the execution of the European arrest warrant shall be dealt with by direct contacts between the judicial authorities involved, or, where appropriate, with the involvement of the central authorities of the Member States.
6. If the authority which receives a European arrest warrant is not competent to act upon it, it shall automatically forward the European arrest warrant to the competent authority in its Member State and shall inform the issuing judicial authority accordingly.

Article 11

Rights of a requested person

1. When a requested person is arrested, the executing competent judicial authority shall, in accordance with its national law, inform that person of the European arrest warrant and of its contents, and also of the possibility of consenting to surrender to the issuing judicial authority.
2. A requested person who is arrested for the purpose of the execution of a European arrest warrant shall have a right to be assisted by a legal counsel and by an interpreter in accordance with the national law of the executing Member State.

Article 12

Keeping the person in detention

When a person is arrested on the basis of a European arrest warrant, the executing judicial authority shall take a decision on whether the requested person should remain in detention, in accordance with the law of the executing Member State. The person may be released provisionally at any time in conformity with the domestic law of the executing Member State, provided that the competent authority of the said Member State takes all the measures it deems necessary to prevent the person absconding.

Article 13

Consent to surrender

1. If the arrested person indicates that he or she consents to surrender, that consent and, if appropriate, express renunciation of entitlement to the "speciality rule", referred to in Article 27(2), shall be given before the executing judicial authority, in accordance with the domestic law of the executing Member State.
2. Each Member State shall adopt the measures necessary to ensure that consent and, where appropriate, renunciation, as referred to in paragraph 1, are established in such a way as to show that the person concerned has expressed them voluntarily and in full awareness of the consequences. To that end, the requested person shall have the right to legal counsel.
3. The consent and, where appropriate, renunciation, as referred to in paragraph 1, shall be

formally recorded in accordance with the procedure laid down by the domestic law of the executing Member State.

4. In principle, consent may not be revoked. Each Member State may provide that consent and, if appropriate, renunciation may be revoked, in accordance with the rules applicable under its domestic law. In this case, the period between the date of consent and that of its revocation shall not be taken into consideration in establishing the time limits laid down in Article 17. A Member State which wishes to have recourse to this possibility shall inform the General Secretariat of the Council accordingly when this Framework Decision is adopted and shall specify the procedures whereby revocation of consent shall be possible and any amendment to them.

Article 14

Hearing of the requested person

Where the arrested person does not consent to his or her surrender as referred to in Article 13, he or she shall be entitled to be heard by the executing judicial authority, in accordance with the law of the executing Member State.

Article 15

Surrender decision

1. The executing judicial authority shall decide, within the time-limits and under the conditions defined in this Framework Decision, whether the person is to be surrendered.
2. If the executing judicial authority finds the information communicated by the issuing Member State to be insufficient to allow it to decide on surrender, it shall request that the necessary supplementary information, in particular with respect to Articles 3 to 5 and Article 8, be furnished as a matter of urgency and may fix a time limit for the receipt thereof, taking into account the need to observe the time limits set in Article 17.
3. The issuing judicial authority may at any time forward any additional useful information to the executing judicial authority.

Article 16

Decision in the event of multiple requests

1. If two or more Member States have issued European arrest warrants for the same person, the decision on which of the European arrest warrants shall be executed shall be taken by the executing judicial authority with due consideration of all the circumstances and especially the relative seriousness and place of the offences, the respective dates of the European arrest warrants and whether the warrant has been issued for the purposes of prosecution or for execution of a custodial sentence or detention order.
2. The executing judicial authority may seek the advice of Eurojust(9) when making the choice referred to in paragraph 1.
3. In the event of a conflict between a European arrest warrant and a request for extradition presented by a third country, the decision on whether the European arrest warrant or the extradition request takes precedence shall be taken by the competent authority of the executing Member State with due consideration of all the circumstances, in particular those referred to in paragraph 1 and those mentioned in the applicable convention.
4. This Article shall be without prejudice to Member States' obligations under the Statute of the International Criminal Court.

Article 17

Time limits and procedures for the decision to execute the European arrest warrant

1. A European arrest warrant shall be dealt with and executed as a matter of urgency.
2. In cases where the requested person consents to his surrender, the final decision on the execution of the European arrest warrant should be taken within a period of 10 days after consent has been given.

3. In other cases, the final decision on the execution of the European arrest warrant should be taken within a period of 60 days after the arrest of the requested person.

4. Where in specific cases the European arrest warrant cannot be executed within the time limits laid down in paragraphs 2 or 3, the executing judicial authority shall immediately inform the issuing judicial authority thereof, giving the reasons for the delay. In such case, the time limits may be extended by a further 30 days.

5. As long as the executing judicial authority has not taken a final decision on the European arrest warrant, it shall ensure that the material conditions necessary for effective surrender of the person remain fulfilled.

6. Reasons must be given for any refusal to execute a European arrest warrant.

7. Where in exceptional circumstances a Member State cannot observe the time limits provided for in this Article, it shall inform Eurojust, giving the reasons for the delay. In addition, a Member State which has experienced repeated delays on the part of another Member State in the execution of European arrest warrants shall inform the Council with a view to evaluating the implementation of this Framework Decision at Member State level.

Article 18

Situation pending the decision

1. Where the European arrest warrant has been issued for the purpose of conducting a criminal prosecution, the executing judicial authority must:

(a) either agree that the requested person should be heard according to Article 19;

(b) or agree to the temporary transfer of the requested person.

2. The conditions and the duration of the temporary transfer shall be determined by mutual agreement between the issuing and executing judicial authorities.

3. In the case of temporary transfer, the person must be able to return to the executing Member State to attend hearings concerning him or her as part of the surrender procedure.

Article 19

Hearing the person pending the decision

1. The requested person shall be heard by a judicial authority, assisted by another person designated in accordance with the law of the Member State of the requesting court.

2. The requested person shall be heard in accordance with the law of the executing Member State and with the conditions determined by mutual agreement between the issuing and executing judicial authorities.

3. The competent executing judicial authority may assign another judicial authority of its Member State to take part in the hearing of the requested person in order to ensure the proper application of this Article and of the conditions laid down.

Article 20

Privileges and immunities

1. Where the requested person enjoys a privilege or immunity regarding jurisdiction or execution in the executing Member State, the time limits referred to in Article 17 shall not start running unless, and counting from the day when, the executing judicial authority is informed of the fact that the privilege or immunity has been waived.

The executing Member State shall ensure that the material conditions necessary for effective surrender are fulfilled when the person no longer enjoys such privilege or immunity.

2. Where power to waive the privilege or immunity lies with an authority of the executing Member State, the executing judicial authority shall request it to exercise that power forthwith. Where power to waive the privilege or immunity lies with an authority of another State or international organisation, it shall be for the issuing judicial authority to request it to exercise that power.

Article 21

Competing international obligations

This Framework Decision shall not prejudice the obligations of the executing Member State where the requested person has been extradited to that Member State from a third State and where that person is protected by provisions of the arrangement under which he or she was extradited concerning speciality. The executing Member State shall take all necessary measures for requesting forthwith the consent of the State from which the requested person was extradited so that he or she can be surrendered to the Member State which issued the European arrest warrant. The time limits referred to in Article 17 shall not start running until the day on which these speciality rules cease to apply. Pending the decision of the State from which the requested person was extradited, the executing Member State will ensure that the material conditions necessary for effective surrender remain fulfilled.

Article 22

Notification of the decision

The executing judicial authority shall notify the issuing judicial authority immediately of the decision on the action to be taken on the European arrest warrant.

Article 23

Time limits for surrender of the person

1. The person requested shall be surrendered as soon as possible on a date agreed between the authorities concerned.
2. He or she shall be surrendered no later than 10 days after the final decision on the execution of the European arrest warrant.
3. If the surrender of the requested person within the period laid down in paragraph 2 is prevented by circumstances beyond the control of any of the Member States, the executing and issuing judicial authorities shall immediately contact each other and agree on a new surrender date. In that event, the surrender shall take place within 10 days of the new date thus agreed.
4. The surrender may exceptionally be temporarily postponed for serious humanitarian reasons, for example if there are substantial grounds for believing that it would manifestly endanger the requested person's life or health. The execution of the European arrest warrant shall take place as soon as these grounds have ceased to exist. The executing judicial authority shall immediately inform the issuing judicial authority and agree on a new surrender date. In that event, the surrender shall take place within 10 days of the new date thus agreed.
5. Upon expiry of the time limits referred to in paragraphs 2 to 4, if the person is still being held in custody he shall be released.

Article 24

Postponed or conditional surrender

1. The executing judicial authority may, after deciding to execute the European arrest warrant, postpone the surrender of the requested person so that he or she may be prosecuted in the executing Member State or, if he or she has already been sentenced, so that he or she may serve, in its territory, a sentence passed for an act other than that referred to in the European arrest warrant.
2. Instead of postponing the surrender, the executing judicial authority may temporarily surrender the requested person to the issuing Member State under conditions to be determined by mutual agreement between the executing and the issuing judicial authorities. The agreement shall be made in writing and the conditions shall be binding on all the authorities in the issuing Member State.

Article 25

Transit

1. Each Member State shall, except when it avails itself of the possibility of refusal when the transit of a national or a resident is requested for the purpose of the execution of a custodial sentence or detention order, permit the transit through its territory of a requested person who is being surrendered provided that it has been given information on:

- (a) the identity and nationality of the person subject to the European arrest warrant;
- (b) the existence of a European arrest warrant;
- (c) the nature and legal classification of the offence;
- (d) the description of the circumstances of the offence, including the date and place.

Where a person who is the subject of a European arrest warrant for the purposes of prosecution is a national or resident of the Member State of transit, transit may be subject to the condition that the person, after being heard, is returned to the transit Member State to serve the custodial sentence or detention order passed against him in the issuing Member State.

2. Each Member State shall designate an authority responsible for receiving transit requests and the necessary documents, as well as any other official correspondence relating to transit requests. Member States shall communicate this designation to the General Secretariat of the Council.

3. The transit request and the information set out in paragraph 1 may be addressed to the authority designated pursuant to paragraph 2 by any means capable of producing a written record. The Member State of transit shall notify its decision by the same procedure.

4. This Framework Decision does not apply in the case of transport by air without a scheduled stopover. However, if an unscheduled landing occurs, the issuing Member State shall provide the authority designated pursuant to paragraph 2 with the information provided for in paragraph 1.

5. Where a transit concerns a person who is to be extradited from a third State to a Member State this Article will apply *mutatis mutandis*. In particular the expression "European arrest warrant" shall be deemed to be replaced by "extradition request".

CHAPTER 3

EFFECTS OF THE SURRENDER

Article 26

Deduction of the period of detention served in the executing Member State

1. The issuing Member State shall deduct all periods of detention arising from the execution of a European arrest warrant from the total period of detention to be served in the issuing Member State as a result of a custodial sentence or detention order being passed.

2. To that end, all information concerning the duration of the detention of the requested person on the basis of the European arrest warrant shall be transmitted by the executing judicial authority or the central authority designated under Article 7 to the issuing judicial authority at the time of the surrender.

Article 27

Possible prosecution for other offences

1. Each Member State may notify the General Secretariat of the Council that, in its relations with other Member States that have given the same notification, consent is presumed to have been given for the prosecution, sentencing or detention with a view to the carrying out of a custodial sentence or detention order for an offence committed prior to his or her surrender, other than that for which he or she was surrendered, unless in a particular case the executing judicial authority states otherwise in its decision on surrender.

2. Except in the cases referred to in paragraphs 1 and 3, a person surrendered may not be prosecuted, sentenced or otherwise deprived of his or her liberty for an offence committed prior to his or her surrender other than that for which he or she was surrendered.

3. Paragraph 2 does not apply in the following cases:

(a) when the person having had an opportunity to leave the territory of the Member State to which he or she has been surrendered has not done so within 45 days of his or her final discharge, or has returned to that territory after leaving it;

(b) the offence is not punishable by a custodial sentence or detention order;

(c) the criminal proceedings do not give rise to the application of a measure restricting personal liberty;

(d) when the person could be liable to a penalty or a measure not involving the deprivation of liberty, in particular a financial penalty or a measure in lieu thereof, even if the penalty or measure may give rise to a restriction of his or her personal liberty;

(e) when the person consented to be surrendered, where appropriate at the same time as he or she renounced the speciality rule, in accordance with Article 13;

(f) when the person, after his/her surrender, has expressly renounced entitlement to the speciality rule with regard to specific offences preceding his/her surrender. Renunciation shall be given before the competent judicial authorities of the issuing Member State and shall be recorded in accordance with that State's domestic law. The renunciation shall be drawn up in such a way as to make clear that the person has given it voluntarily and in full awareness of the consequences. To that end, the person shall have the right to legal counsel;

(g) where the executing judicial authority which surrendered the person gives its consent in accordance with paragraph 4.

4. A request for consent shall be submitted to the executing judicial authority, accompanied by the information mentioned in Article 8(1) and a translation as referred to in Article 8(2). Consent shall be given when the offence for which it is requested is itself subject to surrender in accordance with the provisions of this Framework Decision. Consent shall be refused on the grounds referred to in Article 3 and otherwise may be refused only on the grounds referred to in Article 4. The decision shall be taken no later than 30 days after receipt of the request.

For the situations mentioned in Article 5 the issuing Member State must give the guarantees provided for therein.

Article 28

Surrender or subsequent extradition

1. Each Member State may notify the General Secretariat of the Council that, in its relations with other Member States which have given the same notification, the consent for the surrender of a person to a Member State other than the executing Member State pursuant to a European arrest warrant issued for an offence committed prior to his or her surrender is presumed to have been given, unless in a particular case the executing judicial authority states otherwise in its decision on surrender.

2. In any case, a person who has been surrendered to the issuing Member State pursuant to a European arrest warrant may, without the consent of the executing Member State, be surrendered to a Member State other than the executing Member State pursuant to a European arrest warrant issued for any offence committed prior to his or her surrender in the following cases:

(a) where the requested person, having had an opportunity to leave the territory of the Member State to which he or she has been surrendered, has not done so within 45 days of his final discharge, or has returned to that territory after leaving it;

(b) where the requested person consents to be surrendered to a Member State other than the executing Member State pursuant to a European arrest warrant. Consent shall be given before the competent judicial authorities of the issuing Member State and shall be recorded in accordance with that State's national law. It shall be drawn up in such a way as to make clear that the person concerned has given it voluntarily and in full awareness of the consequences. To that end, the requested person shall have the right to legal counsel;

(c) where the requested person is not subject to the speciality rule, in accordance with Article

27(3)(a), (e), (f) and (g).

3. The executing judicial authority consents to the surrender to another Member State according to the following rules:

(a) the request for consent shall be submitted in accordance with Article 9, accompanied by the information mentioned in Article 8(1) and a translation as stated in Article 8(2);

(b) consent shall be given when the offence for which it is requested is itself subject to surrender in accordance with the provisions of this Framework Decision;

(c) the decision shall be taken no later than 30 days after receipt of the request;

(d) consent shall be refused on the grounds referred to in Article 3 and otherwise may be refused only on the grounds referred to in Article 4.

For the situations referred to in Article 5, the issuing Member State must give the guarantees provided for therein.

4. Notwithstanding paragraph 1, a person who has been surrendered pursuant to a European arrest warrant shall not be extradited to a third State without the consent of the competent authority of the Member State which surrendered the person. Such consent shall be given in accordance with the Conventions by which that Member State is bound, as well as with its domestic law.

Article 29

Handing over of property

1. At the request of the issuing judicial authority or on its own initiative, the executing judicial authority shall, in accordance with its national law, seize and hand over property which:

(a) may be required as evidence, or

(b) has been acquired by the requested person as a result of the offence.

2. The property referred to in paragraph 1 shall be handed over even if the European arrest warrant cannot be carried out owing to the death or escape of the requested person.

3. If the property referred to in paragraph 1 is liable to seizure or confiscation in the territory of the executing Member State, the latter may, if the property is needed in connection with pending criminal proceedings, temporarily retain it or hand it over to the issuing Member State, on condition that it is returned.

4. Any rights which the executing Member State or third parties may have acquired in the property referred to in paragraph 1 shall be preserved. Where such rights exist, the issuing Member State shall return the property without charge to the executing Member State as soon as the criminal proceedings have been terminated.

Article 30

Expenses

1. Expenses incurred in the territory of the executing Member State for the execution of a European arrest warrant shall be borne by that Member State.

2. All other expenses shall be borne by the issuing Member State.

CHAPTER 4

GENERAL AND FINAL PROVISIONS

Article 31

Relation to other legal instruments

1. Without prejudice to their application in relations between Member States and third States, this Framework Decision shall, from 1 January 2004, replace the corresponding provisions of the following conventions applicable in the field of extradition in relations between the Member States:

(a) the European Convention on Extradition of 13 December 1957, its additional protocol of 15 October 1975, its second additional protocol of 17 March 1978, and the European Convention on the suppression of terrorism of 27 January 1977 as far as extradition is concerned;

(b) the Agreement between the 12 Member States of the European Communities on the simplification and modernisation of methods of transmitting extradition requests of 26 May 1989;

(c) the Convention of 10 March 1995 on simplified extradition procedure between the Member States of the European Union;

(d) the Convention of 27 September 1996 relating to extradition between the Member States of the European Union;

(e) Title III, Chapter 4 of the Convention of 19 June 1990 implementing the Schengen Agreement of 14 June 1985 on the gradual abolition of checks at common borders.

2. Member States may continue to apply bilateral or multilateral agreements or arrangements in force when this Framework Decision is adopted in so far as such agreements or arrangements allow the objectives of this Framework Decision to be extended or enlarged and help to simplify or facilitate further the procedures for surrender of persons who are the subject of European arrest warrants.

Member States may conclude bilateral or multilateral agreements or arrangements after this Framework Decision has come into force in so far as such agreements or arrangements allow the prescriptions of this Framework Decision to be extended or enlarged and help to simplify or facilitate further the procedures for surrender of persons who are the subject of European arrest warrants, in particular by fixing time limits shorter than those fixed in Article 17, by extending the list of offences laid down in Article 2(2), by further limiting the grounds for refusal set out in Articles 3 and 4, or by lowering the threshold provided for in Article 2(1) or (2).

The agreements and arrangements referred to in the second subparagraph may in no case affect relations with Member States which are not parties to them.

Member States shall, within three months from the entry into force of this Framework Decision, notify the Council and the Commission of the existing agreements and arrangements referred to in the first subparagraph which they wish to continue applying.

Member States shall also notify the Council and the Commission of any new agreement or arrangement as referred to in the second subparagraph, within three months of signing it.

3. Where the conventions or agreements referred to in paragraph 1 apply to the territories of Member States or to territories for whose external relations a Member State is responsible to which this Framework Decision does not apply, these instruments shall continue to govern the relations existing between those territories and the other Members States.

Article 32

Transitional provision

1. Extradition requests received before 1 January 2004 will continue to be governed by existing instruments relating to extradition. Requests received after that date will be governed by the rules adopted by Member States pursuant to this Framework Decision. However, any Member State may, at the time of the adoption of this Framework Decision by the Council, make a statement indicating that as executing Member State it will continue to deal with requests relating to acts committed before a date which it specifies in accordance with the extradition system applicable before 1 January 2004. The date in question may not be later than 7 August 2002. The said statement will be published in the Official Journal of the European Communities. It may be withdrawn at any time.

Article 33

Provisions concerning Austria and Gibraltar

1. As long as Austria has not modified Article 12(1) of the "Auslieferungs- und Rechtshilfegesetz" and, at the latest, until 31 December 2008, it may allow its executing

judicial authorities to refuse the enforcement of a European arrest warrant if the requested person is an Austrian citizen and if the act for which the European arrest warrant has been issued is not punishable under Austrian law.

2. This Framework Decision shall apply to Gibraltar.

Article 34

Implementation

1. Member States shall take the necessary measures to comply with the provisions of this Framework Decision by 31 December 2003.

2. Member States shall transmit to the General Secretariat of the Council and to the Commission the text of the provisions transposing into their national law the obligations imposed on them under this Framework Decision. When doing so, each Member State may indicate that it will apply immediately this Framework Decision in its relations with those Member States which have given the same notification.

The General Secretariat of the Council shall communicate to the Member States and to the Commission the information received pursuant to Article 7(2), Article 8(2), Article 13(4) and Article 25(2). It shall also have the information published in the Official Journal of the European Communities.

3. On the basis of the information communicated by the General Secretariat of the Council, the Commission shall, by 31 December 2004 at the latest, submit a report to the European Parliament and to the Council on the operation of this Framework Decision, accompanied, where necessary, by legislative proposals.

4. The Council shall in the second half of 2003 conduct a review, in particular of the practical application, of the provisions of this Framework Decision by the Member States as well as the functioning of the Schengen Information System.

Article 35

Entry into force

This Framework Decision shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Communities.

Done at Luxembourg, 13 June 2002.

For the Council

The President

M. Rajoy Brey

(1) OJ C 332 E, 27.11.2001, p. 305.

(2) Opinion delivered on 9 January 2002 (not yet published in the Official Journal).

(3) OJ C 12 E, 15.1.2001, p. 10.

(4) OJ L 239, 22.9.2000, p. 19.

(5) OJ C 78, 30.3.1995, p. 2.

(6) OJ C 313, 13.10.1996, p. 12.

(7) OJ C 364, 18.12.2000, p. 1.

(8) Council Joint Action 98/428/JHA of 29 June 1998 on the creation of a European Judicial Network (OJ L 191, 7.7.1998, p. 4).

(9) Council Decision 2002/187/JHA of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime (OJ L 63, 6.3.2002, p. 1).

ANNEX

EUROPEAN ARREST WARRANT(1)

This warrant has been issued by a competent judicial authority. I request that the person mentioned below be arrested and surrendered for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order.

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(1) This warrant must be written in, or translated into, one of the official languages of the executing Member State, when that State is known, or any other language accepted by that State.

Statements made by certain Member States on the adoption of the Framework Decision

Statements provided for in Article 32

Statement by France:

Pursuant to Article 32 of the framework decision on the European arrest warrant and the surrender procedures between Member States, France states that as executing Member State it will continue to deal with requests relating to acts committed before 1 November 1993, the date of entry into force of the Treaty on European Union signed in Maastricht on 7 February 1992, in accordance with the extradition system applicable before 1 January 2004.

Statement by Italy:

Italy will continue to deal in accordance with the extradition rules in force with all requests relating to acts committed before the date of entry into force of the framework decision on the European arrest warrant, as provided for in Article 32 thereof.

Statement by Austria:

Pursuant to Article 32 of the framework decision on the European arrest warrant and the surrender procedures between Member States, Austria states that as executing Member State it will continue to deal with requests relating to punishable acts committed before the date of entry into force of the framework decision in accordance with the extradition system applicable before that date.

Statements provided for in Article 13(4)

Statement by Belgium:

The consent of the person concerned to his or her surrender may be revoked until the time of surrender.

Statement by Denmark:

Consent to surrender and express renunciation of entitlement to the speciality rule may be revoked in accordance with the relevant rules applicable at any time under Danish law.

Statement by Ireland:

In Ireland, consent to surrender and, where appropriate, express renunciation of the entitlement to the "specialty" rule referred to in Article 27(2) may be revoked. Consent may be revoked in accordance with domestic law until surrender has been executed.

Statement by Finland:

In Finland, consent to surrender and, where appropriate, express renunciation of entitlement to the "specialty rule" referred to in Article 27(2) may be revoked. Consent may be revoked in accordance with domestic law until surrender has been executed.

Statement by Sweden:

Consent or renunciation within the meaning of Article 13(1) may be revoked by the party whose surrender has been requested. Revocation must take place before the decision on surrender is executed.

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

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 63(3)(b) 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 Tampere European Council of 15 and 16 October 1999 established a coherent approach in the field of immigration and asylum, dealing together with the creation of a common asylum system, a legal immigration policy and the fight against illegal immigration.
- (2) The Brussels European Council of 4 and 5 November 2004 called for the establishment of an effective removal and repatriation policy, based on common standards, for persons to be returned in a humane manner and with full respect for their fundamental rights and dignity.
- (3) On 4 May 2005 the Committee of Ministers of the Council of Europe adopted 'Twenty guidelines on forced return'.
- (4) Clear, transparent and fair rules need to be fixed to provide for an effective return policy as a necessary element of a well managed migration policy.
- (5) This Directive should establish a horizontal set of rules, applicable to all third-country nationals who do not or who no longer fulfil the conditions for entry, stay or residence in a Member State.
- (6) Member States should ensure that the ending of illegal stay of third-country nationals is carried out through a fair and transparent procedure. According to general principles of EU law, decisions taken under this Directive should be adopted on a case-by-case basis and based on objective criteria, implying that consider-

ation should go beyond the mere fact of an illegal stay. When using standard forms for decisions related to return, namely return decisions and, if issued, entry-ban decisions and decisions on removal, Member States should respect that principle and fully comply with all applicable provisions of this Directive.

- (7) The need for Community and bilateral readmission agreements with third countries to facilitate the return process is underlined. International cooperation with countries of origin at all stages of the return process is a prerequisite to achieving sustainable return.
- (8) It is recognised that it is legitimate for Member States to return illegally staying third-country nationals, provided that fair and efficient asylum systems are in place which fully respect the principle of non-refoulement.
- (9) In accordance with Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status ⁽²⁾, a third-country national who has applied for asylum in a Member State should not be regarded as staying illegally on the territory of that Member State until a negative decision on the application, or a decision ending his or her right of stay as asylum seeker has entered into force.
- (10) Where there are no reasons to believe that this would undermine the purpose of a return procedure, voluntary return should be preferred over forced return and a period for voluntary departure should be granted. An extension of the period for voluntary departure should be provided for when considered necessary because of the specific circumstances of an individual case. In order to promote voluntary return, Member States should provide for enhanced return assistance and counselling and make best use of the relevant funding possibilities offered under the European Return Fund.
- (11) A common minimum set of legal safeguards on decisions related to return should be established to guarantee effective protection of the interests of the individuals concerned. The necessary legal aid should be made available to those who lack sufficient resources. Member States should provide in their national legislation for which cases legal aid is to be considered necessary.

⁽¹⁾ Opinion of the European Parliament of 18 June 2008 (not yet published in the Official Journal) and Council Decision of 9 December 2008.

⁽²⁾ OJ L 326, 13.12.2005, p. 13.

- (12) The situation of third-country nationals who are staying illegally but who cannot yet be removed should be addressed. Their basic conditions of subsistence should be defined according to national legislation. In order to be able to demonstrate their specific situation in the event of administrative controls or checks, such persons should be provided with written confirmation of their situation. Member States should enjoy wide discretion concerning the form and format of the written confirmation and should also be able to include it in decisions related to return adopted under this Directive.
- (13) The use of coercive measures should be expressly subject to the principles of proportionality and effectiveness with regard to the means used and objectives pursued. Minimum safeguards for the conduct of forced return should be established, taking into account Council Decision 2004/573/EC of 29 April 2004 on the organisation of joint flights for removals from the territory of two or more Member States, of third-country nationals who are subjects of individual removal orders⁽¹⁾. Member States should be able to rely on various possibilities to monitor forced return.
- (14) The effects of national return measures should be given a European dimension by establishing an entry ban prohibiting entry into and stay on the territory of all the Member States. The length of the entry ban should be determined with due regard to all relevant circumstances of an individual case and should not normally exceed five years. In this context, particular account should be taken of the fact that the third-country national concerned has already been the subject of more than one return decision or removal order or has entered the territory of a Member State during an entry ban.
- (15) It should be for the Member States to decide whether or not the review of decisions related to return implies the power for the reviewing authority or body to substitute its own decision related to the return for the earlier decision.
- (16) The use of detention for the purpose of removal should be limited and subject to the principle of proportionality with regard to the means used and objectives pursued. Detention is justified only to prepare the return or carry out the removal process and if the application of less coercive measures would not be sufficient.
- (17) Third-country nationals in detention should be treated in a humane and dignified manner with respect for their fundamental rights and in compliance with international and national law. Without prejudice to the initial apprehension by law-enforcement authorities, regulated by national legislation, detention should, as a rule, take place in specialised detention facilities.
- (18) Member States should have rapid access to information on entry bans issued by other Member States. This information sharing should take place in accordance with Regulation (EC) No 1987/2006 of the European Parliament and of the Council of 20 December 2006 on the establishment, operation and use of the second generation Schengen Information System (SIS II)⁽²⁾.
- (19) Cooperation between the institutions involved at all levels in the return process and the exchange and promotion of best practices should accompany the implementation of this Directive and provide European added value.
- (20) Since the objective of this Directive, namely to establish common rules concerning return, removal, use of coercive measures, detention and entry bans, cannot be sufficiently achieved by the Member States and can therefore, by reason of its scale and effects, 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 Directive does not go beyond what is necessary to achieve that objective.
- (21) Member States should implement this Directive without discrimination on the basis of sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinions, membership of a national minority, property, birth, disability, age or sexual orientation.
- (22) In line with the 1989 United Nations Convention on the Rights of the Child, the 'best interests of the child' should be a primary consideration of Member States when implementing this Directive. In line with the European Convention for the Protection of Human Rights and Fundamental Freedoms, respect for family life should be a primary consideration of Member States when implementing this Directive.
- (23) Application of this Directive is without prejudice to the obligations resulting from the Geneva Convention relating to the Status of Refugees of 28 July 1951, as amended by the New York Protocol of 31 January 1967.
- (24) This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union.

⁽¹⁾ OJ L 261, 6.8.2004, p. 28.

⁽²⁾ OJ L 381, 28.12.2006, p. 4.

- (25) In accordance with Articles 1 and 2 of the Protocol on the position of Denmark annexed to the Treaty on European Union and the Treaty establishing the European Community, Denmark is not taking part in the adoption of this Directive and is not bound by it or subject to its application. Given that this Directive builds — to the extent that it applies to third-country nationals who do not fulfil or who no longer fulfil the conditions of entry in accordance with the Schengen Borders Code ⁽¹⁾ — upon the Schengen acquis under the provisions of Title IV of Part Three of the Treaty establishing the European Community, Denmark shall, in accordance with Article 5 of the said Protocol, decide, within a period of six months after the adoption of this Directive, whether it will implement it in its national law.
- (26) To the extent that it applies to third-country nationals who do not fulfil or who no longer fulfil the conditions of entry in accordance with the Schengen Borders Code, this Directive 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 ⁽²⁾; moreover, in accordance with Articles 1 and 2 of the Protocol on the position of the United Kingdom and Ireland annexed to the Treaty on European Union and to the Treaty establishing the European Community, and without prejudice to Article 4 of the said Protocol, the United Kingdom is not taking part in the adoption of this Directive and is therefore not bound by it in its entirety or subject to its application.
- (27) To the extent that it applies to third-country nationals who do not fulfil or who no longer fulfil the conditions of entry in accordance with the Schengen Borders Code, this Directive 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 ⁽³⁾; moreover, in accordance with Articles 1 and 2 of the Protocol on the position of the United Kingdom and Ireland annexed to the Treaty on European Union and to the Treaty establishing the European Community, and without prejudice to Article 4 of the said Protocol, Ireland is not taking part in the adoption of this Directive and is therefore not bound by it in its entirety or subject to its application.
- (28) As regards Iceland and Norway, this Directive constitutes — to the extent that it applies to third-country nationals who do not fulfil or who no longer fulfil the conditions of entry in accordance with the Schengen Borders Code — 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 association of those two States with the implementation, application and development of the Schengen acquis, which fall within the area referred to in Article 1, point C, of Council Decision 1999/437/EC ⁽⁴⁾ on certain arrangements for the application of that Agreement.
- (29) As regards Switzerland, this Directive constitutes — to the extent that it applies to third-country nationals who do not fulfil or who no longer fulfil the conditions of entry in accordance with the Schengen Borders Code — a development of provisions of the Schengen acquis within the meaning of 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, which fall within the area referred to in Article 1, point C, of Decision 1999/437/EC read in conjunction with Article 3 of Council Decision 2008/146/EC ⁽⁵⁾ on the conclusion, on behalf of the European Community, of that Agreement.
- (30) As regards Liechtenstein, this Directive constitutes — to the extent that it applies to third-country nationals who do not fulfil or who no longer fulfil the conditions of entry in accordance with the Schengen Borders Code — a development of provisions of the Schengen acquis within the meaning of the 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, which fall within the area referred to in Article 1, point C, of Decision 1999/437/EC read in conjunction with Article 3 of Council Decision 2008/261/EC ⁽⁶⁾ on the signature, on behalf of the European Community, and on the provisional application of, certain provisions of that Protocol,

HAVE ADOPTED THIS DIRECTIVE:

CHAPTER I

GENERAL PROVISIONS

Article 1

Subject matter

This Directive sets out common standards and procedures to be applied in Member States for returning illegally staying third-country nationals, in accordance with fundamental rights as general principles of Community law as well as international law, including refugee protection and human rights obligations.

⁽¹⁾ Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) (OJ L 105, 13.4.2006, p. 1).

⁽²⁾ OJ L 131, 1.6.2000, p. 43.

⁽³⁾ OJ L 64, 7.3.2002, p. 20.

⁽⁴⁾ OJ L 176, 10.7.1999, p. 31.

⁽⁵⁾ OJ L 53, 27.2.2008, p. 1.

⁽⁶⁾ OJ L 83, 26.3.2008, p. 3.

*Article 2***Scope**

1. This Directive applies to third-country nationals staying illegally on the territory of a Member State.

2. Member States may decide not to apply this Directive to third-country nationals who:

(a) are subject to a refusal of entry in accordance with Article 13 of the Schengen Borders Code, or who are apprehended or intercepted by the competent authorities in connection with the irregular crossing by land, sea or air of the external border of a Member State and who have not subsequently obtained an authorisation or a right to stay in that Member State;

(b) are subject to return as a criminal law sanction or as a consequence of a criminal law sanction, according to national law, or who are the subject of extradition procedures.

3. This Directive shall not apply to persons enjoying the Community right of free movement as defined in Article 2(5) of the Schengen Borders Code.

*Article 3***Definitions**

For the purpose of this Directive the following definitions shall apply:

1. 'third-country national' means any person who is not a citizen of the Union within the meaning of Article 17(1) of the Treaty and who is not a person enjoying the Community right of free movement, as defined in Article 2(5) of the Schengen Borders Code;

2. 'illegal stay' means the presence on the territory of a Member State, of a third-country national who does not fulfil, or no longer fulfils the conditions of entry as set out in Article 5 of the Schengen Borders Code or other conditions for entry, stay or residence in that Member State;

3. 'return' means the process of a third-country national going back — whether in voluntary compliance with an obligation to return, or enforced — to:

— his or her country of origin, or

— a country of transit in accordance with Community or bilateral readmission agreements or other arrangements, or

— another third country, to which the third-country national concerned voluntarily decides to return and in which he or she will be accepted;

4. 'return decision' means an administrative or judicial decision or act, stating or declaring the stay of a third-country national to be illegal and imposing or stating an obligation to return;

5. 'removal' means the enforcement of the obligation to return, namely the physical transportation out of the Member State;

6. 'entry ban' means an administrative or judicial decision or act prohibiting entry into and stay on the territory of the Member States for a specified period, accompanying a return decision;

7. 'risk of absconding' means the existence of reasons in an individual case which are based on objective criteria defined by law to believe that a third-country national who is the subject of return procedures may abscond;

8. 'voluntary departure' means compliance with the obligation to return within the time-limit fixed for that purpose in the return decision;

9. 'vulnerable persons' means minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence.

*Article 4***More favourable provisions**

1. This Directive shall be without prejudice to more favourable provisions of:

(a) bilateral or multilateral agreements between the Community or the Community and its Member States and one or more third countries;

(b) bilateral or multilateral agreements between one or more Member States and one or more third countries.

2. This Directive shall be without prejudice to any provision which may be more favourable for the third-country national, laid down in the Community acquis relating to immigration and asylum.

3. This Directive shall be without prejudice to the right of the Member States to adopt or maintain provisions that are more favourable to persons to whom it applies provided that such provisions are compatible with this Directive.

4. With regard to third-country nationals excluded from the scope of this Directive in accordance with Article 2(2)(a), Member States shall:

- (a) ensure that their treatment and level of protection are no less favourable than as set out in Article 8(4) and (5) (limitations on use of coercive measures), Article 9(2)(a) (postponement of removal), Article 14(1) (b) and (d) (emergency health care and taking into account needs of vulnerable persons), and Articles 16 and 17 (detention conditions) and
- (b) respect the principle of non-refoulement.

Article 5

Non-refoulement, best interests of the child, family life and state of health

When implementing this Directive, Member States shall take due account of:

- (a) the best interests of the child;
- (b) family life;
- (c) the state of health of the third-country national concerned,

and respect the principle of non-refoulement.

CHAPTER II

TERMINATION OF ILLEGAL STAY

Article 6

Return decision

1. Member States shall issue a return decision to any third-country national staying illegally on their territory, without prejudice to the exceptions referred to in paragraphs 2 to 5.

2. Third-country nationals staying illegally on the territory of a Member State and holding a valid residence permit or other authorisation offering a right to stay issued by another Member State shall be required to go to the territory of that other Member State immediately. In the event of non-compliance by the third-country national concerned with this requirement, or where the third-country national's immediate departure is required for reasons of public policy or national security, paragraph 1 shall apply.

3. Member States may refrain from issuing a return decision to a third-country national staying illegally on their territory if the third-country national concerned is taken back by another Member State under bilateral agreements or arrangements existing on the date of entry into force of this Directive. In

such a case the Member State which has taken back the third-country national concerned shall apply paragraph 1.

4. Member States may at any moment decide to grant an autonomous residence permit or other authorisation offering a right to stay for compassionate, humanitarian or other reasons to a third-country national staying illegally on their territory. In that event no return decision shall be issued. Where a return decision has already been issued, it shall be withdrawn or suspended for the duration of validity of the residence permit or other authorisation offering a right to stay.

5. If a third-country national staying illegally on the territory of a Member State is the subject of a pending procedure for renewing his or her residence permit or other authorisation offering a right to stay, that Member State shall consider refraining from issuing a return decision, until the pending procedure is finished, without prejudice to paragraph 6.

6. This Directive shall not prevent Member States from adopting a decision on the ending of a legal stay together with a return decision and/or a decision on a removal and/or entry ban in a single administrative or judicial decision or act as provided for in their national legislation, without prejudice to the procedural safeguards available under Chapter III and under other relevant provisions of Community and national law.

Article 7

Voluntary departure

1. A return decision shall provide for an appropriate period for voluntary departure of between seven and thirty days, without prejudice to the exceptions referred to in paragraphs 2 and 4. Member States may provide in their national legislation that such a period shall be granted only following an application by the third-country national concerned. In such a case, Member States shall inform the third-country nationals concerned of the possibility of submitting such an application.

The time period provided for in the first subparagraph shall not exclude the possibility for the third-country nationals concerned to leave earlier.

2. Member States shall, where necessary, extend the period for voluntary departure by an appropriate period, taking into account the specific circumstances of the individual case, such as the length of stay, the existence of children attending school and the existence of other family and social links.

3. Certain obligations aimed at avoiding the risk of absconding, such as regular reporting to the authorities, deposit of an adequate financial guarantee, submission of documents or the obligation to stay at a certain place may be imposed for the duration of the period for voluntary departure.

4. If there is a risk of absconding, or if an application for a legal stay has been dismissed as manifestly unfounded or fraudulent, or if the person concerned poses a risk to public policy, public security or national security, Member States may refrain from granting a period for voluntary departure, or may grant a period shorter than seven days.

Article 8

Removal

1. Member States shall take all necessary measures to enforce the return decision if no period for voluntary departure has been granted in accordance with Article 7(4) or if the obligation to return has not been complied with within the period for voluntary departure granted in accordance with Article 7.

2. If a Member State has granted a period for voluntary departure in accordance with Article 7, the return decision may be enforced only after the period has expired, unless a risk as referred to in Article 7(4) arises during that period.

3. Member States may adopt a separate administrative or judicial decision or act ordering the removal.

4. Where Member States use — as a last resort — coercive measures to carry out the removal of a third-country national who resists removal, such measures shall be proportionate and shall not exceed reasonable force. They shall be implemented as provided for in national legislation in accordance with fundamental rights and with due respect for the dignity and physical integrity of the third-country national concerned.

5. In carrying out removals by air, Member States shall take into account the Common Guidelines on security provisions for joint removals by air annexed to Decision 2004/573/EC.

6. Member States shall provide for an effective forced-return monitoring system.

Article 9

Postponement of removal

1. Member States shall postpone removal:

- (a) when it would violate the principle of non-refoulement, or
- (b) for as long as a suspensory effect is granted in accordance with Article 13(2).

2. Member States may postpone removal for an appropriate period taking into account the specific circumstances of the

individual case. Member States shall in particular take into account:

- (a) the third-country national's physical state or mental capacity;
- (b) technical reasons, such as lack of transport capacity, or failure of the removal due to lack of identification.

3. If a removal is postponed as provided for in paragraphs 1 and 2, the obligations set out in Article 7(3) may be imposed on the third-country national concerned.

Article 10

Return and removal of unaccompanied minors

1. Before deciding to issue a return decision in respect of an unaccompanied minor, assistance by appropriate bodies other than the authorities enforcing return shall be granted with due consideration being given to the best interests of the child.

2. Before removing an unaccompanied minor from the territory of a Member State, the authorities of that Member State shall be satisfied that he or she will be returned to a member of his or her family, a nominated guardian or adequate reception facilities in the State of return.

Article 11

Entry ban

1. Return decisions shall be accompanied by an entry ban:

- (a) if no period for voluntary departure has been granted, or
- (b) if the obligation to return has not been complied with.

In other cases return decisions may be accompanied by an entry ban.

2. The length of the entry ban shall be determined with due regard to all relevant circumstances of the individual case and shall not in principle exceed five years. It may however exceed five years if the third-country national represents a serious threat to public policy, public security or national security.

3. Member States shall consider withdrawing or suspending an entry ban where a third-country national who is the subject of an entry ban issued in accordance with paragraph 1, second subparagraph, can demonstrate that he or she has left the territory of a Member State in full compliance with a return decision.

Victims of trafficking in human beings who have been granted a residence permit pursuant to Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities ⁽¹⁾ shall not be subject of an entry ban without prejudice to paragraph 1, first subparagraph, point (b), and provided that the third-country national concerned does not represent a threat to public policy, public security or national security.

Member States may refrain from issuing, withdraw or suspend an entry ban in individual cases for humanitarian reasons.

Member States may withdraw or suspend an entry ban in individual cases or certain categories of cases for other reasons.

4. Where a Member State is considering issuing a residence permit or other authorisation offering a right to stay to a third-country national who is the subject of an entry ban issued by another Member State, it shall first consult the Member State having issued the entry ban and shall take account of its interests in accordance with Article 25 of the Convention implementing the Schengen Agreement ⁽²⁾.

5. Paragraphs 1 to 4 shall apply without prejudice to the right to international protection, as defined in Article 2(a) of Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted ⁽³⁾, in the Member States.

CHAPTER III

PROCEDURAL SAFEGUARDS

Article 12

Form

1. Return decisions and, if issued, entry-ban decisions and decisions on removal shall be issued in writing and give reasons in fact and in law as well as information about available legal remedies.

The information on reasons in fact may be limited where national law allows for the right to information to be restricted, in particular in order to safeguard national security, defence, public security and for the prevention, investigation, detection and prosecution of criminal offences.

2. Member States shall provide, upon request, a written or oral translation of the main elements of decisions related to return, as referred to in paragraph 1, including information on the available legal remedies in a language the third-country

national understands or may reasonably be presumed to understand.

3. Member States may decide not to apply paragraph 2 to third country nationals who have illegally entered the territory of a Member State and who have not subsequently obtained an authorisation or a right to stay in that Member State.

In such cases decisions related to return, as referred to in paragraph 1, shall be given by means of a standard form as set out under national legislation.

Member States shall make available generalised information sheets explaining the main elements of the standard form in at least five of those languages which are most frequently used or understood by illegal migrants entering the Member State concerned.

Article 13

Remedies

1. The third-country national concerned shall be afforded an effective remedy to appeal against or seek review of decisions related to return, as referred to in Article 12(1), before a competent judicial or administrative authority or a competent body composed of members who are impartial and who enjoy safeguards of independence.

2. The authority or body mentioned in paragraph 1 shall have the power to review decisions related to return, as referred to in Article 12(1), including the possibility of temporarily suspending their enforcement, unless a temporary suspension is already applicable under national legislation.

3. The third-country national concerned shall have the possibility to obtain legal advice, representation and, where necessary, linguistic assistance.

4. Member States shall ensure that the necessary legal assistance and/or representation is granted on request free of charge in accordance with relevant national legislation or rules regarding legal aid, and may provide that such free legal assistance and/or representation is subject to conditions as set out in Article 15(3) to (6) of Directive 2005/85/EC.

Article 14

Safeguards pending return

1. Member States shall, with the exception of the situation covered in Articles 16 and 17, ensure that the following principles are taken into account as far as possible in relation to third-country nationals during the period for voluntary departure granted in accordance with Article 7 and during periods for which removal has been postponed in accordance with Article 9:

⁽¹⁾ OJ L 261, 6.8.2004, p. 19.

⁽²⁾ OJ L 239, 22.9.2000, p. 19.

⁽³⁾ OJ L 304, 30.9.2004, p. 12.

- (a) family unity with family members present in their territory is maintained;
- (b) emergency health care and essential treatment of illness are provided;
- (c) minors are granted access to the basic education system subject to the length of their stay;
- (d) special needs of vulnerable persons are taken into account.

2. Member States shall provide the persons referred to in paragraph 1 with a written confirmation in accordance with national legislation that the period for voluntary departure has been extended in accordance with Article 7(2) or that the return decision will temporarily not be enforced.

CHAPTER IV

DETENTION FOR THE PURPOSE OF REMOVAL

Article 15

Detention

1. Unless other sufficient but less coercive measures can be applied effectively in a specific case, Member States may only keep in detention a third-country national who is the subject of return procedures in order to prepare the return and/or carry out the removal process, in particular when:

- (a) there is a risk of absconding or
- (b) the third-country national concerned avoids or hampers the preparation of return or the removal process.

Any detention shall be for as short a period as possible and only maintained as long as removal arrangements are in progress and executed with due diligence.

2. Detention shall be ordered by administrative or judicial authorities.

Detention shall be ordered in writing with reasons being given in fact and in law.

When detention has been ordered by administrative authorities, Member States shall:

- (a) either provide for a speedy judicial review of the lawfulness of detention to be decided on as speedily as possible from the beginning of detention;
- (b) or grant the third-country national concerned the right to take proceedings by means of which the lawfulness of detention shall be subject to a speedy judicial review to be decided on as speedily as possible after the launch of

the relevant proceedings. In such a case Member States shall immediately inform the third-country national concerned about the possibility of taking such proceedings.

The third-country national concerned shall be released immediately if the detention is not lawful.

3. In every case, detention shall be reviewed at reasonable intervals of time either on application by the third-country national concerned or ex officio. In the case of prolonged detention periods, reviews shall be subject to the supervision of a judicial authority.

4. When it appears that a reasonable prospect of removal no longer exists for legal or other considerations or the conditions laid down in paragraph 1 no longer exist, detention ceases to be justified and the person concerned shall be released immediately.

5. Detention shall be maintained for as long a period as the conditions laid down in paragraph 1 are fulfilled and it is necessary to ensure successful removal. Each Member State shall set a limited period of detention, which may not exceed six months.

6. Member States may not extend the period referred to in paragraph 5 except for a limited period not exceeding a further twelve months in accordance with national law in cases where regardless of all their reasonable efforts the removal operation is likely to last longer owing to:

- (a) a lack of cooperation by the third-country national concerned, or
- (b) delays in obtaining the necessary documentation from third countries.

Article 16

Conditions of detention

1. Detention shall take place as a rule in specialised detention facilities. Where a Member State cannot provide accommodation in a specialised detention facility and is obliged to resort to prison accommodation, the third-country nationals in detention shall be kept separated from ordinary prisoners.

2. Third-country nationals in detention shall be allowed — on request — to establish in due time contact with legal representatives, family members and competent consular authorities.

3. Particular attention shall be paid to the situation of vulnerable persons. Emergency health care and essential treatment of illness shall be provided.

4. Relevant and competent national, international and non-governmental organisations and bodies shall have the possibility to visit detention facilities, as referred to in paragraph 1, to the extent that they are being used for detaining third-country nationals in accordance with this Chapter. Such visits may be subject to authorisation.

5. Third-country nationals kept in detention shall be systematically provided with information which explains the rules applied in the facility and sets out their rights and obligations. Such information shall include information on their entitlement under national law to contact the organisations and bodies referred to in paragraph 4.

Article 17

Detention of minors and families

1. Unaccompanied minors and families with minors shall only be detained as a measure of last resort and for the shortest appropriate period of time.
2. Families detained pending removal shall be provided with separate accommodation guaranteeing adequate privacy.
3. Minors in detention shall have the possibility to engage in leisure activities, including play and recreational activities appropriate to their age, and shall have, depending on the length of their stay, access to education.
4. Unaccompanied minors shall as far as possible be provided with accommodation in institutions provided with personnel and facilities which take into account the needs of persons of their age.
5. The best interests of the child shall be a primary consideration in the context of the detention of minors pending removal.

Article 18

Emergency situations

1. In situations where an exceptionally large number of third-country nationals to be returned places an unforeseen heavy burden on the capacity of the detention facilities of a Member State or on its administrative or judicial staff, such a Member State may, as long as the exceptional situation persists, decide to allow for periods for judicial review longer than those provided for under the third subparagraph of Article 15(2) and to take urgent measures in respect of the conditions of detention derogating from those set out in Articles 16(1) and 17(2).
2. When resorting to such exceptional measures, the Member State concerned shall inform the Commission. It shall also inform the Commission as soon as the reasons for applying these exceptional measures have ceased to exist.

3. Nothing in this Article shall be interpreted as allowing Member States to derogate from their general obligation to take all appropriate measures, whether general or particular, to ensure fulfilment of their obligations under this Directive.

CHAPTER V

FINAL PROVISIONS

Article 19

Reporting

The Commission shall report every three years to the European Parliament and the Council on the application of this Directive in the Member States and, if appropriate, propose amendments.

The Commission shall report for the first time by 24 December 2013 and focus on that occasion in particular on the application of Article 11, Article 13(4) and Article 15 in Member States. In relation to Article 13(4) the Commission shall assess in particular the additional financial and administrative impact in Member States.

Article 20

Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 24 December 2010. In relation to Article 13(4), Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 24 December 2011. They shall forthwith communicate to the Commission the text of those measures.

When Member States adopt those measures, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 21

Relationship with the Schengen Convention

This Directive replaces the provisions of Articles 23 and 24 of the Convention implementing the Schengen Agreement.

Article 22

Entry into force

This Directive shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

*Article 23***Addressees**

This Directive is addressed to the Member States in accordance with the Treaty establishing the European Community.

Done at Strasbourg, 16 December 2008.

For the European Parliament

The President

H.-G. PÖTTERING

For the Council

The President

B. LE MAIRE

I

(Acts whose publication is obligatory)

**REGULATION (EC) No 562/2006 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL
of 15 March 2006
establishing a Community Code on the rules governing the movement of persons across borders
(Schengen Borders Code)**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

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

⁽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).

- (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 ⁽¹⁾.
- (14) This Regulation is without prejudice to checks carried out under general police powers and security checks on persons identical to those carried out for domestic flights, to the possibilities for Member States to carry out exceptional checks on baggage in accordance with Council Regulation (EEC) No 3925/91 of 19 December 1991 concerning the elimination of controls and formalities applicable to the cabin and hold baggage of persons taking an intra-Community flight and the baggage of persons making an intra-Community sea crossing ⁽²⁾, 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 ⁽³⁾.
- (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 ⁽⁴⁾.

⁽¹⁾ 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).

⁽²⁾ 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).

⁽³⁾ OJ L 184, 17.7.1999, p. 23.

⁽⁴⁾ 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* ⁽¹⁾ which fall within the area referred to in Article 1, point A, of Council Decision 1999/437/EC ⁽²⁾ 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 ⁽³⁾, 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 ⁽⁴⁾ and 2004/860/EC ⁽⁵⁾.
- (26) An arrangement has to be made to allow representatives of Switzerland to be associated with the work of committees assisting the Commission in the exercise of its implementing powers. Such an arrangement has been contemplated in the Exchange of Letters between the Community and Switzerland, annexed to the abovementioned Agreement.
- (27) This Regulation constitutes a development of provisions of the Schengen *acquis* in which the United Kingdom does not take part, in accordance with Council Decision 2000/365/EC of 29 May 2000 concerning the request of the United Kingdom of Great Britain and Northern Ireland to take part in some of the provisions of the Schengen *acquis* ⁽⁶⁾. 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* ⁽⁷⁾. 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.

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;

⁽¹⁾ OJ L 176, 10.7.1999, p. 36.

⁽²⁾ OJ L 176, 10.7.1999, p. 31.

⁽³⁾ OJ L 176, 10.7.1999, p. 53.

⁽⁴⁾ 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).

⁽⁵⁾ 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).

⁽⁶⁾ OJ L 131, 1.6.2000, p. 43.

⁽⁷⁾ OJ L 64, 7.3.2002, p. 20.

- (b) the airports of the Member States for internal flights;
- (c) sea, river and lake ports of the Member States for regular ferry connections;
2. 'external borders' means the Member States' land borders, including river and lake borders, sea borders and their airports, river ports, sea ports and lake ports, provided that they are not internal borders;
3. 'internal flight' means any flight exclusively to or from the territories of the Member States and not landing in the territory of a third country;
4. 'regular ferry connection' means any ferry connection between the same two or more ports situated in the territory of the Member States, not calling at any ports outside the territory of the Member States and consisting of the transport of passengers and vehicles according to a published timetable;
5. 'persons enjoying the Community right of free movement' means:
- (a) Union citizens within the meaning of Article 17(1) of the Treaty, and third-country nationals who are members of the family of a Union citizen exercising his or her right to free movement to whom Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States ⁽¹⁾ applies;
- (b) third-country nationals and their family members, whatever their nationality, who, under agreements between the Community and its Member States, on the one hand, and those third countries, on the other hand, enjoy rights of free movement equivalent to those of Union citizens;
6. 'third-country national' means any person who is not a Union citizen within the meaning of Article 17(1) of the Treaty and who is not covered by point 5 of this Article;
7. 'persons for whom an alert has been issued for the purposes of refusing entry' means any third-country national for whom an alert has been issued in the Schengen Information System (SIS) in accordance with and for the purposes laid down in Article 96 of the Schengen Convention;
8. 'border crossing point' means any crossing-point authorised by the competent authorities for the crossing of external borders;
9. 'border control' means the activity carried out at a border, in accordance with and for the purposes of this Regulation, in response exclusively to an intention to cross or the act of crossing that border, regardless of any other consideration, consisting of border checks and border surveillance;
10. 'border checks' means the checks carried out at border crossing points, to ensure that persons, including their means of transport and the objects in their possession, may be authorised to enter the territory of the Member States or authorised to leave it;
11. 'border surveillance' means the surveillance of borders between border crossing points and the surveillance of border crossing points outside the fixed opening hours, in order to prevent persons from circumventing border checks;
12. 'second line check' means a further check which may be carried out in a special location away from the location at which all persons are checked (first line);
13. 'border guard' means any public official assigned, in accordance with national law, to a border crossing point or along the border or the immediate vicinity of that border who carries out, in accordance with this Regulation and national law, border control tasks;
14. 'carrier' means any natural or legal person whose profession it is to provide transport of persons;
15. 'residence permit' means:
- (a) all residence permits issued by the Member States according to the uniform format laid down by Council Regulation (EC) No 1030/2002 of 13 June 2002 laying down a uniform format for residence permits for third-country nationals ⁽²⁾;
- (b) all other documents issued by a Member State to third-country nationals authorising a stay in, or re-entry into, its territory, with the exception of temporary permits issued pending examination of a first application for a residence permit as referred to in point (a) or an application for asylum;
16. 'cruise ship' means a ship which follows a given itinerary in accordance with a predetermined programme, which includes a programme of tourist activities in the various ports, and which normally neither takes passengers on nor allows passengers to disembark during the voyage;
17. 'pleasure boating' means the use of pleasure boats for sporting or tourism purposes;
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;

⁽¹⁾ OJ L 158, 30.4.2004, p. 77.

⁽²⁾ OJ L 157, 15.6.2002, p. 1.

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.

Article 3

Scope

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

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

TITLE II

EXTERNAL BORDERS

CHAPTER I

Crossing of external borders and conditions for entry

Article 4

Crossing of external borders

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

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

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

- (a) in connection with pleasure boating or coastal fishing;
- (b) for seamen going ashore to stay in the area of the port where their ships call or in the adjacent municipalities;
- (c) for individuals or groups of persons, where there is a requirement of a special nature, provided that they are in possession of the permits required by national law and that there is no conflict with the interests of public policy and the internal security of the Member States;
- (d) for individuals or groups of persons in the event of an unforeseen emergency situation.

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

Article 5

Entry conditions for third-country nationals

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

- (a) they are in possession of a valid travel document or documents authorising them to cross the border;
- (b) they are in possession of a valid visa, if required pursuant to Council Regulation (EC) No 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement ⁽¹⁾, except where they hold a valid residence permit;
- (c) they justify the purpose and conditions of the intended stay, and they have sufficient means of subsistence, both for the duration of the intended stay and for the return to their country of origin or transit to a third country into which they are certain to be admitted, or are in a position to acquire such means lawfully;
- (d) they are not persons for whom an alert has been issued in the SIS for the purposes of refusing entry;
- (e) they are not considered to be a threat to public policy, internal security, public health or the international relations of any of the Member States, in particular where no alert has been issued in Member States' national data bases for the purposes of refusing entry on the same grounds.

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

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

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

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

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

4. By way of derogation from paragraph 1:
- (a) third-country nationals who do not fulfil all the conditions laid down in paragraph 1 but hold a residence permit or a re-entry visa issued by one of the Member States or, where required, both documents, shall be authorised to enter the territories of the other Member States for transit purposes so that they may reach the territory of the Member State which issued the residence permit or re-entry visa, unless their names are on the national list of alerts of the Member State whose external borders they are seeking to cross and the alert is accompanied by instructions to refuse entry or transit;
- (b) third-country nationals who fulfil the conditions laid down in paragraph 1, except for that laid down in point (b), and who present themselves at the border may be authorised to enter the territories of the Member States, if a visa is issued at the border in accordance with Council Regulation (EC) No 415/2003 of 27 February 2003 on the issue of visas at the border, including the issue of such visas to seamen in transit ⁽¹⁾.

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

If it is not possible to affix a visa in the document, it shall, exceptionally, be affixed on a separate sheet inserted in the document. In such a case, the uniform format for forms for affixing the visa, laid down by Council Regulation (EC) No 333/2002 of 18 February 2002 on a uniform format for forms for affixing the visa issued by Member States to persons holding travel documents not recognised by the Member State drawing up the form ⁽²⁾, 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.

⁽¹⁾ OJ L 64, 7.3.2003, p. 1.

⁽²⁾ OJ L 53, 23.2.2002, p. 4.

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.

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

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

Article 7

Border checks on persons

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

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

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

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

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

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

3. On entry and exit, third-country nationals shall be subject to thorough checks.
- (a) thorough checks on entry shall comprise verification of the conditions governing entry laid down in Article 5(1) and, where applicable, of documents authorising residence and the pursuit of a professional activity. This shall include a detailed examination covering the following aspects:
- (i) verification that the third-country national is in possession of a document which is valid for crossing the border and which has not expired, and that the document is accompanied, where applicable, by the requisite visa or residence permit;
- (ii) thorough scrutiny of the travel document for signs of falsification or counterfeiting;
- (iii) examination of the entry and exit stamps on the travel document of the third-country national concerned, in order to verify, by comparing the dates of entry and exit, that the person has not already exceeded the maximum duration of authorised stay in the territory of the Member States;
- (iv) verification regarding the point of departure and the destination of the third-country national concerned and the purpose of the intended stay, checking if necessary, the corresponding supporting documents;
- (v) verification that the third-country national concerned has sufficient means of subsistence for the duration and purpose of the intended stay, for his or her return to the country of origin or transit to a third country into which he or she is certain to be admitted, or that he or she is in a position to acquire such means lawfully;
- (vi) verification that the third-country national concerned, his or her means of transport and the objects he or she is transporting are not likely to jeopardise the public policy, internal security, public health or international relations of any of the Member States. Such verification shall include direct consultation of the data and alerts on persons and, where necessary, objects included in the SIS and in national data files and the action to be performed, if any, as a result of an alert;
- (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;
- (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.
4. Where facilities exist and if requested by the third-country national, such thorough checks shall be carried out in a private area.
5. Third-country nationals subject to a thorough second line check shall be given information on the purpose of, and procedure for, such a check.
- This information shall be available in all the official languages of the Union and in the language(s) of the country or countries bordering the Member State concerned and shall indicate that the third-country national may request the name or service identification number of the border guards carrying out the thorough second line check, the name of the border crossing point and the date on which the border was crossed.
6. Checks on a person enjoying the Community right on free movement shall be carried out in accordance with Directive 2004/38/EC.
7. Detailed rules governing the information to be registered are laid down in Annex II.

Article 8

Relaxation of border checks

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

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

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

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

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

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

Article 9

Separate lanes and information on signs

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

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

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

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

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

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

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

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

5. The adaptation of existing signs to the provisions of paragraphs 1, 2 and 3 shall be completed by 31 May 2009. Where Member States replace existing signs or put up new ones before that date, they shall comply with the indications provided for in those paragraphs.

Article 10

Stamping of the travel documents of third-country nationals

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

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

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

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

3. No entry or exit stamp shall be affixed:
 - (a) to the travel documents of Heads of State and dignitaries whose arrival has been officially announced in advance through diplomatic channels;
 - (b) to pilots' licences or the certificates of aircraft crew members;
 - (c) to the travel documents of seamen who are present within the territory of a Member State only when their ship puts in and in the area of the port of call;
 - (d) to the travel documents of crew and passengers of cruise ships who are not subject to border checks in accordance with point 3.2.3 of Annex VI;
 - (e) to documents enabling nationals of Andorra, Monaco and San Marino to cross the border.

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

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

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

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

Article 11

Presumption as regards fulfilment of conditions of duration of stay

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

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

In such a case:

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

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

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

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

Article 12

Border surveillance

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

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

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

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

4. Surveillance shall be carried out by stationary or mobile units which perform their duties by patrolling or stationing themselves at places known or perceived to be sensitive, the aim of such surveillance being to apprehend individuals crossing the border illegally. Surveillance may also be carried out by technical means, including electronic means.

5. Additional rules governing surveillance may be adopted in accordance with the procedure referred to in Article 33(2).

Article 13

Refusal of entry

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

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

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

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

Lodging such an appeal shall not have suspensive effect on a decision to refuse entry.

Without prejudice to any compensation granted in accordance with national law, the third-country national concerned shall, where the appeal concludes that the decision to refuse entry was ill-founded, be entitled to correction of the cancelled entry stamp, and any other cancellations or additions which have been made, by the Member State which refused entry.

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

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

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

CHAPTER III

Staff and resources for border control and cooperation between Member States

Article 14

Staff and resources for border control

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

Article 15

Implementation of controls

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

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

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

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

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

Article 16

Cooperation between Member States

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

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

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

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

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

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

*Article 17***Joint control**

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

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

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

CHAPTER IV

Specific rules for border checks*Article 18***Specific rules for the various types of border and the various means of transport used for crossing the external borders**

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

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

*Article 19***Specific rules for checks on certain categories of persons**

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

- (a) Heads of State and the members of their delegation(s);
- (b) pilots of aircraft and other crew members;
- (c) seamen;
- (d) holders of diplomatic, official or service passports and members of international organisations;
- (e) cross-border workers;
- (f) minors.

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

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

TITLE III

INTERNAL BORDERS

CHAPTER I

Abolition of border control at internal borders*Article 20***Crossing internal borders**

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

*Article 21***Checks within the territory**

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

- (a) the exercise of police powers by the competent authorities of the Member States under national law, insofar as the exercise of those powers does not have an effect equivalent to border checks; that shall also apply in border areas. Within the meaning of the first sentence, the exercise of police powers may not, in particular, be considered equivalent to the exercise of border checks when the police measures:
 - (i) do not have border control as an objective,
 - (ii) are based on general police information and experience regarding possible threats to public security and aim, in particular, to combat cross-border crime,
 - (iii) are devised and executed in a manner clearly distinct from systematic checks on persons at the external borders,
 - (iv) are carried out on the basis of spot-checks;
- (b) security checks on persons carried out at ports and airports by the competent authorities under the law of each Member State, by port or airport officials or carriers, provided that such checks are also carried out on persons travelling within a Member State;
- (c) the possibility for a Member State to provide by law for an obligation to hold or carry papers and documents;

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

Article 22

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

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

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

CHAPTER II

Temporary reintroduction of border control at internal borders

Article 23

Temporary reintroduction of border control at internal borders

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

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

Article 24

Procedure for foreseeable events

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

- (a) the reasons for the proposed reintroduction, detailing the events that constitute a serious threat to public policy or internal security;

- (b) the scope of the proposed reintroduction, specifying where border control is to be reintroduced;

- (c) the names of the authorised crossing-points;

- (d) the date and duration of the proposed reintroduction;

- (e) where appropriate, the measures to be taken by the other Member States.

2. Following the notification from the Member State concerned, and with a view to the consultation provided for in paragraph 3, the Commission may issue an opinion without prejudice to Article 64(1) of the Treaty.

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

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

Article 25

Procedure for cases requiring urgent action

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

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

Article 26

Procedure for prolonging border control at internal borders

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

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

Article 27

Informing the European Parliament

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

Article 28

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

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

Article 29

Report on the reintroduction of border control at internal borders

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

Article 30

Informing the public

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

Article 31

Confidentiality

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

TITLE IV

FINAL PROVISIONS

Article 32

Amendments to the Annexes

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

Article 33

Committee

1. The Commission shall be assisted by a committee, hereinafter 'the Committee'.

2. Where reference is made to this paragraph, Articles 5 and 7 of Decision 1999/468/EC shall apply, having regard to the provisions of Article 8 thereof and provided that the implementing measures adopted in accordance with this procedure do not modify the essential provisions of this Regulation.

The period laid down in Article 5(6) of Decision 1999/468/EC shall be set at three months.

3. The Committee shall adopt its rules of procedure.

4. Without prejudice to the implementing measures already adopted, the application of the provisions of this Regulation concerning the adoption of technical rules and decisions in accordance with the procedure referred in paragraph 2 shall be suspended four years after the entry into force of this Regulation. On a proposal from the Commission, the European Parliament and the Council may renew the provisions concerned in accordance with the procedure laid down in Article 251 of the Treaty and, to that end, shall review them prior to the expiry of the four-year period.

Article 34

Notifications

1. Member States shall notify the Commission of:

- (a) the list of residence permits;
- (b) the list of their border crossing points;
- (c) the reference amounts required for the crossing of their external borders fixed annually by the national authorities;
- (d) the list of national services responsible for border control;
- (e) the specimen of model cards issued by Foreign Ministries.

2. The Commission shall make the information notified in conformity with paragraph 1 available to the Member States and the public through publication in the *Official Journal of the European Union*, C Series, and by any other appropriate means.

Article 35

Local border traffic

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

Article 36

Ceuta and Melilla

The provisions of this Regulation shall not affect the special rules applying to the cities of Ceuta and Melilla, as defined in the Declaration by the Kingdom of Spain on the cities of Ceuta and Melilla in the Final Act to the Agreement on the Accession of the Kingdom of Spain to the Convention implementing the Schengen Agreement of 14 June 1985 ⁽¹⁾.

⁽¹⁾ OJ L 239, 22.9.2000, p. 73.

*Article 37***Notification of information by the Member States**

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

The information notified by the Member States shall be published in the *Official Journal of the European Union*, C Series.

*Article 38***Report on the application of Title III**

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

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

*Article 39***Repeals**

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

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

- (a) the Common Manual, including its annexes;

- (b) the decisions of the Schengen Executive Committee of 26 April 1994 (SCH/Com-ex (94) 1, rev 2), 22 December 1994 (SCH/Com-ex (94)17, rev. 4) and 20 December 1995 (SCH/Com-ex (95) 20, rev. 2);
- (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 ⁽¹⁾;
- (e) Council Decision 2004/581/EC of 29 April 2004 determining the minimum indications to be used on signs at external border crossing points ⁽²⁾;
- (f) Council Decision 2004/574/EC of 29 April 2004 amending the Common Manual ⁽³⁾;
- (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 ⁽⁴⁾.
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.

Done at Strasbourg, 15 March 2006.

For the European Parliament
The President
J. BORRELL FONTELLES

For the Council
The President
H. WINKLER

⁽¹⁾ OJ L 116, 26.4.2001, p. 5. Regulation amended by Decision 2004/927/EC (OJ L 396, 31.12.2004, p. 45).

⁽²⁾ OJ L 261, 6.8.2004, p. 119.

⁽³⁾ OJ L 261, 6.8.2004, p. 36.

⁽⁴⁾ OJ L 369, 16.12.2004, p. 5.

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

At all border crossing points, all service information and any other particularly important information shall be registered manually or electronically. The information to be registered shall include in particular:

- (a) the names of the border guard responsible locally for border checks and of the other officers in each team;
 - (b) relaxation of checks on persons applied in accordance with Article 8;
 - (c) the issuing, at the border, of documents in place of passports and of visas;
 - (d) persons apprehended and complaints (criminal offences and administrative breaches);
 - (e) persons refused entry in accordance with Article 13 (grounds for refusal and nationalities);
 - (f) the security codes of entry and exit stamps, the identity of border guards to whom a given stamp is assigned at any given time or shift and the information relating to lost and stolen stamps;
 - (g) complaints from persons subject to checks;
 - (h) other particularly important police or judicial measures;
 - (i) particular occurrences.
-

ANNEX III

Model signs indicating lanes at border crossing points

PART A



(1)

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

PART B



PART C



(¹)



(¹)



(¹)

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

<p>ALL PASSPORTS</p>	 <p>CARS</p>
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<p>ALL PASSPORTS</p>	 <p>BUSES</p>
---------------------------------	--

<p>ALL PASSPORTS</p>	 <p>LORRIES</p>
---------------------------------	--

ANNEX IV

Affixing stamps

1. The travel documents of third-country nationals shall be systematically stamped on entry and exit, in accordance with Article 10. The specifications of those stamps are laid down in the Schengen Executive Committee Decision SCH/COM-EX (94) 16 rev and SCH/Gem-Handb (93) 15 (CONFIDENTIAL).
2. The security codes on the stamps shall be changed at regular intervals not exceeding one month.
3. On the entry and exit of third-country nationals subject to the visa obligation, the stamp will, if possible, be affixed so that it covers the edge of the visa without affecting the legibility of the indications on the visa or the security features of the visa sticker. If several stamps must be affixed (for example in the case of a multiple-entry visa, this shall be done on the page facing the one on which the visa is affixed).

If that page cannot be used, the stamp shall be entered on the following page. The machine readable zone shall not be stamped.

4. Member States shall designate national contact points responsible for exchanging information on the security codes of the entry and exit stamps used at border crossing points and shall inform the other Member States, the General Secretariat of the Council and the Commission thereof. Those contact points shall have access without delay to information regarding common entry and exit stamps used at the external border of the Member State concerned, and in particular to information on the following:
 - (a) the border crossing point to which a given stamp is assigned;
 - (b) the identity of the border guard to whom a given stamp is assigned at any given time;
 - (c) the security code of a given stamp at any given time.

Any inquiries regarding common entry and exit stamps shall be made through the abovementioned national contact points.

The national contact points shall also forward immediately to the other contact points, the General Secretariat of the Council and the Commission information regarding a change in the contact points as well as lost and stolen 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) cancel the visa by applying a stamp stating 'CANCELLED' in the cases referred to in paragraph 2. In such a case the optically variable feature of the visa sticker, the security feature 'latent image effect' as well as the term 'visa' shall be destroyed by crossing it out so as to prevent any later misuse. The border guard shall inform his/her central authorities of this decision forthwith;
 - (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;
2. The visa shall be cancelled in the following cases:
 - (a) if the holder of the visa is the subject of an alert in the SIS for the purposes of being refused entry unless he or she holds a visa or re-entry visa issued by one of the Member States and wishes to enter for transit purposes in order to reach the territory of the Member State which issued the document;
 - (b) if there are serious grounds to believe that the visa was obtained in a fraudulent way.

However, the failure of the third-country national to produce, at the border, one or more of the supporting documents referred to in Article 5(2), shall not automatically lead to a decision to cancel the visa.
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 of 28 June 2001 supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985 ⁽¹⁾;
 - (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.

⁽¹⁾ OJ L 187, 10.7.2001, p. 45.

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 (<i>indicate references to the national law in force</i>), 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 three months during a six-month 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 (<i>each State must indicate the references to national law relating to such cases of refusal of entry</i>).	
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 (<i>each State must indicate the references to the national law and procedure relating to the right of appeal</i>).	
<div style="border: 1px solid black; width: 150px; height: 40px; margin: 0 auto;"></div> Person concerned	<div style="border: 1px solid black; width: 150px; height: 40px; margin: 0 auto;"></div> 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.

1.2. 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. Those checks shall be carried out in either one of the following two ways:

- on the platform, in the first station of arrival or departure on the territory of a Member State,
- on board the train, during transit.

Member States may conclude bilateral agreements on how to conduct those checks. They shall inform the Commission thereof pursuant to Article 37.

1.2.2. By way of derogation from point 1.2.1 and 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, to carry out entry checks on persons in 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 the stations on the territory of the Member States, provided that the persons stay on board the train in the previous station/stations.

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*

2.2.1. It shall be ensured that persons are also checked, in accordance with Articles 6 to 13, in airports which do not hold the status of international airport under the relevant national law (aerodromes) but through which the routing of flights from or to third countries is authorised.

2.2.2. By way of derogation from point 2.1.1 it shall not be necessary to make appropriate arrangements in aerodromes to ensure that inflows of passengers from internal and other flights are physically separated, without prejudice to Regulation (EC) No 2320/2002 of the European Parliament and of the Council of 16 December 2002 establishing common rules in the field of civil aviation security ⁽¹⁾. In addition, when the volume of traffic is low, the border guards need not be present at all times, provided that there is a guarantee that the necessary personnel can be deployed in good time.

2.2.3. When the presence of the border guards is not assured at all times in the aerodrome, the manager of the aerodrome shall give adequate notice to the border guards about the arrival and the departure of aircrafts on flights from or to third countries.

2.3. *Checks on persons on private flights*

2.3.1. In the case of private flights from or to third countries the captain shall transmit to the border guards of the Member State of destination and, where appropriate, of the Member State of first entry, prior to take-off, a general declaration comprising inter alia a flight plan in accordance with Annex 2 to the Convention on International Civil Aviation and information concerning the passengers' identity.

2.3.2. Where private flights coming from a third country and bound for a Member State make stop-overs in the territory of other Member States, the competent authorities of the Member State of entry shall carry out border checks and affix an entry stamp to the general declaration referred to in point 2.3.1.

2.3.3. Where uncertainty exists whether a flight is exclusively coming from, or solely bound for, the territories of the Member States without stop-over on the territory of a third country, the competent authorities shall carry out checks on persons in airports and aerodromes in accordance with points 2.1 to 2.2.

2.3.4. The arrangements for the entry and exit of gliders, micro-light aircraft, helicopters, small-scale aircraft capable of flying short distances only and airships shall be laid down by national law and, where applicable, by bilateral agreements.

3. **Sea borders**

3.1. *General checking procedures on maritime traffic*

3.1.1. Checks on ships shall be carried out at the port of arrival or departure, on board ship or in an area set aside for the purpose, located in the immediate vicinity of the vessel. However, in accordance with the agreements reached on the matter, checks may also be carried out during crossings or, upon the ship's arrival or departure, in the territory of a third country.

The purpose of checks is to ensure that both crew and passengers fulfil the conditions laid down in Article 5, without prejudice to Article 19(1)(c).

3.1.2. The ship's captain or, failing that, the individual or corporation who represents the shipowner in all matters relating to the shipowner's duties in fitting out the vessel (shipowner's agent), shall draw up a list, in duplicate, of the crew and of any passengers. At the latest upon arriving in the port he or she shall give the list(s) to the border guards. If, for reasons of *force majeure*, the list or lists cannot be sent to the border guards, a copy will be sent to the appropriate border post or shipping authority, which shall forward it without delay to the border guards.

3.1.3. One copy of the two lists duly signed by the border guard shall be returned to the ship's captain, who shall produce it on request when in port.

⁽¹⁾ OJ L 355, 30.12.2002, p. 1. Regulation as amended by Regulation (EC) No 849/2004 (OJ L 158, 30.4.2004, p. 1).

- 3.1.4. The ship's captain, or failing that, the shipowner's agent shall report to the competent authority promptly any changes to the composition of the crew or the number of passengers.

In addition, the captain shall notify the competent authorities promptly, and if possible even before the ship enters port, of the presence on board of stowaways. Stowaways will, however, remain under the responsibility of the ship's captain.

- 3.1.5. The ship's captain shall notify the border guards of the ship's departure in due time and in accordance with the rules in force in the port concerned; if he or she is unable to notify them, he or she shall advise the appropriate shipping authority. The second copy of the previously completed and signed list(s) shall be returned to border guards or shipping authorities.

3.2. *Specific check procedures for certain types of shipping*

Cruise ships

- 3.2.1. The cruise ship's captain or, failing that, the shipowner's agent shall transmit to the respective border guards the itinerary and the programme of the cruise, at least 24 hours before leaving the port of departure and before the arrival at each port in the territory of the Member States.

- 3.2.2. If the itinerary of a cruise ship comprises exclusively ports situated in the territory of the Member States, by way of derogation from Articles 4 and 7, no border checks shall be carried out and the cruise ship may dock at ports which are not border crossing points.

Nevertheless, on the basis of an assessment of the risks related to internal security and illegal immigration, checks may be carried out on the crew and passengers of those ships.

- 3.2.3. If the itinerary of a cruise ship comprises both ports situated in the territory of the Member States and ports situated in third countries, by way of derogation from Article 7, border checks shall be carried out as follows:

- (a) where the cruise ship comes from a port situated in a third country and calls for the first time at a port situated in the territory of a Member State, crew and passengers shall be subject to entry checks on the basis of the nominal lists of crew and passengers, as referred to in point 3.2.4.

Passengers going ashore shall be subject to entry checks in accordance with Article 7 unless an assessment of the risks related to internal security and illegal immigration shows that there is no need to carry out such checks;

- (b) where the cruise ship comes from a port situated in a third country and calls again at a port situated in the territory of a Member State, crew and passengers shall be subject to entry checks on the basis of the nominal lists of crew and passengers as referred to in point 3.2.4 to the extent that those lists have been modified since the cruise ship called at the previous port situated in the territory of a Member State.

Passengers going ashore shall be subject to entry checks in accordance with Article 7 unless an assessment of the risks related to internal security and illegal immigration shows that there is no need to carry out such checks;

- (c) where the cruise ship comes from a port situated in a Member State and calls at such a port, passengers going ashore shall be subject to entry checks in accordance with Article 7 if an assessment of the risks related to internal security and illegal immigration so requires;

- (d) where a cruise ship departs from a port situated in a Member State to a port in a third country, crew and passengers shall be subject to exit checks on the basis of the nominal lists of crew and passengers.

If an assessment of the risks related to internal security and illegal immigration so requires, passengers going on board shall be subject to exit checks in accordance with Article 7;

- (e) where a cruise ship departs from a port situated in a Member State to such a port, no exit checks shall be carried out.

Nevertheless, on the basis of an assessment of the risks related to internal security and illegal immigration, checks may be carried out on the crew and passengers of those ships.

3.2.4. The nominal lists of crew and passengers shall include:

- (a) name and surname;
- (b) date of birth;
- (c) nationality;
- (d) number and type of travel document and, where applicable, visa number.

The cruise ship's captain or, failing that, the shipowner's agent shall transmit to the respective border guards the nominal lists at least 24 hours before the arrival at each port in the territory of the Member States or, where the journey to this port lasts less than 24 hours, immediately after the boarding is completed in the previous port.

The nominal list shall be stamped at the first port of entry into the territory of the Member States and in all cases thereafter if the list is modified. The nominal list shall be taken into account in the assessment of the risks as referred to in point 3.2.3.

Pleasure boating

3.2.5. By way of derogation from Articles 4 and 7, persons on board a pleasure boat coming from or departing to a port situated in a Member State shall not be subject to border checks and may enter a port which is not a border crossing point.

However, according to the assessment of the risks of illegal immigration, and in particular where the coastline of a third country is located in the immediate vicinity of the territory of the Member State concerned, checks on those persons and/or a physical search of the pleasure boat shall be carried out.

3.2.6. By way of derogation from Article 4, a pleasure boat coming from a third country may, exceptionally, enter a port which is not a border crossing point. In that case, the persons on board shall notify the port authorities in order to be authorised to enter that port. The port authorities shall contact the authorities in the nearest port designated as a border crossing point in order to report the vessel's arrival. The declaration regarding passengers shall be made by lodging the list of persons on board with the port authorities. That list shall be made available to the border guards, at the latest upon arrival.

Likewise, if for reasons of *force majeure* the pleasure boat coming from a third country has to dock in a port other than a border crossing point, the port authorities shall contact the authorities in the nearest port designated as a border crossing point in order to report the vessel's presence.

3.2.7. During those checks, a document containing all the technical characteristics of the vessel and the names of the persons on board shall be handed in. A copy of that document shall be given to the authorities in the ports of entry and departure. As long as the vessel remains in the territorial waters of one of the Member States, a copy of that document shall be included amongst the ship's papers.

Coastal fishing

3.2.8. By way of derogation from Articles 4 and 7, the crews of coastal fisheries vessels which return every day or within 36 hours to the port of registration or to any other port situated in the territory of the Member States without docking in a port situated in the territory of a third country shall not be systematically checked. Nevertheless, the assessment of the risks of illegal immigration, in particular where the coastline of a third country is located in the immediate vicinity of the territory of the Member State concerned, shall be taken into account in order to determine the frequency of the checks to be carried out. According to those risks, checks on persons and/or a physical search of the vessel shall be carried out.

3.2.9. The crews of coastal fisheries vessels not registered in a port situated in the territory of a Member State shall be checked in accordance with the provisions relating to seamen.

The ship's captain shall notify the competent authorities of any alteration to the crew list and of the presence of any passengers.

Ferry connections

3.2.10. Checks shall be carried out on persons on board ferry connections with ports situated in third countries. The following rules shall apply:

- (a) where possible, Member States shall provide separate lanes, in accordance with Article 9;
- (b) checks on foot passengers shall be carried out individually;
- (c) checks on vehicle occupants shall be carried out while they are at the vehicle;
- (d) ferry passengers travelling by coach shall be considered as foot passengers. Those passengers shall alight from the coach for the checks;
- (e) checks on drivers of heavy goods vehicles and any accompanying persons shall be conducted while the occupants are at the vehicle. Those checks will in principle be organised separately from checks on the other passengers;
- (f) to ensure that checks are carried out quickly, there shall be an adequate number of gates;
- (g) so as to detect illegal immigrants in particular, random searches shall be made on the means of transport used by the passengers, and where applicable on the loads and other goods stowed in the means of transport;
- (h) ferry crew members shall be dealt with in the same way as commercial ship crew members.

4. Inland waterways shipping

- 4.1. 'Inland waterways shipping involving the crossing of an external border' covers the use, for business or pleasure purposes, of all types of boat and floating vessels on rivers, canals and lakes.
- 4.2. As regards boats used for business purposes, the captain and the persons employed on board who appear on the crew list and members of the families of those persons who live on board shall be regarded as crew members or equivalent.
- 4.3. The relevant provisions of points 3.1 to 3.2 shall apply *mutatis mutandis* to checks on inland waterways shipping.

ANNEX VII

Special rules for certain categories of persons**1. Heads of State**

By way of derogation from Article 5 and Articles 7 to 13, Heads of State and the members of their delegation, whose arrival and departure have been officially announced through diplomatic channels to the border guards, may not be subject to border checks.

2. Pilots of aircraft and other crew members

2.1. By way of derogation from Article 5 the holders of a pilot's licence or a crew member certificate as provided for in Annex 9 to the Civil Aviation Convention of 7 December 1944 may, in the course of their duties and on the basis of those documents:

- (a) embark and disembark in the stop-over airport or the airport of arrival situated in the territory of a Member State;
- (b) enter the territory of the municipality of the stop-over airport or the airport of arrival situated in the territory of a Member State;
- (c) go, by any means of transport, to an airport situated in the territory of a Member State in order to embark on an aircraft departing from that same airport.

In all other cases, the requirements provided for by Article 5(1) shall be fulfilled.

2.2. Articles 6 to 13 shall apply to checks on aircraft crew members. Wherever possible, priority will be given to checks on aircraft crews. Specifically, they will be checked either before passengers or at special locations set aside for the purpose. By way of derogation from Article 7, crews known to staff responsible for border controls in the performance of their duties may be subject to random checks only.

3. Seamen

3.1. By way of derogation from Articles 4 and 7, Member States may authorise seamen holding a seafarer's identity document issued in accordance with the Geneva Convention of 19 June 2003 (No 185), the London Convention of 9 April 1965 and the relevant national law, to enter into the territory of the Member States by going ashore to stay in the area of the port where their ships call or in the adjacent municipalities without presenting themselves at a border crossing point, on condition that they appear on the crew list, which has previously been submitted for checking by the competent authorities, of the ship to which they belong.

However, according to the assessment of the risks of internal security and illegal immigration, seamen shall be subject to a check in accordance with Article 7 by the border guards before they go ashore.

If a seaman constitutes a threat to public policy, internal security or public health, he may be refused permission to go ashore.

3.2. Seamen who intend to stay outside the municipalities situated in the vicinity of ports shall comply with the conditions for entry to the territory of the Member States, as laid down in Article 5(1).

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

4.1. In view of the special privileges or immunities they enjoy, the holders of diplomatic, official or service passports issued by third countries or their Governments recognised by the Member States, as well as the holders of documents issued by the international organisations listed in point 4.4 who are travelling in the course of their duties, may be given priority over other travellers at border crossing points even though they remain, where applicable, subject to the requirement for a visa.

By way of derogation from Article 5(1)(c), persons holding those documents shall not be required to prove that they have sufficient means of subsistence.

- 4.2. If a person presenting himself or herself at the external border invokes privileges, immunities and exemptions, the border guard may require him or her to provide evidence of his or her status by producing the appropriate documents, in particular certificates issued by the accrediting State or a diplomatic passport or other means. If he or she has doubts, the border guard may, in case of urgent need, apply direct to the Ministry of Foreign Affairs.
- 4.3. Accredited members of diplomatic missions and of consular representations and their families may enter the territory of the Member States on presentation of the card referred to in Article 19(2) and of the document authorising them to cross the border. Moreover, by way of derogation from Article 13 border guards may not refuse the holders of diplomatic, official or service passports entry to the territory of the Member States without first consulting the appropriate national authorities. This shall also apply where an alert has been entered in the SIS for such persons.
- 4.4. The documents issued by the international organisations for the purposes specified in point 4.1 are in particular the following:
- United Nations *laissez-passer* issued to staff of the United Nations and subordinate agencies under the Convention on Privileges and Immunities of Specialised Agencies adopted by the United Nations General Assembly on 21 November 1947 in New York,
 - European Community (EC) *laissez-passer*,
 - European Atomic Energy Community (Euratom) *laissez-passer*,
 - legitimacy certificate issued by the Secretary-General of the Council of Europe,
 - documents issued pursuant to paragraph 2 of Article III of the Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Force (military ID cards accompanied by a travel order, travel warrant, or an individual or collective movement order) as well as documents issued in the framework of the Partnership for Peace.

5. **Cross-border workers**

- 5.1. The procedures for checking cross-border workers are governed by the general rules on border control, in particular Articles 7 and 13.
- 5.2. By way of derogation from Article 7, cross-border workers who are well known to the border guards owing to their frequent crossing of the border at the same border crossing point and who have not been revealed by an initial check to be the subject of an alert in the SIS or in a national data file shall be subject only to random checks to ensure that they hold a valid document authorising them to cross the border and fulfil the necessary entry conditions. Thorough checks shall be carried out on those persons from time to time, without warning and at irregular intervals.
- 5.3. The provisions of point 5.2 may be extended to other categories of regular cross-border commuters.

6. **Minors**

- 6.1. Border guards shall pay particular attention to minors, whether travelling accompanied or unaccompanied. Minors crossing an external border shall be subject to the same checks on entry and exit as adults, as provided for in this Regulation.
- 6.2. In the case of accompanied minors, the border guard shall check that the persons accompanying minors have parental care over them, especially where minors are accompanied by only one adult and there are serious grounds for suspecting that they may have been unlawfully removed from the custody of the person(s) legally exercising parental care over them. In the latter case, the border guard shall carry out a further investigation in order to detect any inconsistencies or contradictions in the information given.
- 6.3. In the case of minors travelling unaccompanied, border guards shall ensure, by means of thorough checks on travel documents and supporting documents, that the minors do not leave the territory against the wishes of the person(s) having parental care over them.

ANNEX VIII

Name of State

Logo of State (Name of Office)



_____ (1)

APPROVAL OF THE EVIDENCE REGARDING THE RESPECT OF THE CONDITION OF THE DURATION OF A SHORT STAY IN CASES WHERE THE TRAVEL DOCUMENT DOES NOT BEAR AN ENTRY STAMP

On _____ at (time) _____ at (place) _____

We, the undersigning authority, _____ have before us:

Surname _____ First name _____

Date of birth _____ Place of birth _____ Sex: _____

Nationality _____ Resident in _____

Travel document _____ number _____

Issued in _____ on _____

Visa number _____ (if applicable) issued by _____

for a period of _____ days on the following grounds: _____

Having regard to the evidence relating to the duration of his/her stay on the territory of the Member States that he/she) has provided, he/she) is considered to have entered the territory of the Member State _____ on _____ at _____ at the border crossing point _____

Contact details of the undersigning authority:

Tel _____

Fax: _____

e-mail: _____

The person concerned will receive a copy of this document.

Person concerned

Officer responsible + stamp

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

I

(Acts adopted under the EC Treaty/Euratom Treaty whose publication is obligatory)

REGULATIONS

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)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 62(2)(a) and (b)(ii) 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) In accordance with Article 61 of the Treaty, the creation of an area in which persons may move freely should be accompanied by measures with respect to external border controls, asylum and immigration.
- (2) Pursuant to Article 62(2) of the Treaty, measures on the crossing of the external borders of the Member States shall establish rules on visas for intended stays of no more than three months, including the procedures and conditions for issuing visas by Member States.
- (3) As regards visa policy, the establishment of a 'common corpus' of legislation, particularly via the consolidation and development of the *acquis* (the relevant provisions of the Convention implementing the Schengen Agreement of 14 June 1985 ⁽²⁾ and the Common Consular Instructions ⁽³⁾), is one of the fundamental components of 'further development of the common visa policy as part of a multi-layer system aimed at

facilitating legitimate travel and tackling illegal immigration through further harmonisation of national legislation and handling practices at local consular missions', as defined in the Hague Programme: strengthening freedom, security and justice in the European Union ⁽⁴⁾.

- (4) Member States should be present or represented for visa purposes in all third countries whose nationals are subject to visa requirements. Member States lacking their own consulate in a given third country or in a certain part of a given third country should endeavour to conclude representation arrangements in order to avoid a disproportionate effort on the part of visa applicants to have access to consulates.
- (5) It is necessary to set out rules on the transit through international areas of airports in order to combat illegal immigration. Thus nationals from a common list of third countries should be required to hold airport transit visas. Nevertheless, in urgent cases of mass influx of illegal immigrants, Member States should be allowed to impose such a requirement on nationals of third countries other than those listed in the common list. Member States' individual decisions should be reviewed on an annual basis.
- (6) The reception arrangements for applicants should be made with due respect for human dignity. Processing of visa applications should be conducted in a professional and respectful manner and be proportionate to the objectives pursued.
- (7) Member States should ensure that the quality of the service offered to the public is of a high standard and follows good administrative practices. They should allocate appropriate numbers of trained staff as well as sufficient resources in order to facilitate as much as possible the visa application process. Member States should ensure that a 'one-stop' principle is applied to all applicants.

⁽¹⁾ Opinion of the European Parliament of 2 April 2009 (not yet published in the Official Journal) and Council Decision of 25 June 2009.

⁽²⁾ OJ L 239, 22.9.2000, p. 19.

⁽³⁾ OJ C 326, 22.12.2005, p. 1.

⁽⁴⁾ OJ C 53, 3.3.2005, p. 1.

- (8) Provided that certain conditions are fulfilled, multiple-entry visas should be issued in order to lessen the administrative burden of Member States' consulates and to facilitate smooth travel for frequent or regular travellers. Applicants known to the consulate for their integrity and reliability should as far as possible benefit from a simplified procedure.
- (9) Because of the registration of biometric identifiers in the Visa Information System (VIS) as established by Regulation (EC) No 767/2008 of the European Parliament and of the Council of 9 July 2008 concerning Visa Information System (VIS) and the exchange of data between Member States on short-stay visas (VIS Regulation) ⁽¹⁾, the appearance of the applicant in person — at least for the first application — should be one of the basic requirements for the application for a visa.
- (10) In order to facilitate the visa application procedure of any subsequent application, it should be possible to copy fingerprints from the first entry into the VIS within a period of 59 months. Once this period of time has elapsed, the fingerprints should be collected again.
- (11) Any document, data or biometric identifier received by a Member State in the course of the visa application process shall be considered a consular document under the Vienna Convention on Consular Relations of 24 April 1963 and shall be treated in an appropriate manner.
- (12) Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data ⁽²⁾ applies to the Member States with regard to the processing of personal data pursuant to this Regulation.
- (13) In order to facilitate the procedure, several forms of cooperation should be envisaged, such as limited representation, co-location, common application centres, recourse to honorary consuls and cooperation with external service providers, taking into account in particular data protection requirements set out in Directive 95/46/EC. Member States should, in accordance with the conditions laid down in this Regulation, determine the type of organisational structure which they will use in each third country.
- (14) It is necessary to make provision for situations in which a Member State decides to cooperate with an external service provider for the collection of applications. Such a decision may be taken if, in particular circumstances or for reasons relating to the local situation, cooperation with other Member States in the form of representation, limited representation, co-location or a Common Application Centre proves not to be appropriate for the Member State concerned. Such arrangements should be established in compliance with the general principles for issuing visas and with the data protection requirements set out in Directive 95/46/EC. In addition, the need to avoid visa shopping should be taken into consideration when establishing and implementing such arrangements.
- (15) Where a Member State has decided to cooperate with an external service provider, it should maintain the possibility for all applicants to lodge applications directly at its diplomatic missions or consular posts.
- (16) A Member State should cooperate with an external service provider on the basis of a legal instrument which should contain provisions on its exact responsibilities, on direct and total access to its premises, information for applicants, confidentiality and on the circumstances, conditions and procedures for suspending or terminating the cooperation.
- (17) This Regulation, by allowing Member States to cooperate with external service providers for the collection of applications while establishing the 'one-stop' principle for the lodging of applications, creates a derogation from the general rule that an applicant must appear in person at a diplomatic mission or consular post. This is without prejudice to the possibility of calling the applicant for a personal interview.
- (18) Local Schengen cooperation is crucial for the harmonised application of the common visa policy and for proper assessment of migratory and/or security risks. Given the differences in local circumstances, the operational application of particular legislative provisions should be assessed among Member States' diplomatic missions and consular posts in individual locations in order to ensure a harmonised application of the legislative provisions to prevent visa shopping and different treatment of visa applicants.
- (19) Statistical data are an important means of monitoring migratory movements and can serve as an efficient management tool. Therefore, such data should be compiled regularly in a common format.

⁽¹⁾ OJ L 218, 13.8.2008, p. 60.

⁽²⁾ OJ L 281, 23.11.1995, p. 31.

- (20) The measures necessary for the implementation of this Regulation should be adopted in accordance with Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission ⁽¹⁾.
- (21) In particular, the Commission should be empowered to adopt amendments to the Annexes to this Regulation. Since those measures are of general scope and are designed to amend non-essential elements of this Regulation, inter alia, by supplementing it with new non-essential elements, they must be adopted in accordance with the regulatory procedure with scrutiny provided for in Article 5a of Decision 1999/468/EC.
- (22) In order to ensure the harmonised application of this Regulation at operational level, instructions should be drawn up on the practice and procedures to be followed by Member States when processing visa applications.
- (23) A common Schengen visa Internet site is to be established to improve the visibility and a uniform image of the common visa policy. Such a site will serve as a means to provide the general public with all relevant information in relation to the application for a visa.
- (24) Appropriate measures should be adopted for the monitoring and evaluation of this Regulation.
- (25) The VIS Regulation and 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) ⁽²⁾ should be amended in order to take account of the provisions of this Regulation.
- (26) Bilateral agreements concluded between the Community and third countries aiming at facilitating the processing of applications for visas may derogate from the provisions of this Regulation.
- (27) When a Member State hosts the Olympic Games and the Paralympic Games, a particular scheme facilitating the issuing of visas to members of the Olympic family should apply.
- (28) Since the objective of this Regulation, namely the establishment of the procedures and conditions for issuing visas for transit through or intended stays in the territory of the Member States not exceeding three months in any six-month period, 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.
- (29) This Regulation respects fundamental rights and observes the principles recognised in particular by the Council of Europe's Convention for the Protection of Human Rights and Fundamental Freedoms and by the Charter of Fundamental Rights of the European Union.
- (30) The conditions governing entry into the territory of the Member States or the issue of visas do not affect the rules currently governing recognition of the validity of travel documents.
- (31) 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 does not take part in the adoption of this Regulation and is not bound by it, or subject to its application. Given that this Regulation builds on the Schengen *acquis* under the provisions of Title IV of Part Three of the Treaty establishing the European Community, Denmark shall, in accordance with Article 5 of that 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.
- (32) As regards Iceland and Norway, this Regulation constitutes a development of provisions of the Schengen *acquis* within the meaning of the Agreement concluded between the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the association of those two States with the implementation, application and development of the Schengen *acquis* ⁽³⁾ which fall within the area referred to in Article 1, point B of Council Decision 1999/437/EC ⁽⁴⁾ on certain arrangements for the application of that Agreement.
- (33) An arrangement should 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 under this Regulation. Such an arrangement has been contemplated in the Exchange of Letters between the Council of the European Union and Iceland and Norway concerning committees which assist the European Commission in the exercise of its executive powers ⁽⁵⁾, annexed to the abovementioned Agreement. The Commission has submitted to the Council a draft recommendation with a view to negotiating this arrangement.

⁽¹⁾ OJ L 184, 17.7.1999, p. 23.

⁽²⁾ OJ L 105, 13.4.2006, p. 1.

⁽³⁾ OJ L 176, 10.7.1999, p. 36.

⁽⁴⁾ OJ L 176, 10.7.1999, p. 31.

⁽⁵⁾ OJ L 176, 10.7.1999, p. 53.

- (34) As regards Switzerland, this Regulation constitutes a development of the provisions of the Schengen *acquis* within the meaning of 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* ⁽¹⁾, which fall within the area referred to in Article 1, point B, of Decision 1999/437/EC read in conjunction with Article 3 of Council Decision 2008/146/EC ⁽²⁾ on the conclusion of that Agreement.
- (35) As regards Liechtenstein, this Regulation constitutes a development of provisions of the Schengen *acquis* within the meaning of the Protocol signed 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 concluded 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*, which fall within the area referred to in Article 1, point B, of Decision 1999/437/EC read in conjunction with Article 3 of Council Decision 2008/261/EC ⁽³⁾ on the signing of that Protocol.
- (36) This Regulation constitutes a development of the 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* ⁽⁴⁾. The United Kingdom is therefore not taking part in its adoption and is not bound by it or subject to its application.
- (37) This Regulation constitutes a development of the 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* ⁽⁵⁾. Ireland is therefore not taking part in the adoption of the Regulation and is not bound by it or subject to its application.
- (38) This Regulation, with the exception of Article 3, constitutes provisions building on the Schengen *acquis* or otherwise relating to it within the meaning of Article 3(2) of the 2003 Act of Accession and within the meaning of Article 4(2) of the 2005 Act of Accession,

⁽¹⁾ OJ L 53, 27.2.2008, p. 52.

⁽²⁾ OJ L 53, 27.2.2008, p. 1.

⁽³⁾ OJ L 83, 26.3.2008, p. 3.

⁽⁴⁾ OJ L 131, 1.6.2000, p. 43.

⁽⁵⁾ OJ L 64, 7.3.2002, p. 20.

HAVE ADOPTED THIS REGULATION:

TITLE I

GENERAL PROVISIONS

Article 1

Objective and scope

1. This Regulation establishes the procedures and conditions for issuing visas for transit through or intended stays in the territory of the Member States not exceeding three months in any six-month period.
2. The provisions of this Regulation shall apply to any third-country national who must be in possession of a visa when crossing the external borders of the Member States pursuant to Council Regulation (EC) No 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement ⁽⁶⁾, without prejudice to:
 - (a) the rights of free movement enjoyed by third-country nationals who are family members of citizens of the Union;
 - (b) the equivalent rights enjoyed by third-country nationals and their family members, who, under agreements between the Community and its Member States, on the one hand, and these third countries, on the other, enjoy rights of free movement equivalent to those of Union citizens and members of their families.
3. This Regulation also lists the third countries whose nationals are required to hold an airport transit visa by way of exception from the principle of free transit laid down in Annex 9 to the Chicago Convention on International Civil Aviation, and establishes the procedures and conditions for issuing visas for the purpose of transit through the international transit areas of Member States' airports.

Article 2

Definitions

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

1. 'third-country national' means any person who is not a citizen of the Union within the meaning of Article 17(1) of the Treaty;
2. 'visa' means an authorisation issued by a Member State with a view to:
 - (a) transit through or an intended stay in the territory of the Member States of a duration of no more than three months in any six-month period from the date of first entry in the territory of the Member States;

⁽⁶⁾ OJ L 81, 21.3.2001, p. 1.

- (b) transit through the international transit areas of airports of the Member States;
3. 'uniform visa' means a visa valid for the entire territory of the Member States;
4. 'visa with limited territorial validity' means a visa valid for the territory of one or more Member States but not all Member States;
5. 'airport transit visa' means a visa valid for transit through the international transit areas of one or more airports of the Member States;
6. 'visa sticker' means the uniform format for visas as defined by Council Regulation (EC) No 1683/95 of 29 May 1995 laying down a uniform format for visas ⁽¹⁾;
7. 'recognised travel document' means a travel document recognised by one or more Member States for the purpose of affixing visas;
8. 'separate sheet for affixing a visa' means the 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 as defined 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 ⁽²⁾;
9. 'consulate' means a Member State's diplomatic mission or a Member State's consular post authorised to issue visas and headed by a career consular officer as defined by the Vienna Convention on Consular Relations of 24 April 1963;
10. 'application' means an application for a visa;
11. 'commercial intermediary' means a private administrative agency, transport company or travel agency (tour operator or retailer).
- the international transit areas of airports situated on the territory of the Member States.
2. In urgent cases of mass influx of illegal immigrants, individual Member States may require nationals of third countries other than those referred to in paragraph 1 to hold an airport transit visa when passing through the international transit areas of airports situated on their territory. Member States shall notify the Commission of such decisions before their entry into force and of withdrawals of such an airport transit visa requirement.
3. Within the framework of the Committee referred to in Article 52(1), those notifications shall be reviewed on an annual basis for the purpose of transferring the third country concerned to the list set out in Annex IV.
4. If the third country is not transferred to the list set out in Annex IV, the Member State concerned may maintain, provided that the conditions in paragraph 2 are met, or withdraw the airport transit visa requirement.
5. The following categories of persons shall be exempt from the requirement to hold an airport transit visa provided for in paragraphs 1 and 2:
- (a) holders of a valid uniform visa, national long-stay visa or residence permit issued by a Member State;
- (b) third-country nationals holding the valid residence permits listed in Annex V issued by Andorra, Canada, Japan, San Marino or the United States of America guaranteeing the holder's unconditional readmission;
- (c) third-country nationals holding a valid visa for a Member State or for a State party to the Agreement on the European Economic Area of 2 May 1992, Canada, Japan or the United States of America, or when they return from those countries after having used the visa;
- (d) family members of citizens of the Union as referred to in Article 1(2)(a);
- (e) holders of diplomatic passports;
- (f) flight crew members who are nationals of a contracting Party to the Chicago Convention on International Civil Aviation.

TITLE II

AIRPORT TRANSIT VISA

Article 3

Third-country nationals required to hold an airport transit visa

1. Nationals of the third countries listed in Annex IV shall be required to hold an airport transit visa when passing through

⁽¹⁾ OJ L 164, 14.7.1995, p. 1.

⁽²⁾ OJ L 53, 23.2.2002, p. 4.

TITLE III

PROCEDURES AND CONDITIONS FOR ISSUING VISAS

CHAPTER I

Authorities taking part in the procedures relating to applications*Article 4***Authorities competent for taking part in the procedures relating to applications**

1. Applications shall be examined and decided on by consulates.
2. By way of derogation from paragraph 1, applications may be examined and decided on at the external borders of the Member States by the authorities responsible for checks on persons, in accordance with Articles 35 and 36.
3. In the non-European overseas territories of Member States, applications may be examined and decided on by the authorities designated by the Member State concerned.
4. A Member State may require the involvement of authorities other than the ones designated in paragraphs 1 and 2 in the examination of and decision on applications.
5. A Member State may require to be consulted or informed by another Member State in accordance with Articles 22 and 31.

*Article 5***Member State competent for examining and deciding on an application**

1. The Member State competent for examining and deciding on an application for a uniform visa shall be:
 - (a) the Member State whose territory constitutes the sole destination of the visit(s);
 - (b) if the visit includes more than one destination, the Member State whose territory constitutes the main destination of the visit(s) in terms of the length or purpose of stay; or
 - (c) if no main destination can be determined, the Member State whose external border the applicant intends to cross in order to enter the territory of the Member States.
2. The Member State competent for examining and deciding on an application for a uniform visa for the purpose of transit shall be:
 - (a) in the case of transit through only one Member State, the Member State concerned; or

- (b) in the case of transit through several Member States, the Member State whose external border the applicant intends to cross to start the transit.

3. The Member State competent for examining and deciding on an application for an airport transit visa shall be:
 - (a) in the case of a single airport transit, the Member State on whose territory the transit airport is situated; or
 - (b) in the case of double or multiple airport transit, the Member State on whose territory the first transit airport is situated.

4. Member States shall cooperate to prevent a situation in which an application cannot be examined and decided on because the Member State that is competent in accordance with paragraphs 1 to 3 is neither present nor represented in the third country where the applicant lodges the application in accordance with Article 6.

*Article 6***Consular territorial competence**

1. An application shall be examined and decided on by the consulate of the competent Member State in whose jurisdiction the applicant legally resides.
2. A consulate of the competent Member State shall examine and decide on an application lodged by a third-country national legally present but not residing in its jurisdiction, if the applicant has provided justification for lodging the application at that consulate.

*Article 7***Competence to issue visas to third-country nationals legally present within the territory of a Member State**

Third-country nationals who are legally present in the territory of a Member State and who are required to hold a visa to enter the territory of one or more other Member States shall apply for a visa at the consulate of the Member State that is competent in accordance with Article 5(1) or (2).

*Article 8***Representation arrangements**

1. A Member State may agree to represent another Member State that is competent in accordance with Article 5 for the purpose of examining applications and issuing visas on behalf of that Member State. A Member State may also represent another Member State in a limited manner solely for the collection of applications and the enrolment of biometric identifiers.
2. The consulate of the representing Member State shall, when contemplating refusing a visa, submit the application to the relevant authorities of the represented Member State in order for them to take the final decision on the application within the time limits set out in Article 23(1), (2) or (3).

3. The collection and transmission of files and data to the represented Member State shall be carried out in compliance with the relevant data protection and security rules.

4. A bilateral arrangement shall be established between the representing Member State and the represented Member State containing the following elements:

- (a) it shall specify the duration of such representation, if only temporary, and procedures for its termination;
- (b) it may, in particular when the represented Member State has a consulate in the third country concerned, provide for the provision of premises, staff and payments by the represented Member State;
- (c) it may stipulate that applications from certain categories of third-country nationals are to be transmitted by the representing Member State to the central authorities of the represented Member State for prior consultation as provided for in Article 22;
- (d) by way of derogation from paragraph 2, it may authorise the consulate of the representing Member State to refuse to issue a visa after examination of the application.

5. Member States lacking their own consulate in a third country shall endeavour to conclude representation arrangements with Member States that have consulates in that country.

6. With a view to ensuring that a poor transport infrastructure or long distances in a specific region or geographical area does not require a disproportionate effort on the part of applicants to have access to a consulate, Member States lacking their own consulate in that region or area shall endeavour to conclude representation arrangements with Member States that have consulates in that region or area.

7. The represented Member State shall notify the representation arrangements or the termination of such arrangements to the Commission before they enter into force or are terminated.

8. Simultaneously, the consulate of the representing Member State shall inform both the consulates of other Member States and the delegation of the Commission in the jurisdiction concerned about representation arrangements or the termination of such arrangements before they enter into force or are terminated.

9. If the consulate of the representing Member State decides to cooperate with an external service provider in accordance with Article 43, or with accredited commercial intermediaries

as provided for in Article 45, such cooperation shall include applications covered by representation arrangements. The central authorities of the represented Member State shall be informed in advance of the terms of such cooperation.

CHAPTER II

Application

Article 9

Practical modalities for lodging an application

1. Applications shall be lodged no more than three months before the start of the intended visit. Holders of a multiple-entry visa may lodge the application before the expiry of the visa valid for a period of at least six months.
2. Applicants may be required to obtain an appointment for the lodging of an application. The appointment shall, as a rule, take place within a period of two weeks from the date when the appointment was requested.
3. In justified cases of urgency, the consulate may allow applicants to lodge their applications either without appointment, or an appointment shall be given immediately.
4. Applications may be lodged at the consulate by the applicant or by accredited commercial intermediaries, as provided for in Article 45(1), without prejudice to Article 13, or in accordance with Article 42 or 43.

Article 10

General rules for lodging an application

1. Without prejudice to the provisions of Articles 13, 42, 43 and 45, applicants shall appear in person when lodging an application.
2. Consulates may waive the requirement referred to in paragraph 1 when the applicant is known to them for his integrity and reliability.
3. When lodging the application, the applicant shall:
 - (a) present an application form in accordance with Article 11;
 - (b) present a travel document in accordance with Article 12;
 - (c) present a photograph in accordance with the standards set out in Regulation (EC) No 1683/95 or, where the VIS is operational pursuant to Article 48 of the VIS Regulation, in accordance with the standards set out in Article 13 of this Regulation;

- (d) allow the collection of his fingerprints in accordance with Article 13, where applicable;
- (e) pay the visa fee in accordance with Article 16;
- (f) provide supporting documents in accordance with Article 14 and Annex II;
- (g) where applicable, produce proof of possession of adequate and valid travel medical insurance in accordance with Article 15.

Article 11

Application form

1. Each applicant shall submit a completed and signed application form, as set out in Annex I. Persons included in the applicant's travel document shall submit a separate application form. Minors shall submit an application form signed by a person exercising permanent or temporary parental authority or legal guardianship.
2. Consulates shall make the application form widely available and easily accessible to applicants free of charge.
3. The form shall be available in the following languages:
 - (a) the official language(s) of the Member State for which a visa is requested;
 - (b) the official language(s) of the host country;
 - (c) the official language(s) of the host country and the official language(s) of the Member State for which a visa is requested; or
 - (d) in case of representation, the official language(s) of the representing Member State.

In addition to the language(s) referred to in point (a), the form may be made available in another official language of the institutions of the European Union.

4. If the application form is not available in the official language(s) of the host country, a translation of it into that/those language(s) shall be made available separately to applicants.
5. A translation of the application form into the official language(s) of the host country shall be produced under local Schengen cooperation provided for in Article 48.
6. The consulate shall inform applicants of the language(s) which may be used when filling in the application form.

Article 12

Travel document

The applicant shall present a valid travel document satisfying the following criteria:

- (a) its validity shall extend at least three months after the intended date of departure from the territory of the Member States or, in the case of several visits, after the last intended date of departure from the territory of the Member States. However, in a justified case of emergency, this obligation may be waived;
- (b) it shall contain at least two blank pages;
- (c) it shall have been issued within the previous 10 years.

Article 13

Biometric identifiers

1. Member States shall collect biometric identifiers of the applicant comprising a photograph of him and his 10 fingerprints in accordance with the safeguards laid down in the Council of Europe's Convention for the Protection of Human Rights and Fundamental Freedoms, in the Charter of Fundamental Rights of the European Union and in the United Nations Convention on the Rights of the Child.

2. At the time of submission of the first application, the applicant shall be required to appear in person. At that time, the following biometric identifiers of the applicant shall be collected:

- a photograph, scanned or taken at the time of application, and
- his 10 fingerprints taken flat and collected digitally.

3. Where fingerprints collected from the applicant as part of an earlier application were entered in the VIS for the first time less than 59 months before the date of the new application, they shall be copied to the subsequent application.

However, where there is reasonable doubt regarding the identity of the applicant, the consulate shall collect fingerprints within the period specified in the first subparagraph.

Furthermore, if at the time when the application is lodged, it cannot be immediately confirmed that the fingerprints were collected within the period specified in the first subparagraph, the applicant may request that they be collected.

4. In accordance with Article 9(5) of the VIS Regulation, the photograph attached to each application shall be entered in the VIS. The applicant shall not be required to appear in person for this purpose.

The technical requirements for the photograph shall be in accordance with the international standards as set out in the International Civil Aviation Organization (ICAO) document 9303 Part 1, 6th edition.

5. Fingerprints shall be taken in accordance with ICAO standards and Commission Decision 2006/648/EC of 22 September 2006 laying down the technical specifications on the standards for biometric features related to the development of the Visa Information System ⁽¹⁾.

6. The biometric identifiers shall be collected by qualified and duly authorised staff of the authorities competent in accordance with Article 4(1), (2) and (3). Under the supervision of the consulates, the biometric identifiers may also be collected by qualified and duly authorised staff of an honorary consul as referred to in Article 42 or of an external service provider as referred to in Article 43. The Member State(s) concerned shall, where there is any doubt, provide for the possibility of verifying at the consulate fingerprints which have been taken by the external service provider.

7. The following applicants shall be exempt from the requirement to give fingerprints:

- (a) children under the age of 12;
- (b) persons for whom fingerprinting is physically impossible. If the fingerprinting of fewer than 10 fingers is possible, the maximum number of fingerprints shall be taken. However, should the impossibility be temporary, the applicant shall be required to give the fingerprints at the following application. The authorities competent in accordance with Article 4(1), (2) and (3) shall be entitled to ask for further clarification of the grounds for the temporary impossibility. Member States shall ensure that appropriate procedures guaranteeing the dignity of the applicant are in place in the event of there being difficulties in enrolling;
- (c) heads of State or government and members of a national government with accompanying spouses, and the members of their official delegation when they are invited by Member States' governments or by international organisations for an official purpose;
- (d) sovereigns and other senior members of a royal family, when they are invited by Member States' governments or by international organisations for an official purpose.

8. In the cases referred to in paragraph 7, the entry 'not applicable' shall be introduced in the VIS in accordance with Article 8(5) of the VIS Regulation.

Article 14

Supporting documents

1. When applying for a uniform visa, the applicant shall present:

- (a) documents indicating the purpose of the journey;
- (b) documents in relation to accommodation, or proof of sufficient means to cover his accommodation;
- (c) documents indicating that the applicant possesses sufficient means of subsistence both for the duration of the intended stay and for the return to his country of origin or residence, or for the transit to a third country into which he is certain to be admitted, or that he is in a position to acquire such means lawfully, in accordance with Article 5(1)(c) and (3) of the Schengen Borders Code;
- (d) information enabling an assessment of the applicant's intention to leave the territory of the Member States before the expiry of the visa applied for.

2. When applying for an airport transit visa, the applicant shall present:

- (a) documents in relation to the onward journey to the final destination after the intended airport transit;
- (b) information enabling an assessment of the applicant's intention not to enter the territory of the Member States.

3. A non-exhaustive list of supporting documents which the consulate may request from the applicant in order to verify the fulfilment of the conditions listed in paragraphs 1 and 2 is set out in Annex II.

4. Member States may require applicants to present a proof of sponsorship and/or private accommodation by completing a form drawn up by each Member State. That form shall indicate in particular:

- (a) whether its purpose is proof of sponsorship and/or of accommodation;
- (b) whether the host is an individual, a company or an organisation;
- (c) the host's identity and contact details;
- (d) the invited applicant(s);
- (e) the address of the accommodation;

⁽¹⁾ OJ L 267, 27.9.2006, p. 41.

- (f) the length and purpose of the stay;
- (g) possible family ties with the host.

In addition to the Member State's official language(s), the form shall be drawn up in at least one other official language of the institutions of the European Union. The form shall provide the person signing it with the information required pursuant to Article 37(1) of the VIS Regulation. A specimen of the form shall be notified to the Commission.

5. Within local Schengen cooperation the need to complete and harmonise the lists of supporting documents shall be assessed in each jurisdiction in order to take account of local circumstances.
6. Consulates may waive one or more of the requirements of paragraph 1 in the case of an applicant known to them for his integrity and reliability, in particular the lawful use of previous visas, if there is no doubt that he will fulfil the requirements of Article 5(1) of the Schengen Borders Code at the time of the crossing of the external borders of the Member States.

Article 15

Travel medical insurance

1. Applicants for a uniform visa for one or two entries shall prove that they are in possession of adequate and valid travel medical insurance to cover any expenses which might arise in connection with repatriation for medical reasons, urgent medical attention and/or emergency hospital treatment or death, during their stay(s) on the territory of the Member States.
 2. Applicants for a uniform visa for more than two entries (multiple entries) shall prove that they are in possession of adequate and valid travel medical insurance covering the period of their first intended visit.
- In addition, such applicants shall sign the statement, set out in the application form, declaring that they are aware of the need to be in possession of travel medical insurance for subsequent stays.
3. The insurance shall be valid throughout the territory of the Member States and cover the entire period of the person's intended stay or transit. The minimum coverage shall be EUR 30 000.

When a visa with limited territorial validity covering the territory of more than one Member State is issued, the insurance cover shall be valid at least in the Member States concerned.

4. Applicants shall, in principle, take out insurance in their country of residence. Where this is not possible, they shall seek to obtain insurance in any other country.

When another person takes out insurance in the name of the applicant, the conditions set out in paragraph 3 shall apply.

5. When assessing whether the insurance cover is adequate, consulates shall ascertain whether claims against the insurance company would be recoverable in a Member State.
6. The insurance requirement may be considered to have been met where it is established that an adequate level of insurance may be presumed in the light of the applicant's professional situation. The exemption from presenting proof of travel medical insurance may concern particular professional groups, such as seafarers, who are already covered by travel medical insurance as a result of their professional activities.
7. Holders of diplomatic passports shall be exempt from the requirement to hold travel medical insurance.

Article 16

Visa fee

1. Applicants shall pay a visa fee of EUR 60.
2. Children from the age of six years and below the age of 12 years shall pay a visa fee of EUR 35.
3. The visa fee shall be revised regularly in order to reflect the administrative costs.
4. The visa fee shall be waived for applicants belonging to one of the following categories:
 - (a) children under six years;
 - (b) school pupils, students, postgraduate students and accompanying teachers who undertake stays for the purpose of study or educational training;
 - (c) researchers from third countries travelling for the purpose of carrying out scientific research as defined in Recommendation No 2005/761/EC of the European Parliament and of the Council of 28 September 2005 to facilitate the issue by the Member States of uniform short-stay visas for researchers from third countries travelling within the Community for the purpose of carrying out scientific research⁽¹⁾;
 - (d) representatives of non-profit organisations aged 25 years or less participating in seminars, conferences, sports, cultural or educational events organised by non-profit organisations.

⁽¹⁾ OJ L 289, 3.11.2005, p. 23.

5. The visa fee may be waived for:
- (a) children from the age of six years and below the age of 12 years;
 - (b) holders of diplomatic and service passports;
 - (c) participants aged 25 years or less in seminars, conferences, sports, cultural or educational events, organised by non-profit organisations.

Within local Schengen cooperation, Member States shall aim to harmonise the application of these exemptions.

6. In individual cases, the amount of the visa fee to be charged may be waived or reduced when to do so serves to promote cultural or sporting interests as well as interests in the field of foreign policy, development policy and other areas of vital public interest or for humanitarian reasons.

7. The visa fee shall be charged in euro, in the national currency of the third country or in the currency usually used in the third country where the application is lodged, and shall not be refundable except in the cases referred to in Articles 18(2) and 19(3).

When charged in a currency other than euro, the amount of the visa fee charged in that currency shall be determined and regularly reviewed in application of the euro foreign exchange reference rate set by the European Central Bank. The amount charged may be rounded up and consulates shall ensure under local Schengen cooperation that they charge similar fees.

8. The applicant shall be given a receipt for the visa fee paid.

Article 17

Service fee

1. An additional service fee may be charged by an external service provider referred to in Article 43. The service fee shall be proportionate to the costs incurred by the external service provider while performing one or more of the tasks referred to in Article 43(6).

2. The service fee shall be specified in the legal instrument referred to in Article 43(2).

3. Within the framework of local Schengen cooperation, Member States shall ensure that the service fee charged to an applicant duly reflects the services offered by the external service provider and is adapted to local circumstances. Furthermore, they shall aim to harmonise the service fee applied.

4. The service fee shall not exceed half of the amount of the visa fee set out in Article 16(1), irrespective of the possible

reductions in or exemptions from the visa fee as provided for in Article 16(2), (4), (5) and (6).

5. The Member State(s) concerned shall maintain the possibility for all applicants to lodge their applications directly at its/their consulates.

CHAPTER III

Examination of and decision on an application

Article 18

Verification of consular competence

1. When an application has been lodged, the consulate shall verify whether it is competent to examine and decide on it in accordance with the provisions of Articles 5 and 6.

2. If the consulate is not competent, it shall, without delay, return the application form and any documents submitted by the applicant, reimburse the visa fee, and indicate which consulate is competent.

Article 19

Admissibility

1. The competent consulate shall verify whether:

— the application has been lodged within the period referred to in Article 9(1),

— the application contains the items referred to in Article 10(3)(a) to (c),

— the biometric data of the applicant have been collected, and

— the visa fee has been collected.

2. Where the competent consulate finds that the conditions referred to in paragraph 1 have been fulfilled, the application shall be admissible and the consulate shall:

— follow the procedures described in Article 8 of the VIS Regulation, and

— further examine the application.

Data shall be entered in the VIS only by duly authorised consular staff in accordance with Articles 6(1), 7, 9(5) and 9(6) of the VIS Regulation.

3. Where the competent consulate finds that the conditions referred to in paragraph 1 have not been fulfilled, the application shall be inadmissible and the consulate shall without delay:

- return the application form and any documents submitted by the applicant,
- destroy the collected biometric data,
- reimburse the visa fee, and
- not examine the application.

4. By way of derogation, an application that does not meet the requirements set out in paragraph 1 may be considered admissible on humanitarian grounds or for reasons of national interest.

Article 20

Stamp indicating that an application is admissible

1. When an application is admissible, the competent consulate shall stamp the applicant's travel document. The stamp shall be as set out in the model in Annex III and shall be affixed in accordance with the provisions of that Annex.
2. Diplomatic, service/official and special passports shall not be stamped.
3. The provisions of this Article shall apply to the consulates of the Member States until the date when the VIS becomes fully operational in all regions, in accordance with Article 48 of the VIS Regulation.

Article 21

Verification of entry conditions and risk assessment

1. In the examination of an application for a uniform visa, it shall be ascertained whether the applicant fulfils the entry conditions set out in Article 5(1)(a), (c), (d) and (e) of the Schengen Borders Code, and particular consideration shall be given to assessing whether the applicant presents a risk of illegal immigration or a risk to the security of the Member States and whether the applicant intends to leave the territory of the Member States before the expiry of the visa applied for.
2. In respect of each application, the VIS shall be consulted in accordance with Articles 8(2) and 15 of the VIS Regulation. Member States shall ensure that full use is made of all search criteria pursuant to Article 15 of the VIS Regulation in order to avoid false rejections and identifications.
3. While checking whether the applicant fulfils the entry conditions, the consulate shall verify:
 - (a) that the travel document presented is not false, counterfeit or forged;
 - (b) the applicant's justification for the purpose and conditions of the intended stay, and that he has sufficient means of

subsistence, both for the duration of the intended stay and for the return to his country of origin or residence, or for the transit to a third country into which he is certain to be admitted, or is in a position to acquire such means lawfully;

- (c) whether the applicant is a person for whom an alert has been issued in the Schengen Information System (SIS) for the purpose of refusing entry;
- (d) that the applicant is not considered to be a threat to public policy, internal security or public health as defined in Article 2(19) of the Schengen Borders Code or to the international relations of any of the Member States, in particular where no alert has been issued in Member States' national databases for the purpose of refusing entry on the same grounds;
- (e) that the applicant is in possession of adequate and valid travel medical insurance, where applicable.

4. The consulate shall, where applicable, verify the length of previous and intended stays in order to verify that the applicant has not exceeded the maximum duration of authorised stay in the territory of the Member States, irrespective of possible stays authorised under a national long-stay visa or a residence permit issued by another Member State.

5. The means of subsistence for the intended stay 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, on the basis of the reference amounts set by the Member States in accordance with Article 34(1)(c) of the Schengen Borders Code. Proof of sponsorship and/or private accommodation may also constitute evidence of sufficient means of subsistence.

6. In the examination of an application for an airport transit visa, the consulate shall in particular verify:

- (a) that the travel document presented is not false, counterfeit or forged;
- (b) the points of departure and destination of the third-country national concerned and the coherence of the intended itinerary and airport transit;
- (c) proof of the onward journey to the final destination.

7. The examination of an application shall be based notably on the authenticity and reliability of the documents submitted and on the veracity and reliability of the statements made by the applicant.

8. During the examination of an application, consulates may in justified cases call the applicant for an interview and request additional documents.

9. A previous visa refusal shall not lead to an automatic refusal of a new application. A new application shall be assessed on the basis of all available information.

Article 22

Prior consultation of central authorities of other Member States

1. A Member State may require the central authorities of other Member States to consult its central authorities during the examination of applications lodged by nationals of specific third countries or specific categories of such nationals. Such consultation shall not apply to applications for airport transit visas.

2. The central authorities consulted shall reply definitively within seven calendar days after being consulted. The absence of a reply within this deadline shall mean that they have no grounds for objecting to the issuing of the visa.

3. Member States shall notify the Commission of the introduction or withdrawal of the requirement of prior consultation before it becomes applicable. This information shall also be given within local Schengen cooperation in the jurisdiction concerned.

4. The Commission shall inform Member States of such notifications.

5. From the date of the replacement of the Schengen Consultation Network, as referred to in Article 46 of the VIS Regulation, prior consultation shall be carried out in accordance with Article 16(2) of that Regulation.

Article 23

Decision on the application

1. Applications shall be decided on within 15 calendar days of the date of the lodging of an application which is admissible in accordance with Article 19.

2. That period may be extended up to a maximum of 30 calendar days in individual cases, notably when further scrutiny of the application is needed or in cases of representation where the authorities of the represented Member State are consulted.

3. Exceptionally, when additional documentation is needed in specific cases, the period may be extended up to a maximum of 60 calendar days.

4. Unless the application has been withdrawn, a decision shall be taken to:

- (a) issue a uniform visa in accordance with Article 24;
- (b) issue a visa with limited territorial validity in accordance with Article 25;
- (c) refuse a visa in accordance with Article 32; or
- (d) discontinue the examination of the application and transfer it to the relevant authorities of the represented Member State in accordance with Article 8(2).

The fact that fingerprinting is physically impossible, in accordance with Article 13(7)(b), shall not influence the issuing or refusal of a visa.

CHAPTER IV

Issuing of the visa

Article 24

Issuing of a uniform visa

1. The period of validity of a visa and the length of the authorised stay shall be based on the examination conducted in accordance with Article 21.

A visa may be issued for one, two or multiple entries. The period of validity shall not exceed five years.

In the case of transit, the length of the authorised stay shall correspond to the time necessary for the purpose of the transit.

Without prejudice to Article 12(a), the period of validity of the visa shall include an additional 'period of grace' of 15 days.

Member States may decide not to grant such a period of grace for reasons of public policy or because of the international relations of any of the Member States.

2. Without prejudice to Article 12(a), multiple-entry visas shall be issued with a period of validity between six months and five years, where the following conditions are met:

- (a) the applicant proves the need or justifies the intention to travel frequently and/or regularly, in particular due to his occupational or family status, such as business persons, civil servants engaged in regular official contacts with Member States and EU institutions, representatives of civil society organisations travelling for the purpose of educational training, seminars and conferences, family members of citizens of the Union, family members of third-country nationals legally residing in Member States and seafarers; and

(b) the applicant proves his integrity and reliability, in particular the lawful use of previous uniform visas or visas with limited territorial validity, his economic situation in the country of origin and his genuine intention to leave the territory of the Member States before the expiry of the visa applied for.

3. The data set out in Article 10(1) of the VIS Regulation shall be entered into the VIS when a decision on issuing such a visa has been taken.

Article 25

Issuing of a visa with limited territorial validity

1. A visa with limited territorial validity shall be issued exceptionally, in the following cases:

(a) when the Member State concerned considers it necessary on humanitarian grounds, for reasons of national interest or because of international obligations,

(i) to derogate from the principle that the entry conditions laid down in Article 5(1)(a), (c), (d) and (e) of the Schengen Borders Code must be fulfilled;

(ii) to issue a visa despite an objection by the Member State consulted in accordance with Article 22 to the issuing of a uniform visa; or

(iii) to issue a visa for reasons of urgency, although the prior consultation in accordance with Article 22 has not been carried out;

or

(b) when for reasons deemed justified by the consulate, a new visa is issued for a stay during the same six-month period to an applicant who, over this six-month period, has already used a uniform visa or a visa with limited territorial validity allowing for a stay of three months.

2. A visa with limited territorial validity shall be valid for the territory of the issuing Member State. It may exceptionally be valid for the territory of more than one Member State, subject to the consent of each such Member State.

3. If the applicant holds a travel document that is not recognised by one or more, but not all Member States, a visa valid for the territory of the Member States recognising the travel document shall be issued. If the issuing Member State does not recognise the applicant's travel document, the visa issued shall only be valid for that Member State.

4. When a visa with limited territorial validity has been issued in the cases described in paragraph 1(a), the central authorities of the issuing Member State shall circulate the

relevant information to the central authorities of the other Member States without delay, by means of the procedure referred to in Article 16(3) of the VIS Regulation.

5. The data set out in Article 10(1) of the VIS Regulation shall be entered into the VIS when a decision on issuing such a visa has been taken.

Article 26

Issuing of an airport transit visa

1. An airport transit visa shall be valid for transiting through the international transit areas of the airports situated on the territory of Member States.

2. Without prejudice to Article 12(a), the period of validity of the visa shall include an additional 'period of grace' of 15 days.

Member States may decide not to grant such a period of grace for reasons of public policy or because of the international relations of any of the Member States.

3. Without prejudice to Article 12(a), multiple airport transit visas may be issued with a period of validity of a maximum six months.

4. The following criteria in particular are relevant for taking the decision to issue multiple airport transit visas:

(a) the applicant's need to transit frequently and/or regularly; and

(b) the integrity and reliability of the applicant, in particular the lawful use of previous uniform visas, visas with limited territorial validity or airport transit visas, his economic situation in his country of origin and his genuine intention to pursue his onward journey.

5. If the applicant is required to hold an airport transit visa in accordance with the provisions of Article 3(2), the airport transit visa shall be valid only for transiting through the international transit areas of the airports situated on the territory of the Member State(s) concerned.

6. The data set out in Article 10(1) of the VIS Regulation shall be entered into the VIS when a decision on issuing such a visa has been taken.

Article 27

Filling in the visa sticker

1. When the visa sticker is filled in, the mandatory entries set out in Annex VII shall be inserted and the machine-readable zone filled in, as provided for in ICAO document 9303, Part 2.

2. Member States may add national entries in the 'comments' section of the visa sticker, which shall not duplicate the mandatory entries in Annex VII.

3. All entries on the visa sticker shall be printed, and no manual changes shall be made to a printed visa sticker.

4. Visa stickers may be filled in manually only in case of technical force majeure. No changes shall be made to a manually filled in visa sticker.

5. When a visa sticker is filled in manually in accordance with paragraph 4 of this Article, this information shall be entered into the VIS in accordance with Article 10(1)(k) of the VIS Regulation.

Article 28

Invalidation of a completed visa sticker

1. If an error is detected on a visa sticker which has not yet been affixed to the travel document, the visa sticker shall be invalidated.

2. If an error is detected after the visa sticker has been affixed to the travel document, the visa sticker shall be invalidated by drawing a cross with indelible ink on the visa sticker and a new visa sticker shall be affixed to a different page.

3. If an error is detected after the relevant data have been introduced into the VIS in accordance with Article 10(1) of the VIS Regulation, the error shall be corrected in accordance with Article 24(1) of that Regulation.

Article 29

Affixing a visa sticker

1. The printed visa sticker containing the data provided for in Article 27 and Annex VII shall be affixed to the travel document in accordance with the provisions set out in Annex VIII.

2. Where the issuing Member State does not recognise the applicant's travel document, the separate sheet for affixing a visa shall be used.

3. When a visa sticker has been affixed to the separate sheet for affixing a visa, this information shall be entered into the VIS in accordance with Article 10(1)(j) of the VIS Regulation.

4. Individual visas issued to persons who are included in the travel document of the applicant shall be affixed to that travel document.

5. Where the travel document in which such persons are included is not recognised by the issuing Member State, the individual stickers shall be affixed to the separate sheets for affixing a visa.

Article 30

Rights derived from an issued visa

Mere possession of a uniform visa or a visa with limited territorial validity shall not confer an automatic right of entry.

Article 31

Information of central authorities of other Member States

1. A Member State may require that its central authorities be informed of visas issued by consulates of other Member States to nationals of specific third countries or to specific categories of such nationals, except in the case of airport transit visas.

2. Member States shall notify the Commission of the introduction or withdrawal of the requirement for such information before it becomes applicable. This information shall also be given within local Schengen cooperation in the jurisdiction concerned.

3. The Commission shall inform Member States of such notifications.

4. From the date referred to in Article 46 of the VIS Regulation, information shall be transmitted in accordance with Article 16(3) of that Regulation.

Article 32

Refusal of a visa

1. Without prejudice to Article 25(1), a visa shall be refused:

(a) if the applicant:

(i) presents a travel document which is false, counterfeit or forged;

(ii) does not provide justification for the purpose and conditions of the intended stay;

(iii) does not provide proof of sufficient means of subsistence, both for the duration of the intended stay and for the return to his country of origin or residence, or for the transit to a third country into which he is certain to be admitted, or is not in a position to acquire such means lawfully;

(iv) has already stayed for three months during the current six-month period on the territory of the Member States on the basis of a uniform visa or a visa with limited territorial validity;

(v) is a person for whom an alert has been issued in the SIS for the purpose of refusing entry;

- (vi) is considered to be a threat to public policy, internal security or public health as defined in Article 2(19) of the Schengen Borders Code or to the international relations of any of the Member States, in particular where an alert has been issued in Member States' national databases for the purpose of refusing entry on the same grounds; or
- (vii) does not provide proof of holding adequate and valid travel medical insurance, where applicable;
- or
- (b) if there are reasonable doubts as to the authenticity of the supporting documents submitted by the applicant or the veracity of their contents, the reliability of the statements made by the applicant or his intention to leave the territory of the Member States before the expiry of the visa applied for.
2. A decision on refusal and the reasons on which it is based shall be notified to the applicant by means of the standard form set out in Annex VI.

3. Applicants who have been refused a visa shall have the right to appeal. Appeals shall be conducted against the Member State that has taken the final decision on the application and in accordance with the national law of that Member State. Member States shall provide applicants with information regarding the procedure to be followed in the event of an appeal, as specified in Annex VI.
4. In the cases referred to in Article 8(2), the consulate of the representing Member State shall inform the applicant of the decision taken by the represented Member State.
5. Information on a refused visa shall be entered into the VIS in accordance with Article 12 of the VIS Regulation.

CHAPTER V

Modification of an issued visa

Article 33

Extension

1. The period of validity and/or the duration of stay of an issued visa shall be extended where the competent authority of a Member State considers that a visa holder has provided proof of force majeure or humanitarian reasons preventing him from leaving the territory of the Member States before the expiry of the period of validity of or the duration of stay authorised by the visa. Such an extension shall be granted free of charge.

2. The period of validity and/or the duration of stay of an issued visa may be extended if the visa holder provides proof of serious personal reasons justifying the extension of the period of validity or the duration of stay. A fee of EUR 30 shall be charged for such an extension.
3. Unless otherwise decided by the authority extending the visa, the territorial validity of the extended visa shall remain the same as that of the original visa.
4. The authority competent to extend the visa shall be that of the Member State on whose territory the third-country national is present at the moment of applying for an extension.
5. Member States shall notify to the Commission the authorities competent for extending visas.
6. Extension of visas shall take the form of a visa sticker.
7. Information on an extended visa shall be entered into the VIS in accordance with Article 14 of the VIS Regulation.

Article 34

Annulment and revocation

1. A visa shall be annulled where it becomes evident that the conditions for issuing it were not met at the time when it was issued, in particular if there are serious grounds for believing that the visa was fraudulently obtained. A visa shall in principle be annulled by the competent authorities of the Member State which issued it. A visa may be annulled by the competent authorities of another Member State, in which case the authorities of the Member State that issued the visa shall be informed of such annulment.
2. A visa shall be revoked where it becomes evident that the conditions for issuing it are no longer met. A visa shall in principle be revoked by the competent authorities of the Member State which issued it. A visa may be revoked by the competent authorities of another Member State, in which case the authorities of the Member State that issued the visa shall be informed of such revocation.
3. A visa may be revoked at the request of the visa holder. The competent authorities of the Member States that issued the visa shall be informed of such revocation.
4. Failure of the visa holder to produce, at the border, one or more of the supporting documents referred to in Article 14(3), shall not automatically lead to a decision to annul or revoke the visa.

5. If a visa is annulled or revoked, a stamp stating 'ANNULLED' or 'REVOKED' shall be affixed to it and the optically variable feature of the visa sticker, the security feature 'latent image effect' as well as the term 'visa' shall be invalidated by being crossed out.

6. A decision on annulment or revocation of a visa and the reasons on which it is based shall be notified to the applicant by means of the standard form set out in Annex VI.

7. A visa holder whose visa has been annulled or revoked shall have the right to appeal, unless the visa was revoked at his request in accordance with paragraph 3. Appeals shall be conducted against the Member State that has taken the decision on the annulment or revocation and in accordance with the national law of that Member State. Member States shall provide applicants with information regarding the procedure to be followed in the event of an appeal, as specified in Annex VI.

8. Information on an annulled or a revoked visa shall be entered into the VIS in accordance with Article 13 of the VIS Regulation.

CHAPTER VI

Visas issued at the external borders

Article 35

Visas applied for at the external border

1. In exceptional cases, visas may be issued at border crossing points if the following conditions are satisfied:

- (a) the applicant fulfils the conditions laid down in Article 5(1)(a), (c), (d) and (e) of the Schengen Borders Code;
- (b) the applicant has not been in a position to apply for a visa in advance and submits, if required, supporting documents substantiating unforeseeable and imperative reasons for entry; and
- (c) the applicant's return to his country of origin or residence or transit through States other than Member States fully implementing the Schengen *acquis* is assessed as certain.

2. Where a visa is applied for at the external border, the requirement that the applicant be in possession of travel medical insurance may be waived when such travel medical insurance is not available at that border crossing point or for humanitarian reasons.

3. A visa issued at the external border shall be a uniform visa, entitling the holder to stay for a maximum duration of 15

days, depending on the purpose and conditions of the intended stay. In the case of transit, the length of the authorised stay shall correspond to the time necessary for the purpose of the transit.

4. Where the conditions laid down in Article 5(1)(a), (c), (d) and (e) of the Schengen Borders Code are not fulfilled, the authorities responsible for issuing the visa at the border may issue a visa with limited territorial validity, in accordance with Article 25(1)(a) of this Regulation, for the territory of the issuing Member State only.

5. A third-country national falling within a category of persons for whom prior consultation is required in accordance with Article 22 shall, in principle, not be issued a visa at the external border.

However, a visa with limited territorial validity for the territory of the issuing Member State may be issued at the external border for such persons in exceptional cases, in accordance with Article 25(1)(a).

6. In addition to the reasons for refusing a visa as provided for in Article 32(1) a visa shall be refused at the border crossing point if the conditions referred to in paragraph 1(b) of this Article are not met.

7. The provisions on justification and notification of refusals and the right of appeal set out in Article 32(3) and Annex VI shall apply.

Article 36

Visas issued to seafarers in transit at the external border

1. A seafarer who is required to be in possession of a visa when crossing the external borders of the Member States may be issued with a visa for the purpose of transit at the border where:

- (a) he fulfils the conditions set out in Article 35(1); and
- (b) he is crossing the border in question in order to embark on, re-embark on or disembark from a ship on which he will work or has worked as a seafarer.

2. Before issuing a visa at the border to a seafarer in transit, the competent national authorities shall comply with the rules set out in Annex IX, Part 1, and make sure that the necessary information concerning the seafarer in question has been exchanged by means of a duly completed form for seafarers in transit, as set out in Annex IX, Part 2.

3. This Article shall apply without prejudice to Article 35(3), (4) and (5).

TITLE IV

ADMINISTRATIVE MANAGEMENT AND ORGANISATION*Article 37***Organisation of visa sections**

1. Member States shall be responsible for organising the visa sections of their consulates.

In order to prevent any decline in the level of vigilance and to protect staff from being exposed to pressure at local level, rotation schemes for staff dealing directly with applicants shall be set up, where appropriate. Particular attention shall be paid to clear work structures and a distinct allocation/division of responsibilities in relation to the taking of final decisions on applications. Access to consultation of the VIS and the SIS and other confidential information shall be restricted to a limited number of duly authorised staff. Appropriate measures shall be taken to prevent unauthorised access to such databases.

2. The storage and handling of visa stickers shall be subject to adequate security measures to avoid fraud or loss. Each consulate shall keep an account of its stock of visa stickers and register how each visa sticker has been used.

3. Member States' consulates shall keep archives of applications. Each individual file shall contain the application form, copies of relevant supporting documents, a record of checks made and the reference number of the visa issued, in order for staff to be able to reconstruct, if need be, the background for the decision taken on the application.

Individual application files shall be kept for a minimum of two years from the date of the decision on the application as referred to in Article 23(1).

*Article 38***Resources for examining applications and monitoring of consulates**

1. Member States shall deploy appropriate staff in sufficient numbers to carry out the tasks relating to the examining of applications, in such a way as to ensure reasonable and harmonised quality of service to the public.

2. Premises shall meet appropriate functional requirements of adequacy and allow for appropriate security measures.

3. Member States' central authorities shall provide adequate training to both expatriate staff and locally employed staff and shall be responsible for providing them with complete, precise and up-to-date information on the relevant Community and national law.

4. Member States' central authorities shall ensure frequent and adequate monitoring of the conduct of examination of applications and take corrective measures when deviations from the provisions of this Regulation are detected.

*Article 39***Conduct of staff**

1. Member States' consulates shall ensure that applicants are received courteously.

2. Consular staff shall, in the performance of their duties, fully respect human dignity. Any measures taken shall be proportionate to the objectives pursued by such measures.

3. While performing their tasks, consular staff shall not discriminate against persons on grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

*Article 40***Forms of cooperation**

1. Each Member State shall be responsible for organising the procedures relating to applications. In principle, applications shall be lodged at a consulate of a Member State.

2. Member States shall:

(a) equip their consulates and authorities responsible for issuing visas at the borders with the required material for the collection of biometric identifiers, as well as the offices of their honorary consuls, whenever they make use of them, to collect biometric identifiers in accordance with Article 42; and/or

(b) cooperate with one or more other Member States, within the framework of local Schengen cooperation or by other appropriate contacts, in the form of limited representation, co-location, or a Common Application Centre in accordance with Article 41.

3. In particular circumstances or for reasons relating to the local situation, such as where:

(a) the high number of applicants does not allow the collection of applications and of data to be organised in a timely manner and in decent conditions; or

(b) it is not possible to ensure a good territorial coverage of the third country concerned in any other way;

and where the forms of cooperation referred to in paragraph 2(b) prove not to be appropriate for the Member State concerned, a Member State may, as a last resort, cooperate with an external service provider in accordance with Article 43.

4. Without prejudice to the right to call the applicant for a personal interview, as provided for in Article 21(8), the selection of a form of organisation shall not lead to the applicant being required to appear in person at more than one location in order to lodge an application.

5. Member States shall notify to the Commission how they intend to organise the procedures relating to applications in each consular location.

Article 41

Cooperation between Member States

1. Where 'co-location' is chosen, staff of the consulates of one or more Member States shall carry out the procedures relating to applications (including the collection of biometric identifiers) addressed to them at the consulate of another Member State and share the equipment of that Member State. The Member States concerned shall agree on the duration of and conditions for the termination of the co-location as well as the proportion of the visa fee to be received by the Member State whose consulate is being used.

2. Where 'Common Application Centres' are established, staff of the consulates of two or more Member States shall be pooled in one building in order for applicants to lodge applications (including biometric identifiers). Applicants shall be directed to the Member State competent for examining and deciding on the application. Member States shall agree on the duration of and conditions for the termination of such cooperation as well as the cost-sharing among the participating Member States. One Member State shall be responsible for contracts in relation to logistics and diplomatic relations with the host country.

3. In the event of termination of cooperation with other Member States, Member States shall assure the continuity of full service.

Article 42

Recourse to honorary consuls

1. Honorary consuls may also be authorised to perform some or all of the tasks referred to in Article 43(6). Adequate measures shall be taken to ensure security and data protection.

2. Where the honorary consul is not a civil servant of a Member State, the performance of those tasks shall comply with the requirements set out in Annex X, except for the provisions in point D(c) of that Annex.

3. Where the honorary consul is a civil servant of a Member State, the Member State concerned shall ensure that requirements comparable to those which would apply if the tasks were performed by its consulate are applied.

Article 43

Cooperation with external service providers

1. Member States shall endeavour to cooperate with an external service provider together with one or more Member States, without prejudice to public procurement and competition rules.

2. Cooperation with an external service provider shall be based on a legal instrument that shall comply with the requirements set out in Annex X.

3. Member States shall, within the framework of local Schengen cooperation, exchange information about the selection of external service providers and the establishment of the terms and conditions of their respective legal instruments.

4. The examination of applications, interviews (where appropriate), the decision on applications and the printing and affixing of visa stickers shall be carried out only by the consulate.

5. External service providers shall not have access to the VIS under any circumstances. Access to the VIS shall be reserved exclusively to duly authorised staff of consulates.

6. An external service provider may be entrusted with the performance of one or more of the following tasks:

- (a) providing general information on visa requirements and application forms;
- (b) informing the applicant of the required supporting documents, on the basis of a checklist;
- (c) collecting data and applications (including collection of biometric identifiers) and transmitting the application to the consulate;
- (d) collecting the visa fee;
- (e) managing the appointments for appearance in person at the consulate or at the external service provider;
- (f) collecting the travel documents, including a refusal notification if applicable, from the consulate and returning them to the applicant.

7. When selecting an external service provider, the Member State(s) concerned shall scrutinise the solvency and reliability of the company, including the necessary licences, commercial registration, company statutes, bank contracts, and ensure that there is no conflict of interests.

8. The Member State(s) concerned shall ensure that the external service provider selected complies with the terms and conditions assigned to it in the legal instrument referred to in paragraph 2.

9. The Member State(s) concerned shall remain responsible for compliance with data protection rules for the processing of data and shall be supervised in accordance with Article 28 of Directive 95/46/EC.

Cooperation with an external service provider shall not limit or exclude any liability arising under the national law of the Member State(s) concerned for breaches of obligations with regard to the personal data of applicants or the performance of one or more of the tasks referred to in paragraph 6. This provision is without prejudice to any action which may be taken directly against the external service provider under the national law of the third country concerned.

10. The Member State(s) concerned shall provide training to the external service provider, corresponding to the knowledge needed to offer an appropriate service and sufficient information to applicants.

11. The Member State(s) concerned shall closely monitor the implementation of the legal instrument referred to in paragraph 2, including:

- (a) the general information on visa requirements and application forms provided by the external service provider to applicants;
- (b) all the technical and organisational security measures required to protect personal data against accidental or unlawful destruction or accidental loss, alteration, unauthorised disclosure or access, in particular where the cooperation involves the transmission of files and data to the consulate of the Member State(s) concerned, and all other unlawful forms of processing personal data;
- (c) the collection and transmission of biometric identifiers;
- (d) the measures taken to ensure compliance with data protection provisions.

To this end, the consulate(s) of the Member State(s) concerned shall, on a regular basis, carry out spot checks on the premises of the external service provider.

12. In the event of termination of cooperation with an external service provider, Member States shall ensure the continuity of full service.

13. Member States shall provide the Commission with a copy of the legal instrument referred to in paragraph 2.

Article 44

Encryption and secure transfer of data

1. In the case of representation arrangements between Member States and cooperation of Member States with an external service provider and recourse to honorary consuls, the represented Member State(s) or the Member State(s) concerned shall ensure that the data are fully encrypted, whether electronically transferred or physically transferred on an electronic storage medium from the authorities of the representing Member State to the authorities of the represented Member State(s) or from the external service provider or from the honorary consul to the authorities of the Member State(s) concerned.

2. In third countries which prohibit encryption of data to be electronically transferred from the authorities of the representing Member State to the authorities of the represented Member State(s) or from the external service provider or from the honorary consul to the authorities of the Member State(s) concerned, the represented Member State(s) or the Member State(s) concerned shall not allow the representing Member State or the external service provider or the honorary consul to transfer data electronically.

In such a case, the represented Member State(s) or the Member State(s) concerned shall ensure that the electronic data are transferred physically in fully encrypted form on an electronic storage medium from the authorities of the representing Member State to the authorities of the represented Member State(s) or from the external service provider or from the honorary consul to the authorities of the Member State(s) concerned by a consular officer of a Member State or, where such a transfer would require disproportionate or unreasonable measures to be taken, in another safe and secure way, for example by using established operators experienced in transporting sensitive documents and data in the third country concerned.

3. In all cases the level of security for the transfer shall be adapted to the sensitive nature of the data.

4. The Member States or the Community shall endeavour to reach agreement with the third countries concerned with the aim of lifting the prohibition against encryption of data to be electronically transferred from the authorities of the representing Member State to the authorities of the represented Member State(s) or from the external service provider or from the honorary consul to the authorities of the Member State(s) concerned.

Article 45

Member States' cooperation with commercial intermediaries

1. Member States may cooperate with commercial intermediaries for the lodging of applications, except for the collection of biometric identifiers.

2. Such cooperation shall be based on the granting of an accreditation by Member States' relevant authorities. The accreditation shall, in particular, be based on the verification of the following aspects:

- (a) the current status of the commercial intermediary: current licence, the commercial register, contracts with banks;
- (b) existing contracts with commercial partners based in the Member States offering accommodation and other package tour services;
- (c) contracts with transport companies, which must include an outward journey, as well as a guaranteed and fixed return journey.

3. Accredited commercial intermediaries shall be monitored regularly by spot checks involving personal or telephone interviews with applicants, verification of trips and accommodation, verification that the travel medical insurance provided is adequate and covers individual travellers, and wherever deemed necessary, verification of the documents relating to group return.

4. Within local Schengen cooperation, information shall be exchanged on the performance of the accredited commercial intermediaries concerning irregularities detected and refusal of applications submitted by commercial intermediaries, and on detected forms of travel document fraud and failure to carry out scheduled trips.

5. Within local Schengen cooperation, lists shall be exchanged of commercial intermediaries to which accreditation has been given by each consulate and from which accreditation has been withdrawn, together with the reasons for any such withdrawal.

Each consulate shall make sure that the public is informed about the list of accredited commercial intermediaries with which it cooperates.

Article 46

Compilation of statistics

Member States shall compile annual statistics on visas, in accordance with the table set out in Annex XII. These statistics shall be submitted by 1 March for the preceding calendar year.

Article 47

Information to the general public

1. Member States' central authorities and consulates shall provide the general public with all relevant information in relation to the application for a visa, in particular:

- (a) the criteria, conditions and procedures for applying for a visa;
- (b) the means of obtaining an appointment, if applicable;
- (c) where the application may be submitted (competent consulate, Common Application Centre or external service provider);
- (d) accredited commercial intermediaries;
- (e) the fact that the stamp as provided for in Article 20 has no legal implications;
- (f) the time limits for examining applications provided for in Article 23(1), (2) and (3);
- (g) the third countries whose nationals or specific categories of whose nationals are subject to prior consultation or information;
- (h) that negative decisions on applications must be notified to the applicant, that such decisions must state the reasons on which they are based and that applicants whose applications are refused have a right to appeal, with information regarding the procedure to be followed in the event of an appeal, including the competent authority, as well as the time limit for lodging an appeal;
- (i) that mere possession of a visa does not confer an automatic right of entry and that the holders of visa are requested to present proof that they fulfil the entry conditions at the external border, as provided for in Article 5 of the Schengen Borders Code.

2. The representing and represented Member State shall inform the general public about representation arrangements as referred to in Article 8 before such arrangements enter into force.

TITLE V

LOCAL SCHENGEN COOPERATION

Article 48

Local Schengen cooperation between Member States' consulates

1. In order to ensure a harmonised application of the common visa policy taking into account, where appropriate, local circumstances, Member States' consulates and the Commission shall cooperate within each jurisdiction and assess the need to establish in particular:

- (a) a harmonised list of supporting documents to be submitted by applicants, taking into account Article 14 and Annex II;
- (b) common criteria for examining applications in relation to exemptions from paying the visa fee in accordance with Article 16(5) and matters relating to the translation of the application form in accordance with Article 11(5);
- (c) an exhaustive list of travel documents issued by the host country, which shall be updated regularly.

If in relation to one or more of the points (a) to (c), the assessment within local Schengen cooperation confirms the need for a local harmonised approach, measures on such an approach shall be adopted pursuant to the procedure referred to in Article 52(2).

2. Within local Schengen cooperation a common information sheet shall be established on uniform visas and visas with limited territorial validity and airport transit visas, namely, the rights that the visa implies and the conditions for applying for it, including, where applicable, the list of supporting documents as referred to in paragraph 1(a).

3. The following information shall be exchanged within local Schengen cooperation:

- (a) monthly statistics on uniform visas, visas with limited territorial validity, and airport transit visas issued, as well as the number of visas refused;
- (b) with regard to the assessment of migratory and/or security risks, information on:
 - (i) the socioeconomic structure of the host country;
 - (ii) sources of information at local level, including social security, health insurance, fiscal registers and entry-exit registrations;
 - (iii) the use of false, counterfeit or forged documents;
 - (iv) illegal immigration routes;
 - (v) refusals;
- (c) information on cooperation with transport companies;

- (d) information on insurance companies providing adequate travel medical insurance, including verification of the type of coverage and possible excess amount.

4. Local Schengen cooperation meetings to deal specifically with operational issues in relation to the application of the common visa policy shall be organised regularly among Member States and the Commission. These meetings shall be convened within the jurisdiction by the Commission, unless otherwise agreed at the request of the Commission.

Single-topic meetings may be organised and sub-groups set up to study specific issues within local Schengen cooperation.

5. Summary reports of local Schengen cooperation meetings shall be drawn up systematically and circulated locally. The Commission may delegate the drawing up of the reports to a Member State. The consulates of each Member State shall forward the reports to their central authorities.

On the basis of these reports, the Commission shall draw up an annual report within each jurisdiction to be submitted to the European Parliament and the Council.

6. Representatives of the consulates of Member States not applying the Community *acquis* in relation to visas, or of third countries, may on an ad hoc basis be invited to participate in meetings for the exchange of information on issues relating to visas.

TITLE VI

FINAL PROVISIONS

Article 49

Arrangements in relation to the Olympic Games and Paralympic Games

Member States hosting the Olympic Games and Paralympic Games shall apply the specific procedures and conditions facilitating the issuing of visas set out in Annex XI.

Article 50

Amendments to the Annexes

Measures designed to amend non-essential elements of this Regulation and amending Annexes I, II, III, IV, V, VI, VII, VIII and XII shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 52(3).

Article 51

Instructions on the practical application of the Visa Code

Operational instructions on the practical application of the provisions of this Regulation shall be drawn up in accordance with the procedure referred to in Article 52(2).

Article 52

Committee procedure

1. The Commission shall be assisted by a committee (the Visa Committee).

2. Where reference is made to this paragraph, Articles 5 and 7 of Decision 1999/468/EC shall apply, having regard to the provisions of Article 8 thereof and provided that the implementing measures adopted in accordance with this procedure do not modify the essential provisions of this Regulation.

The period laid down in Article 5(6) of Decision 1999/468/EC shall be three months.

3. Where reference is made to this paragraph, Articles 5a(1) to (4) and 7 of Decision 1999/468/EC shall apply, having regard to the provisions of Article 8 thereof.

Article 53

Notification

1. Member States shall notify the Commission of:

- (a) representation arrangements referred to in Article 8;
- (b) third countries whose nationals are required by individual Member States to hold an airport transit visa when passing through the international transit areas of airports situated on their territory, as referred to in Article 3;
- (c) the national form for proof of sponsorship and/or private accommodation referred to in Article 14(4), if applicable;
- (d) the list of third countries for which prior consultation referred to in Article 22(1) is required;
- (e) the list of third countries for which information referred to in Article 31(1) is required;
- (f) the additional national entries in the 'comments' section of the visa sticker, as referred to in Article 27(2);
- (g) authorities competent for extending visas, as referred to in Article 33(5);
- (h) the forms of cooperation chosen as referred to in Article 40;
- (i) statistics compiled in accordance with Article 46 and Annex XII.

2. The Commission shall make the information notified pursuant to paragraph 1 available to the Member States and the public via a constantly updated electronic publication.

Article 54

Amendments to Regulation (EC) No 767/2008

Regulation (EC) No 767/2008 is hereby amended as follows:

1. Article 4(1) shall be amended as follows:

(a) point (a) shall be replaced by the following:

'(a) "uniform visa" as defined in Article 2(3) 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) (*);

(*) OJ L 243, 15.9.2009, p. 1.;

(b) point (b) shall be deleted;

(c) point (c) shall be replaced by the following:

'(c) "airport transit visa" as defined in Article 2(5) of Regulation (EC) No 810/2009;';

(d) point (d) shall be replaced by the following:

'(d) "visa with limited territorial validity" as defined in Article 2(4) of Regulation (EC) No 810/2009;';

(e) point (e) shall be deleted;

2. in Article 8(1), the words 'On receipt of an application', shall be replaced by the following:

'When the application is admissible according to Article 19 of Regulation (EC) No 810/2009';

3. Article 9 shall be amended as follows:

(a) the heading shall be replaced by the following:

'Data to be entered on application';

(b) paragraph 4 shall be amended as follows:

(i) point (a) shall be replaced by the following:

'(a) surname (family name), surname at birth (former family name(s)), first name(s) (given name(s)); date of birth, place of birth, country of birth, sex;';

(ii) point (e) shall be deleted;

(iii) point (g) shall be replaced by the following:

'(g) Member State(s) of destination and duration of the intended stay or transit;';

(iv) point (h) shall be replaced by the following:

‘(h) main purpose(s) of the journey;’

(v) point (i) shall be replaced by the following:

‘(i) intended date of arrival in the Schengen area and intended date of departure from the Schengen area;’

(vi) point (j) shall be replaced by the following:

‘(j) Member State of first entry;’

(vii) point (k) shall be replaced by the following:

‘(k) the applicant’s home address;’

(viii) in point (l), the word ‘school’ shall be replaced by: ‘educational establishment’;

(ix) in point (m), the words ‘father and mother’ shall be replaced by ‘parental authority or legal guardian’;

4. the following point shall be added to Article 10(1):

‘(k) if applicable, the information indicating that the visa sticker has been filled in manually.’;

5. in Article 11, the introductory paragraph shall be replaced by the following:

‘Where the visa authority representing another Member State discontinues the examination of the application, it shall add the following data to the application file.’;

6. Article 12 shall be amended as follows:

(a) in paragraph 1, point (a) shall be replaced by the following:

‘(a) status information indicating that the visa has been refused and whether that authority refused it on behalf of another Member State.’;

(b) paragraph 2 shall be replaced by the following:

‘2. The application file shall also indicate the ground(s) for refusal of the visa, which shall be one or more of the following:

(a) the applicant:

(i) presents a travel document which is false, counterfeit or forged;

(ii) does not provide justification for the purpose and conditions of the intended stay;

(iii) does not provide proof of sufficient means of subsistence, both for the duration of the

intended stay and for the return to his country of origin or residence, or for the transit to a third country into which he is certain to be admitted, or is not in a position to acquire such means lawfully;

(iv) has already stayed for three months during the current six-month period on the territory of the Member States on a basis of a uniform visa or a visa with limited territorial validity;

(v) is a person for whom an alert has been issued in the SIS for the purpose of refusing entry;

(vi) is considered to be a threat to public policy, internal security or public health as defined in Article 2(19) of the Schengen Borders Code or to the international relations of any of the Member States, in particular where an alert has been issued in Member States’ national databases for the purpose of refusing entry on the same grounds;

(vii) does not provide proof of holding adequate and valid travel medical insurance, where applicable;

(b) the information submitted regarding the justification for the purpose and conditions of the intended stay was not reliable;

(c) the applicant’s intention to leave the territory of the Member States before the expiry of the visa could not be ascertained;

(d) sufficient proof that the applicant has not been in a position to apply for a visa in advance justifying application for a visa at the border was not provided.’;

7. Article 13 shall be replaced by the following:

‘Article 13

Data to be added for a visa annulled or revoked

1. Where a decision has been taken to annul or to revoke a visa, the visa authority that has taken the decision shall add the following data to the application file:

(a) status information indicating that the visa has been annulled or revoked;

(b) authority that annulled or revoked the visa, including its location;

(c) place and date of the decision.

2. The application file shall also indicate the ground(s) for annulment or revocation, which shall be:

- (a) one or more of the ground(s) listed in Article 12(2);
- (b) the request of the visa holder to revoke the visa;

8. Article 14 shall be amended as follows:

(a) paragraph 1 shall be amended as follows:

- (i) the introductory paragraph shall be replaced by the following:

'1. Where a decision has been taken to extend the period of validity and/or the duration of stay of an issued visa, the visa authority which extended the visa shall add the following data to the application file:;

- (ii) point (d) shall be replaced by the following:

'(d) the number of the visa sticker of the extended visa;';

- (iii) point (g) shall be replaced by the following:

'(g) the territory in which the visa holder is entitled to travel, if the territorial validity of the extended visa differs from that of the original visa;';

(b) in paragraph 2, point (c) shall be deleted;

9. in Article 15(1), the words 'extend or shorten the validity of the visa' shall be replaced by 'or extend the visa';

10. Article 17 shall be amended as follows:

(a) point 4 shall be replaced by the following:

'4. Member State of first entry;';

(b) point 6 shall be replaced by the following:

'6. the type of visa issued;';

(c) point 11 shall be replaced by the following:

'11. main purpose(s) of the journey;';

11. in Article 18(4)(c), Article 19(2)(c), Article 20(2)(d), Article 22(2)(d), the words 'or shortened' shall be deleted;

12. in Article 23(1)(d), the word 'shortened' shall be deleted.

Article 55

Amendments to Regulation (EC) No 562/2006

Annex V, Part A of Regulation (EC) No 562/2006 is hereby amended as follows:

(a) point 1(c), shall be replaced by the following:

'(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) (*);

(*) OJ L 243, 15.9.2009, p. 1.;

(b) point 2 shall be deleted.

Article 56

Repeals

1. Articles 9 to 17 of the Convention implementing the Schengen Agreement of 14 June 1985 shall be repealed.

2. The following shall be repealed:

(a) Decision of the Schengen Executive Committee of 28 April 1999 on the definitive versions of the Common Manual and the Common Consular Instructions (SCH/Com-ex (99) 13 (the Common Consular Instructions, including the Annexes);

(b) Decisions of the Schengen Executive Committee of 14 December 1993 extending the uniform visa (SCH/Com-ex (93) 21) and on the common principles for cancelling, rescinding or shortening the length of validity of the uniform visa (SCH/Com-ex (93) 24), Decision of the Schengen Executive Committee of 22 December 1994 on the exchange of statistical information on the issuing of uniform visas (SCH/Com-ex (94) 25), Decision of the Schengen Executive Committee of 21 April 1998 on the exchange of statistics on issued visas (SCH/Com-ex (98) 12) and Decision of the Schengen Executive Committee of 16 December 1998 on the introduction of a harmonised form providing proof of invitation, sponsorship and accommodation (SCH/Com-ex (98) 57);

(c) Joint Action 96/197/JHA of 4 March 1996 on airport transit arrangements ⁽¹⁾;

(d) Council Regulation (EC) No 789/2001 of 24 April 2001 reserving to the Council implementing powers with regard to certain detailed provisions and practical procedures for examining visa applications ⁽²⁾;

⁽¹⁾ OJ L 63, 13.3.1996, p. 8.

⁽²⁾ OJ L 116, 26.4.2001, p. 2.

- (e) Council Regulation (EC) No 1091/2001 of 28 May 2001 on freedom of movement with a long-stay visa ⁽¹⁾;
- (f) 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 ⁽²⁾;
- (g) Article 2 of Regulation (EC) No 390/2009 of the European Parliament and of the Council of 23 April 2009 amending the Common Consular Instructions on visas for diplomatic and consular posts in relation to the introduction of biometrics including provisions on the organisation of the reception and processing of visa applications ⁽³⁾.

3. References to repealed instruments shall be construed as references to this Regulation and read in accordance with the correlation table in Annex XIII.

Article 57

Monitoring and evaluation

1. Two years after all the provisions of this Regulation have become applicable, the Commission shall produce an evaluation of its application. This overall evaluation shall include an examination of the results achieved against objectives and of the implementation of the provisions of this Regulation, without prejudice to the reports referred to in paragraph 3.
2. The Commission shall transmit the evaluation referred to in paragraph 1 to the European Parliament and the Council. On the basis of the evaluation, the Commission shall submit, if necessary, appropriate proposals with a view to amending this Regulation.
3. The Commission shall present, three years after the VIS is brought into operation and every four years thereafter, a report to the European Parliament and to the Council on the implementation of Articles 13, 17, 40 to 44 of this Regulation, including the implementation of the collection and use of biometric identifiers, the suitability of the ICAO standard

chosen, compliance with data protection rules, experience with external service providers with specific reference to the collection of biometric data, the implementation of the 59-month rule for the copying of fingerprints and the organisation of the procedures relating to applications. The report shall also include, on the basis of Article 17(12), (13) and (14) and of Article 50(4) of the VIS Regulation, the cases in which fingerprints could factually not be provided or were not required to be provided for legal reasons, compared with the number of cases in which fingerprints were taken. The report shall include information on cases in which a person who could factually not provide fingerprints was refused a visa. The report shall be accompanied, where necessary, by appropriate proposals to amend this Regulation.

4. The first of the reports referred to in paragraph 3 shall also address the issue of the sufficient reliability for identification and verification purposes of fingerprints of children under the age of 12 and, in particular, how fingerprints evolve with age, on the basis of the results of a study carried out under the responsibility of the Commission.

Article 58

Entry into force

1. This Regulation shall enter into force on the 20th day following its publication in the *Official Journal of the European Union*.
2. It shall apply from 5 April 2010.
3. Article 52 and Article 53(1)(a) to (h) and (2) shall apply from 5 October 2009.
4. As far as the Schengen Consultation Network (Technical Specifications) is concerned, Article 56(2)(d) shall apply from the date referred to in Article 46 of the VIS Regulation.
5. Article 32(2) and (3), Article 34(6) and (7) and Article 35(7) shall apply from 5 April 2011.

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

Done at Brussels, 13 July 2009.

For the European Parliament
The President
H.-G. PÖTTERING

For the Council
The President
E. ERLANDSSON

⁽¹⁾ OJ L 150, 6.6.2001, p. 4.

⁽²⁾ OJ L 64, 7.3.2003, p. 1.

⁽³⁾ OJ L 131, 28.5.2009, p. 1.

ANNEX I

Harmonised application form ⁽¹⁾

	<h2 style="margin: 0;">Application for Schengen Visa</h2> <p style="margin: 0;">This application form is free</p>	PHOTO
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1. Surname (Family name) (x)				For official use only Date of application: Visa application number: Application lodged at <input type="checkbox"/> Embassy/consulate <input type="checkbox"/> CAC <input type="checkbox"/> Service provider <input type="checkbox"/> Commercial intermediary <input type="checkbox"/> Border Name: <input type="checkbox"/> Other File handled by: Supporting documents: <input type="checkbox"/> Travel document <input type="checkbox"/> Means of subsistence <input type="checkbox"/> Invitation <input type="checkbox"/> Means of transport <input type="checkbox"/> TMI <input type="checkbox"/> Other: Visa decision: <input type="checkbox"/> Refused <input type="checkbox"/> Issued: <input type="checkbox"/> A <input type="checkbox"/> C <input type="checkbox"/> LTV <input type="checkbox"/> Valid From Until Number of entries: <input type="checkbox"/> 1 <input type="checkbox"/> 2 <input type="checkbox"/> Multiple Number of days:
2. Surname at birth (Former family name(s)) (x)				
3. First name(s) (Given name(s)) (x)				
4. Date of birth (day-month-year)	5. Place of birth	7. Current nationality Nationality at birth, if different:		
	6. Country of birth			
8. Sex <input type="checkbox"/> Male <input type="checkbox"/> Female		9. Marital status <input type="checkbox"/> Single <input type="checkbox"/> Married <input type="checkbox"/> Separated <input type="checkbox"/> Divorced <input type="checkbox"/> Widow(er) <input type="checkbox"/> Other (please specify)		
10. In the case of minors: Surname, first name, address (if different from applicant's) and nationality of parental authority/legal guardian				
11. National identity number, where applicable				
12. Type of travel document <input type="checkbox"/> Ordinary passport <input type="checkbox"/> Diplomatic passport <input type="checkbox"/> Service passport <input type="checkbox"/> Official passport <input type="checkbox"/> Special passport <input type="checkbox"/> Other travel document (please specify)				
13. Number of travel document	14. Date of issue	15. Valid until	16. Issued by	
17. Applicant's home address and e-mail address		Telephone number(s)		
18. Residence in a country other than the country of current nationality <input type="checkbox"/> No <input type="checkbox"/> Yes. Residence permit or equivalent No Valid until				
* 19. Current occupation				
* 20. Employer and employer's address and telephone number. For students, name and address of educational establishment.				
21. Main purpose(s) of the journey: <input type="checkbox"/> Tourism <input type="checkbox"/> Business <input type="checkbox"/> Visiting family or friends <input type="checkbox"/> Cultural <input type="checkbox"/> Sports <input type="checkbox"/> Official visit <input type="checkbox"/> Medical reasons <input type="checkbox"/> Study <input type="checkbox"/> Transit <input type="checkbox"/> Airport transit <input type="checkbox"/> Other (please specify)				

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

22. Member State(s) of destination	23. Member State of first entry	
24. Number of entries requested <input type="checkbox"/> Single entry <input type="checkbox"/> Two entries <input type="checkbox"/> Multiple entries	25. Duration of the intended stay or transit Indicate number of days	

The fields marked with * shall not be filled in by family members of EU, EEA or CH citizens (spouse, child or dependent ascendant) while exercising their right to free movement. Family members of EU, EEA or CH citizens shall present documents to prove this relationship and fill in fields No 34 and 35.

(x) Fields 1-3 shall be filled in in accordance with the data in the travel document.

26. Schengen visas issued during the past three years <input type="checkbox"/> No <input type="checkbox"/> Yes. Date(s) of validity from to	
27. Fingerprints collected previously for the purpose of applying for a Schengen visa <input type="checkbox"/> No <input type="checkbox"/> Yes Date, if known	
28. Entry permit for the final country of destination, where applicable Issued by Valid from until	
29. Intended date of arrival in the Schengen area	30. Intended date of departure from the Schengen area
* 31. Surname and first name of the inviting person(s) in the Member State(s). If not applicable, name of hotel(s) or temporary accommodation(s) in the Member State(s)	
Address and e-mail address of inviting person(s)/hotel(s)/temporary accommodation(s)	Telephone and telefax
* 32. Name and address of inviting company/organisation	Telephone and telefax of company/organisation
Surname, first name, address, telephone, telefax, and e-mail address of contact person in company/organisation	
* 33. Cost of travelling and living during the applicant's stay is covered	
<input type="checkbox"/> by the applicant himself/herself Means of support <input type="checkbox"/> Cash <input type="checkbox"/> Traveller's cheques <input type="checkbox"/> Credit card <input type="checkbox"/> Prepaid accommodation <input type="checkbox"/> Prepaid transport <input type="checkbox"/> Other (please specify)	<input type="checkbox"/> by a sponsor (host, company, organisation), please specify <input type="checkbox"/> referred to in field 31 or 32 <input type="checkbox"/> other (please specify) Means of support <input type="checkbox"/> Cash <input type="checkbox"/> Accommodation provided <input type="checkbox"/> All expenses covered during the stay <input type="checkbox"/> Prepaid transport <input type="checkbox"/> Other (please specify)

34. Personal data of the family member who is an EU, EEA or CH citizen		
Surname		First name(s)
Date of birth	Nationality	Number of travel document or ID card
35. Family relationship with an EU, EEA or CH citizen <input type="checkbox"/> spouse <input type="checkbox"/> child <input type="checkbox"/> grandchild <input type="checkbox"/> dependent ascendant		
36. Place and date		37. Signature (for minors, signature of parental authority/legal guardian)

I am aware that the visa fee is not refunded if the visa is refused.

Applicable in case a multiple-entry visa is applied for (cf. field No 24):

I am aware of the need to have an adequate travel medical insurance for my first stay and any subsequent visits to the territory of Member States.

I am aware of and consent to the following: the collection of the data required by this application form and the taking of my photograph and, if applicable, the taking of fingerprints, are mandatory for the examination of the visa application; and any personal data concerning me which appear on the visa application form, as well as my fingerprints and my photograph will be supplied to the relevant authorities of the Member States and processed by those authorities, for the purposes of a decision on my visa application.

Such data as well as data concerning the decision taken on my application or a decision whether to annul, revoke or extend a visa issued will be entered into, and stored in the Visa Information System (VIS) ⁽¹⁾ for a maximum period of five years, during which it will be accessible to the visa authorities and the authorities competent for carrying out checks on visas at external borders and within the Member States, immigration and asylum authorities in the Member States for the purposes of verifying whether the conditions for the legal entry into, stay and residence on the territory of the Member States are fulfilled, of identifying persons who do not or who no longer fulfil these conditions, of examining an asylum application and of determining responsibility for such examination. Under certain conditions the data will be also available to designated authorities of the Member States and to Europol for the purpose of the prevention, detection and investigation of terrorist offences and of other serious criminal offences. The authority of the Member State responsible for processing the data is: [...].

I am aware that I have the right to obtain in any of the Member States notification of the data relating to me recorded in the VIS and of the Member State which transmitted the data, and to request that data relating to me which are inaccurate be corrected and that data relating to me processed unlawfully be deleted. At my express request, the authority examining my application will inform me of the manner in which I may exercise my right to check the personal data concerning me and have them corrected or deleted, including the related remedies according to the national law of the State concerned. The national supervisory authority of that Member State [contact details] will hear claims concerning the protection of personal data.

I declare that to the best of my knowledge all particulars supplied by me are correct and complete. I am aware that any false statements will lead to my application being rejected or to the annulment of a visa already granted and may also render me liable to prosecution under the law of the Member State which deals with the application.

I undertake to leave the territory of the Member States before the expiry of the visa, if granted. I have been informed that possession of a visa is only one of the prerequisites for entry into the European territory of the Member States. The mere fact that a visa has been granted to me does not mean that I will be entitled to compensation if I fail to comply with the relevant provisions of Article 5(1) of Regulation (EC) No 562/2006 (Schengen Borders Code) and I am therefore refused entry. The prerequisites for entry will be checked again on entry into the European territory of the Member States.

Place and date	Signature (for minors, signature of parental authority/legal guardian):
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⁽¹⁾ In so far as the VIS is operational.

ANNEX II

Non-exhaustive list of supporting documents

The supporting documents referred to in Article 14, to be submitted by visa applicants may include the following:

A. DOCUMENTATION RELATING TO THE PURPOSE OF THE JOURNEY

1. for business trips:
 - (a) an invitation from a firm or an authority to attend meetings, conferences or events connected with trade, industry or work;
 - (b) other documents which show the existence of trade relations or relations for work purposes;
 - (c) entry tickets for fairs and congresses, if appropriate;
 - (d) documents proving the business activities of the company;
 - (e) documents proving the applicant's employment status in the company;
2. for journeys undertaken for the purposes of study or other types of training:
 - (a) a certificate of enrolment at an educational establishment for the purposes of attending vocational or theoretical courses within the framework of basic and further training;
 - (b) student cards or certificates of the courses to be attended;
3. for journeys undertaken for the purposes of tourism or for private reasons:
 - (a) documents relating to accommodation:
 - an invitation from the host if staying with one,
 - a document from the establishment providing accommodation or any other appropriate document indicating the accommodation envisaged;
 - (b) documents relating to the itinerary:
 - confirmation of the booking of an organised trip or any other appropriate document indicating the envisaged travel plans,
 - in the case of transit: visa or other entry permit for the third country of destination; tickets for onward journey;
4. for journeys undertaken for political, scientific, cultural, sports or religious events or other reasons:
 - invitation, 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 journey;
5. for journeys of members of official delegations who, following an official invitation addressed to the government of the third country concerned, participate in meetings, consultations, negotiations or exchange programmes, as well as in events held in the territory of a Member State by intergovernmental organisations:
 - a letter issued by an authority of the third country concerned confirming that the applicant is a member of the official delegation travelling to a Member State to participate in the abovementioned events, accompanied by a copy of the official invitation;
6. for journeys undertaken for medical reasons:
 - an official document of the medical institution confirming necessity for medical care in that institution and proof of sufficient financial means to pay for the medical treatment.

B. DOCUMENTATION ALLOWING FOR THE ASSESSMENT OF THE APPLICANT'S INTENTION TO LEAVE THE TERRITORY OF THE MEMBER STATES

1. reservation of or return or round ticket;
2. proof of financial means in the country of residence;
3. proof of employment: bank statements;
4. proof of real estate property;
5. proof of integration into the country of residence: family ties; professional status.

C. DOCUMENTATION IN RELATION TO THE APPLICANT'S FAMILY SITUATION

1. consent of parental authority or legal guardian (when a minor does not travel with them);
 2. proof of family ties with the host/inviting person.
-

ANNEX III

UNIFORM FORMAT AND USE OF THE STAMP INDICATING THAT A VISA APPLICATION IS ADMISSIBLE

... visa ... ⁽¹⁾

xx/xx/xxxx ⁽²⁾ ... ⁽³⁾

Example:

C visa FR

22.4.2009 Consulat de France

Djibouti

The stamp shall be placed on the first available page that contains no entries or stamps in the travel document.

⁽¹⁾ Code of the Member State examining the application. The codes as set out in Annex VII point 1.1 are used.

⁽²⁾ Date of application (eight digits: xx day, xx month, xxxx year).

⁽³⁾ Authority examining the visa application.

ANNEX IV

Common list of third countries listed in Annex I to Regulation (EC) No 539/2001, whose nationals are required to be in possession of an airport transit visa when passing through the international transit area of airports situated on the territory of the Member States

AFGHANISTAN

BANGLADESH

DEMOCRATIC REPUBLIC OF THE CONGO

ERITREA

ETHIOPIA

GHANA

IRAN

IRAQ

NIGERIA

PAKISTAN

SOMALIA

SRI LANKA

ANNEX V

LIST OF RESIDENCE PERMITS ENTITLING THEIR HOLDERS TO TRANSIT THROUGH THE AIRPORTS OF MEMBER STATES WITHOUT BEING REQUIRED TO HOLD AN AIRPORT TRANSIT VISA

ANDORRA:

- Tarjeta provisional de estancia y de trabajo (provisional residence and work permit) (white). These are issued to seasonal workers; the period of validity depends on the duration of employment, but never exceeds six months. This permit is not renewable,
- Tarjeta de estancia y de trabajo (residence and work permit) (white). This permit is issued for six months and may be renewed for another year,
- Tarjeta de estancia (residence permit) (white). This permit is issued for six months and may be renewed for another year,
- Tarjeta temporal de residencia (temporary residence permit) (pink). This permit is issued for one year and may be renewed twice, each time for another year,
- Tarjeta ordinaria de residencia (ordinary residence permit) (yellow). This permit is issued for three years and may be renewed for another three years,
- Tarjeta privilegiada de residencia (special residence permit) (green). This permit is issued for five years and is renewable, each time for another five years,
- Autorización de residencia (residence authorisation) (green). This permit is issued for one year and is renewable, each time for another three years,
- Autorización temporal de residencia y de trabajo (temporary residence and work authorisation) (pink). This permit is issued for two years and may be renewed for another two years,
- Autorización ordinaria de residencia y de trabajo (ordinary residence and work authorisation) (yellow). This permit is issued for five years,
- Autorización privilegiada de residencia y de trabajo (special residence and work authorisation) (green). This permit is issued for 10 years and is renewable, each time for another 10 years.

CANADA:

- Permanent resident card (plastic card).

JAPAN:

- Re-entry permit to Japan.

SAN MARINO:

- Permesso di soggiorno ordinario (validità illimitata) (ordinary residence permit (no expiry date)),
- Permesso di soggiorno continuativo speciale (validità illimitata) (special permanent residence permit (no expiry date)),
- Carta d'identità de San Marino (validità illimitata) (San Marino identity card (no expiry date)).

UNITED STATES OF AMERICA:

- Form I-551 permanent resident card (valid for 2 to 10 years),
- Form I-551 Alien registration receipt card (valid for 2 to 10 years),
- Form I-551 Alien registration receipt card (no expiry date),
- Form I-327 Re-entry document (valid for two years — issued to holders of a I-551),
- Resident alien card (valid for 2 or 10 years or no expiry date. This document guarantees the holder's return only if his stay outside the USA has not exceeded one year),
- Permit to re-enter (valid for two years. This document guarantees the holder's return only if his stay outside the USA has not exceeded two years),
- Valid temporary residence stamp in a valid passport (valid for one year from the date of issue).

ANNEX VI

STANDARD FORM FOR NOTIFYING AND MOTIVATING REFUSAL, ANNULMENT
OR REVOCATION OF A VISA⁽¹⁾

REFUSAL/ANNULMENT/REVOCATION OF VISA

Ms/Mr _____,

The _____ Embassy/Consulate-General/Consulate/[other competent authority] in _____
_____ [on behalf of (name of represented Member State)];

[Other competent authority] of _____

The authorities responsible for checks on persons at _____

has/have

examined your visa application;

examined your visa, number: _____, issued: _____ [day/month/year].

The visa has been refused The visa has been annulled The visa has been revoked

This decision is based on the following reason(s):

1. a false/counterfeit/forged travel document was presented
2. justification for the purpose and conditions of the intended stay was not provided
3. you have not provided proof of sufficient means of subsistence, for the duration of the intended stay or for the return to the country of origin or residence, or for the transit to a third country into which you are certain to be admitted, or you are not in a position to acquire such means lawfully
4. you have already stayed for three months during the current six-month period on the territory of the Member States on the basis of a uniform visa or a visa with limited territorial validity
5. an alert has been issued in the Schengen Information System (SIS) for the purpose of refusing entry by _____ (indication of Member State)
6. one or more Member State(s) consider you to be a threat to public policy, internal security, public health as defined in Article 2(19) of Regulation (EC) No 562/2006 (Schengen Borders Code) or the international relations of one or more of the Member States)
7. proof of holding an adequate and valid travel medical insurance was not provided
8. the information submitted regarding the justification for the purpose and conditions of the intended stay was not reliable
9. your intention to leave the territory of the Member States before the expiry of the visa could not be ascertained

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

10. sufficient proof that you have not been in a position to apply for a visa in advance, justifying application for a visa at the border, was not provided
11. revocation of the visa was requested by the visa holder ⁽¹⁾.

Remarks:

Comments: The person concerned may appeal against the decision to refuse/annul/revoke a visa as provided for in national law. The person concerned must receive a copy of this document. Each Member State must indicate the references to the national law and the procedure relating to the right of appeal, including the competent authority with which an appeal may be lodged, as well as the time limit for lodging such an appeal.

Date and stamp of embassy/consulate-general/consulate/of the authorities responsible for checks on persons/of other competent authorities

Signature of person concerned ⁽²⁾

⁽¹⁾ Revocation of a visa based on this reason is not subject to the right of appeal.

⁽²⁾ If required by national law.

ANNEX VII

FILLING IN THE VISA STICKER

1. Mandatory entries section

1.1. 'VALID FOR' heading:

This heading indicates the territory in which the visa holder is entitled to travel.

This heading may be completed in one of the following ways only:

(a) Schengen States;

(b) Schengen State or Schengen States to whose territory the validity of the visa is limited (in this case the following abbreviations are used):

BE	BELGIUM
CZ	CZECH REPUBLIC
DK	DENMARK
DE	GERMANY
EE	ESTONIA
GR	GREECE
ES	SPAIN
FR	FRANCE
IT	ITALY
LV	LATVIA
LT	LITHUANIA
LU	LUXEMBOURG
HU	HUNGARY
MT	MALTA
NL	NETHERLANDS
AT	AUSTRIA
PL	POLAND
PT	PORTUGAL
SI	SLOVENIA
SK	SLOVAKIA
FI	FINLAND
SE	SWEDEN
IS	ICELAND
NO	NORWAY
CH	SWITZERLAND

1.2. When the sticker is used to issue a uniform visa this heading is filled in using the words 'Schengen States', in the language of the issuing Member State.

1.3. When the sticker is used to issue a visa with limited territorial validity pursuant to Article 25(1) of this Regulation this heading is filled in with the name(s) of the Member State(s) to which the visa holder's stay is limited, in the language of the issuing Member State.

1.4. When the sticker is used to issue a visa with limited territorial validity pursuant to Article 25(3) of this Regulation, the following options for the codes to be entered may be used:

(a) entry of the codes for the Member States concerned;

- (b) entry of the words 'Schengen States', followed in brackets by the minus sign and the codes of the Member States for whose territory the visa is not valid;
- (c) in case the 'valid for' field is not sufficient for entering all codes for the Member States (not) recognising the travel document concerned the font size of the letters used is reduced.

2. 'FROM ... TO' heading:

This heading indicates the period of the visa holder's stay as authorised by the visa.

The date from which the visa holder may enter the territory for which the visa is valid is written as below, following the word 'FROM':

- the day is written using two digits, the first of which is a zero if the day in question is a single digit,
- horizontal dash,
- the month is written using two digits, the first of which is a zero if the month in question is a single digit,
- horizontal dash,
- the year is written using two digits, which correspond with the last two digits of the year.

For example: 05-12-07 = 5 December 2007.

The date of the last day of the period of the visa holder's authorised stay is entered after the word 'TO' and is written in the same way as the first date. The visa holder must have left the territory for which the visa is valid by midnight on that date.

3. 'NUMBER OF ENTRIES' heading:

This heading shows the number of times the visa holder may enter the territory for which the visa is valid, i.e. it refers to the number of periods of stay which may be spread over the entire period of validity, see 4.

The number of entries may be one, two or more. This number is written to the right-hand side of the preprinted part, using '01', '02' or the abbreviation 'MULT', where the visa authorises more than two entries.

When a multiple airport transit visa is issued pursuant to Article 26(3) of this Regulation, the visa's validity is calculated as follows: first date of departure plus six months.

The visa is no longer valid when the total number of exits made by the visa holder equals the number of authorised entries, even if the visa holder has not used up the number of days authorised by the visa.

4. 'DURATION OF VISIT ... DAYS' heading:

This heading indicates the number of days during which the visa holder may stay in the territory for which the visa is valid. This stay may be continuous or, depending on the number of days authorised, spread over several periods between the dates mentioned under 2, bearing in mind the number of entries authorised under 3.

The number of days authorised is written in the blank space between 'DURATION OF VISIT' and 'DAYS', in the form of two digits, the first of which is a zero if the number of days is less than 10.

The maximum number of days that may be entered under this heading is 90.

When a visa is valid for more than six months, the duration of stays is 90 days in every six-month period.

5. 'ISSUED IN ... ON ...' heading:

This heading gives the name of the location where the issuing authority is situated. The date of issue is indicated after 'ON'.

The date of issue is written in the same way as the date referred to in 2.

6. 'PASSPORT NUMBER' heading:

This heading indicates the number of the travel document to which the visa sticker is affixed.

In case the person to whom the visa is issued is included in the passport of the spouse, parental authority or legal guardian, the number of the travel document of that person is indicated.

When the applicant's travel document is not recognised by the issuing Member State, the uniform format for the separate sheet for affixing visas is used for affixing the visa.

The number to be entered under this heading, if the visa sticker is affixed to the separate sheet, is not the passport number but the same typographical number as appears on the form, made up of six digits.

7. 'TYPE OF VISA' heading:

In order to facilitate matters for the control authorities, this heading specifies the type of visa using the letters A, C and D as follows:

A: airport transit visa (as defined in Article 2(5) of this Regulation)

C: visa (as defined in Article 2(2) of this Regulation)

D: long-stay visa

8. 'SURNAME AND FIRST NAME' heading:

The first word in the 'surname' box followed by the first word in the 'first name' box of the visa holder's travel document is written in that order. The issuing authority verifies that the name and first name which appear in the travel document and which are to be entered under this heading and in the section to be electronically scanned are the same as those appearing in the visa application. If the number of characters of the surname and first name exceeds the number of spaces available, the excess characters are replaced by a dot (·).

9. (a) Mandatory entries to be added in the 'COMMENTS' section

— in the case of a visa issued on behalf of another Member State pursuant to Article 8, the following mention is added: 'R/[Code of represented Member State]',

— in the case of a visa issued for the purpose of transit, the following mention is added: 'TRANSIT';

(b) National entries in 'COMMENTS' section

This section also contains the comments in the language of the issuing Member State relating to national provisions. However, such comments shall not duplicate the mandatory comments referred to in point 1;

(c) Section for the photograph

The visa holder's photograph, in colour, shall be integrated in the space reserved for that purpose.

The following rules shall be observed with respect to the photograph to be integrated into the visa sticker.

The size of the head from chin to crown shall be between 70 % and 80 % of the vertical dimension of the surface of the photograph.

The minimum resolution requirements shall be:

— 300 pixels per inch (ppi), uncompressed, for scanning,

— 720 dots per inch (dpi) for colour printing of photos.

10. Machine-readable zone

This section is made up of two lines of 36 characters (OCR B-10 cpi).

First line: 36 characters (mandatory)

Positions	Number of characters	Heading contents	Specifications
1-2	2	Type of document	First character: V Second character: code indicating type of visa (A, C or D)
3-5	3	Issuing State	ICAO alphabetic code 3-character: BEL, CHE, CZE, DNK, D<<, EST, GRC, ESP, FRA, ITA, LVA, LTU, LUX, HUN, MLT, NLD, AUT, POL, PRT, SVN, SVK, FIN, SWE, ISL, NOR
6-36	31	Surname and first name	The surname should be separated from the first names by 2 symbols (<<); individual components of the name should be separated by one symbol (<); spaces which are not needed should be filled in with one symbol (<)

Second line: 36 characters (mandatory)

Positions	Number of characters	Heading contents	Specifications
1	9	Visa number	This is the number printed in the top right-hand corner of the sticker
10	1	Control character	This character is the result of a complex calculation, based on the previous area according to an algorithm defined by the ICAO
11	3	Applicant's nationality	Alphabetic coding according to ICAO 3-character codes
14	6	Date of birth	The order followed is YYMMDD where: YY = year (mandatory) MM = month or << if unknown DD = day or << if unknown
20	1	Control character	This character is the result of a complex calculation, based on the previous area according to an algorithm defined by the ICAO
21	1	Sex	F = Female, M = Male, < = Not specified
22	6	Date on which the visa's validity ends	The order followed is YYMMDD without a filler
28	1	Control character	This character is the result of a complex calculation, based on the previous area according to an algorithm defined by the ICAO
29	1	Territorial validity	(a) For LTV visas, insert the letter T (b) For uniform visas insert the filler <
30	1	Number of entries	1, 2, or M
31	2	Duration of stay	(a) Short stay: number of days should be inserted in the visual reading area (b) Long stay: <<
33	4	Start of validity	The structure is MMDD without any filler.

ANNEX VIII

AFFIXING THE VISA STICKER

1. The visa sticker shall be affixed to the first page of the travel document that contains no entries or stamps — other than the stamp indicating that an application is admissible.
 2. The sticker shall be aligned with and affixed to the edge of the page of the travel document. The machine-readable zone of the sticker shall be aligned with the edge of the page.
 3. The stamp of the issuing authorities shall be placed in the 'COMMENTS' section in such a manner that it extends beyond the sticker onto the page of the travel document.
 4. Where it is necessary to dispense with the completion of the section to be scanned electronically, the stamp may be placed in this section to render it unusable. The size and content of the stamp to be used shall be determined by the national rules of the Member State.
 5. To prevent re-use of a visa sticker affixed to the separate sheet for affixing a visa, the seal of the issuing authorities shall be stamped to the right, straddling the sticker and the separate sheet, in such a way as neither to impede reading of the headings and the comments nor to enter the machine-readable zone.
 6. The extension of a visa, pursuant to Article 33 of this Regulation, shall take the form of a visa sticker. The seal of the issuing authorities shall be affixed to the visa sticker.
-

ANNEX IX

PART 1

Rules for issuing visas at the border to seafarers in transit subject to visa requirements

These rules relate to the exchange of information between the competent authorities of the Member States with respect to seafarers in transit subject to visa requirements. Insofar as a visa is issued at the border on the basis of the information that has been exchanged, the responsibility lies with the Member State issuing the visa.

For the purposes of these rules:

'Member State port': means a port constituting an external border of a Member State;

'Member State airport': means an airport constituting an external border of a Member State.

I. Signing on a vessel berthed or expected at a Member State port (entry into the territory of the Member States)

- the shipping company or its agent shall inform the competent authorities at the Member State port where the ship is berthed or expected that seafarers subject to visa requirements are due to enter via a Member State airport, land or sea border. The shipping company or its agent shall sign a guarantee in respect of those seafarers that all expenses for the stay and, if necessary, for the repatriation of the seafarers will be covered by the shipping company,
- those competent authorities shall verify as soon as possible whether the information provided by the shipping company or its agent is correct and shall examine whether the other conditions for entry into the territory of the Member States have been satisfied. The travel route within the territory of the Member States shall also be verified e.g. by reference to the (airline) tickets,
- when seafarers are due to enter via a Member State airport, the competent authorities at the Member State port shall inform the competent authorities at the Member State airport of entry, by means of a duly completed form for seafarers in transit who are subject to visa requirements (as set out in Part 2), sent by fax, electronic mail or other means, of the results of the verification and shall indicate whether a visa may in principle be issued at the border. When seafarers are due to enter via a land or a sea border, the competent authorities at the border post via which the seafarer concerned enters the territory of the Member States shall be informed by the same procedure,
- where the verification of the available data is positive and the outcome is clearly consistent with the seafarer's declaration or documents, the competent authorities at the Member State airport of entry or exit may issue a visa at the border the authorised stay of which shall correspond to what is necessary for the purpose of the transit. Furthermore, in such cases the seafarer's travel document shall be stamped with a Member State entry or exit stamp and given to the seafarer concerned.

II. Leaving service from a vessel that has entered a Member State port (exit from the territory of the Member States)

- the shipping company or its agent shall inform the competent authorities at that Member State port of entry of seafarers subject to visa requirements who are due to leave their service and exit from the Member States territory via a Member State airport, land or sea border. The shipping company or its agent shall sign a guarantee in respect of those seafarers that all expenses for the stay and, if necessary, for the repatriation costs of the seafarers will be covered by the shipping company,
- the competent authorities shall verify as soon as possible whether the information provided by the shipping company or its agent is correct and shall examine whether the other conditions for entry into the territory of the Member States have been satisfied. The travel route within the territory of the Member States shall also be verified e.g. by reference to the (airline) tickets,
- where the verification of the available data is positive, the competent authorities may issue a visa the authorised stay of which shall correspond to what is necessary for the purpose of the transit.

III. Transferring from a vessel that entered a Member State port to another vessel

- the shipping company or its agent shall inform the competent authorities at that Member State port of entry of seafarers subject to visa requirements who are due to leave their service and exit from the territory of the Member States via another Member State port. The shipping company or its agent shall sign a guarantee in respect of those seafarers that all expenses for the stay and, if necessary, for the repatriation of the seafarers will be covered by the shipping company,
- the competent authorities shall verify as soon as possible whether the information provided by the shipping company or its agent is correct and shall examine whether the other conditions for entry into the territory of the Member States have been satisfied. The competent authorities at the Member State port from which the seafarers will leave the territory of the Member States by ship shall be contacted for the examination. A check shall be carried out to establish whether the ship they are joining is berthed or expected there. The travel route within the territory of the Member States shall also be verified,
- where the verification of the available data is positive, the competent authorities may issue a visa the authorised stay of which shall correspond to what is necessary for the purpose of the transit.

PART 2

FORM FOR SEAFARERS IN TRANSIT WHO ARE SUBJECT TO VISA REQUIREMENTS			
FOR OFFICIAL USE:			
ISSUER: (STAMP) SURNAME/CODE OF OFFICIAL:		RECIPIENT: AUTHORITY	
DATA ON SEAFARER:			
SURNAME(S):	1A	FORENAME(S):	1B
NATIONALITY:	1C	RANK/GRADE:	1D
PLACE OF BIRTH:	2A	DATE OF BIRTH:	2B
PASSPORT NUMBER:	3A	SEAMAN'S BOOK NUMBER:	4A
DATE OF ISSUE:	3B	DATE OF ISSUE:	4B
PERIOD OF VALIDITY:	3C	PERIOD OF VALIDITY:	4C
DATA ON VESSEL AND SHIPPING AGENT:			
NAME OF SHIPPING AGENT:	5A	TELEPHONE NUMBER	5B
NAME OF VESSEL	6A	FLAG:	6C
IMO NUMBER	6B		
DATE OF ARRIVAL:	7A	ORIGIN OF VESSEL:	7B
DATE OF DEPARTURE:	8A	DESTINATION OF VESSEL:	8B
DATA ON MOVEMENT OF SEAFARER:			
FINAL DESTINATION OF SEAFARER:			9
REASONS FOR APPLICATION:			
SIGNING ON	<input type="checkbox"/>	TRANSFER	<input type="checkbox"/>
		LEAVING SERVICE	<input type="checkbox"/>
			10
MEANS OF TRANSPORT	CAR <input type="checkbox"/>	TRAIN <input type="checkbox"/>	AEROPLANE <input type="checkbox"/>
			11
DATE OF:	ARRIVAL:	TRANSIT:	DEPARTURE:
			12
	CAR (*) <input type="checkbox"/>	TRAIN (*) <input type="checkbox"/>	
	REGISTRATION No:	JOURNEY ROUTE:	
FLIGHT INFORMATION:	DATE:	TIME:	FLIGHT NUMBER:
Formal declaration signed by the shipping agent or the ship owner confirming his responsibility for the stay and, if necessary, for the repatriation costs of the seafarer.			

(*) = to be completed only if data are available.

DETAILED DESCRIPTION OF FORM

Points 1-4: the identity of the seafarer

(1)	A. Surname(s)
	B. Forename(s)
	C. Nationality
	D. Rank/Grade
(2)	A. Place of birth
	B. Date of birth
(3)	A. Passport number
	B. Date of issue
	C. Period of validity
(4)	A. Seaman's book number
	B. Date of issue
	C. Period of validity

As to points 3 and 4: depending on the nationality of the seafarer and the Member State being entered, a travel document or a seaman's book may be used for identification purposes.

Points 5-8: the shipping agent and the vessel concerned

(5)	Name of shipping agent (the individual or corporation that represents the ship owner on the spot in all matters relating to the ship owner's duties in fitting out the vessel) under 5A and telephone number (and other contact details as fax number, electronic mail address) under 5B
(6)	A. Name of vessel
	B. IMO-number (this number consists of 7 numbers and is also known as 'Lloyds-number')
	C. Flag (under which the merchant vessel is sailing)
(7)	A. Date of arrival of vessel
	B. Origin (port) of vessel
	Letter 'A' refers to the vessel's date of arrival in the port where the seafarer is to sign on
(8)	A. Date of departure of vessel
	B. Destination of vessel (next port)

As to points 7A and 8A: indications regarding the length of time for which the seafarer may travel in order to sign on.

It should be remembered that the route followed is very much subject to unexpected interferences and external factors such as storms, breakdowns, etc.

Points 9-12: purpose of the seafarer's journey and his destination

(9) The 'final destination' is the end of the seafarer's journey. This may be either the port at which he is to sign on or the country to which he is heading if he is leaving service.

(10) Reasons for application

- (a) In the case of signing on, the final destination is the port at which the seafarer is to sign on.
- (b) In the case of transfer to another vessel within the territory of the Member States, it is also the port at which the seafarer is to sign on. Transfer to a vessel situated outside the territory of the Member States must be regarded as leaving service.
- (c) In the case of leaving service, this can occur for various reasons, such as end of contract, accident at work, urgent family reasons, etc.

(11) Means of transport

List of means used within the territory of the Member States by the seafarer in transit who is subject to a visa requirement, in order to reach his final destination. On the form, the following three possibilities are envisaged:

- (a) car (or coach);
- (b) train;
- (c) aeroplane.

(12) Date of arrival (on the territory of the Member States)

Applies primarily to a seafarer at the first Member State airport or border crossing point (since it may not always be an airport) at the external border via which he wishes to enter the territory of the Member States.

Date of transit

This is the date on which the seafarer signs off at a port in the territory of the Member States and heads towards another port also situated in the territory of the Member States.

Date of departure

This is the date on which the seafarer signs off at a port in the territory of the Member States to transfer to another vessel at a port situated outside the territory of the Member States, or the date on which the seafarer signs off at a port in the territory of the Member States to return to his home (outside the territory of the Member States).

After determining the three means of travel, available information should also be provided concerning those means:

- (a) car, coach: registration number;
- (b) train: name, number, etc.;
- (c) flight data: date, time, number.

(13) Formal declaration signed by the shipping agent or the ship owner confirming his responsibility for the expenses for the stay and, if necessary, for the repatriation of the seafarer.

ANNEX X

LIST OF MINIMUM REQUIREMENTS TO BE INCLUDED IN THE LEGAL INSTRUMENT IN THE CASE OF COOPERATION WITH EXTERNAL SERVICE PROVIDERS

- A. In relation to the performance of its activities, the external service provider shall, with regard to data protection:
- (a) prevent at all times any unauthorised reading, copying, modification or deletion of data, in particular during their transmission to the diplomatic mission or consular post of the Member State(s) competent for processing an application;
 - (b) in accordance with the instructions given by the Member State(s) concerned, transmit the data,
 - electronically, in encrypted form, or
 - physically, in a secured way;
 - (c) transmit the data as soon as possible:
 - in the case of physically transferred data, at least once a week,
 - in the case of electronically transferred encrypted data, at the latest at the end of the day of their collection;
 - (d) delete the data immediately after their transmission and ensure that the only data that might be retained shall be the name and contact details of the applicant for the purposes of the appointment arrangements, as well as the passport number, until the return of the passport to the applicant, where applicable;
 - (e) ensure all the technical and organisational security measures required to protect personal data against accidental or unlawful destruction or accidental loss, alteration, unauthorised disclosure or access, in particular where the cooperation involves the transmission of files and data to the diplomatic mission or consular post of the Member State(s) concerned and all other unlawful forms of processing personal data;
 - (f) process the data only for the purposes of processing the personal data of applicants on behalf of the Member State(s) concerned;
 - (g) apply data protection standards at least equivalent to those set out in Directive 95/46/EC;
 - (h) provide applicants with the information required pursuant to Article 37 of the VIS Regulation.
- B. In relation to the performance of its activities, the external service provider shall, with regard to the conduct of staff:
- (a) ensure that its staff are appropriately trained;
 - (b) ensure that its staff in the performance of their duties:
 - receive applicants courteously,
 - respect the human dignity and integrity of applicants,
 - do not discriminate against persons on grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation, and
 - respect the rules of confidentiality which shall also apply once members of staff have left their job or after suspension or termination of the legal instrument;
 - (c) provide identification of the staff working for the external service provider at all times;
 - (d) prove that its staff do not have criminal records and have the requisite expertise.

- C. In relation to the verification of the performance of its activities, the external service provider shall:
- (a) provide for access by staff entitled by the Member State(s) concerned to its premises at all times without prior notice, in particular for inspection purposes;
 - (b) ensure the possibility of remote access to its appointment system for inspection purposes;
 - (c) ensure the use of relevant monitoring methods (e.g. test applicants; webcam);
 - (d) ensure access to proof of data protection compliance, including reporting obligations, external audits and regular spot checks;
 - (e) report to the Member State(s) concerned without delay any security breaches or any complaints from applicants on data misuse or unauthorised access, and coordinate with the Member State(s) concerned in order to find a solution and give explanatory responses promptly to the complaining applicants.
- D. In relation to general requirements, the external service provider shall:
- (a) act under the instructions of the Member State(s) competent for processing the application;
 - (b) adopt appropriate anti-corruption measures (e.g. provisions on staff remuneration; cooperation in the selection of staff members employed on the task; two-man-rule; rotation principle);
 - (c) respect fully the provisions of the legal instrument, which shall contain a suspension or termination clause, in particular in the event of breach of the rules established, as well as a revision clause with a view to ensuring that the legal instrument reflects best practice.
-

ANNEX XI

SPECIFIC PROCEDURES AND CONDITIONS FACILITATING THE ISSUING OF VISAS TO MEMBERS OF THE OLYMPIC FAMILY PARTICIPATING IN THE OLYMPIC GAMES AND PARALYMPIC GAMES

CHAPTER I

Purpose and definitions

Article 1

Purpose

The following specific procedures and conditions facilitate the application for and issuing of visas to members of the Olympic family for the duration of the Olympic and Paralympic Games organised by a Member State.

In addition, the relevant provisions of the Community *acquis* concerning procedures for applying for and issuing visas shall apply.

Article 2

Definitions

For the purposes of this Regulation:

1. 'Responsible organisations' relate to measures envisaged to facilitate the procedures for applying for and issuing visas for members of the Olympic family taking part in the Olympic and/or Paralympic Games, and they mean the official organisations, in terms of the Olympic Charter, which are entitled to submit lists of members of the Olympic family to the Organising Committee of the Member State hosting the Olympic and Paralympic Games with a view to the issue of accreditation cards for the Games;
2. 'Member of the Olympic family' means any person who is a member of the International Olympic Committee, the International Paralympic Committee, International Federations, the National Olympic and Paralympic Committees, the Organising Committees of the Olympic Games and the national associations, such as athletes, judges/referees, coaches and other sports technicians, medical personnel attached to teams or individual sportsmen/women and media-accredited journalists, senior executives, donors, sponsors or other official invitees, who agree to be guided by the Olympic Charter, act under the control and supreme authority of the International Olympic Committee, are included on the lists of the responsible organisations and are accredited by the Organising Committee of the Member State hosting the Olympic and Paralympic Games as participants in the [year] Olympic and/or Paralympic Games;
3. 'Olympic accreditation cards' which are issued by the Organising Committee of the Member State hosting the Olympic and Paralympic Games in accordance with its national legislation means one of two secure documents, one for the Olympic Games and one for the Paralympic Games, each bearing a photograph of its holder, establishing the identity of the member of the Olympic family and authorising access to the facilities at which competitions are held and to other events scheduled throughout the duration of the Games;
4. 'Duration of the Olympic Games and Paralympic Games' means the period during which the Olympic Games and the period during which the Paralympic Games take place;
5. 'Organising Committee of the Member State hosting the Olympic and Paralympic Games' means the Committee set up on by the hosting Member State in accordance with its national legislation to organise the Olympic and Paralympic Games, which decides on accreditation of members of the Olympic family taking part in those Games;
6. 'Services responsible for issuing visas' means the services designated by the Member State hosting the Olympic Games and Paralympic Games to examine applications and issue visas to members of the Olympic family.

CHAPTER II

Issuing of visas

Article 3

Conditions

A visa may be issued pursuant to this Regulation only where the person concerned:

- (a) has been designated by one of the responsible organisations and accredited by the Organising Committee of the Member State hosting the Olympic and Paralympic Games as a participant in the Olympic and/or Paralympic Games;

- (b) holds a valid travel document authorising the crossing of the external borders, as referred to in Article 5 of the Schengen Borders Code;
- (c) is not a person for whom an alert has been issued for the purpose of refusing entry;
- (d) is not considered to be a threat to public policy, national security or the international relations of any of the Member States.

Article 4

Filing of the application

1. Where a responsible organisation draws up a list of the persons selected to take part in the Olympic and/or Paralympic Games, it may, together with the application for the issue of an Olympic accreditation card for the persons selected, file a collective application for visas for those persons selected who are required to be in possession of a visa in accordance with Regulation (EC) No 539/2001, except where those persons hold a residence permit issued by a Member State or a residence permit issued by the United Kingdom or Ireland, in accordance with 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 ⁽¹⁾.
2. A collective application for visas for the persons concerned shall be forwarded at the same time as applications for the issue of an Olympic accreditation card to the Organising Committee of the Member State hosting the Olympic and Paralympic Games in accordance with the procedure established by it.
3. Individual visa applications shall be submitted for each person taking part in the Olympic and/or Paralympic Games.
4. The Organising Committee of the Member State hosting the Olympic and Paralympic Games shall forward to the services responsible for issuing visas, a collective application for visas as quickly as possible, together with copies of applications for the issue of an Olympic accreditation card for the persons concerned, bearing their full name, nationality, sex and date and place of birth and the number, type and expiry date of their travel document.

Article 5

Examination of the collective application for visas and type of the visa issued

1. The visa shall be issued by the services responsible for issuing visas following an examination designed to ensure that the conditions set out in Article 3 are met.
2. The visa issued shall be a uniform, multiple-entry visa authorising a stay of not more than three months for the duration of the Olympic and/or Paralympic Games.
3. Where the member of the Olympic family concerned does not meet the conditions set out in point (c) or (d) of Article 3, the services responsible for issuing visas may issue a visa with limited territorial validity in accordance with Article 25 of this Regulation.

Article 6

Form of the visa

1. The visa shall take the form of two numbers entered on the Olympic accreditation card. The first number shall be the visa number. In the case of a uniform visa, that number shall be made up of seven (7) characters comprising six (6) digits preceded by the letter 'C'. In the case of a visa with limited territorial validity, that number shall be made up of eight (8) characters comprising six (6) digits preceded by the letters 'XX' ⁽²⁾. The second number shall be the number of the travel document of the person concerned.
2. The services responsible for issuing visas shall forward the visa numbers to the Organising Committee of the Member State hosting the Olympic and Paralympic Games for the purpose of issuing Olympic accreditation cards.

⁽¹⁾ OJ L 158, 30.4.2004, p. 77.

⁽²⁾ Reference to the ISO code of the organising Member State.

*Article 7***Waiver of fees**

The examination of visa applications and the issue of visas shall not give rise to any fees being charged by the services responsible for issuing visas.

*CHAPTER III***General and final provisions***Article 8***Cancellation of a visa**

Where the list of persons put forward as participants in the Olympic and/or Paralympic Games is amended before the Games begin, the responsible organisations shall inform without any delay the Organising Committee of the Member State hosting the Olympic and Paralympic Games thereof so that the Olympic accreditation cards of the persons removed from the list may be revoked. The Organising Committee shall notify the services responsible for issuing visas thereof and shall inform them of the numbers of the visas in question.

The services responsible for issuing visas shall cancel the visas of the persons concerned. They shall immediately inform the authorities responsible for border checks thereof, and the latter shall without delay forward that information to the competent authorities of the other Member States.

*Article 9***External border checks**

1. The entry checks carried out on members of the Olympic family who have been issued visas in accordance with this Regulation shall, when such members cross the external borders of the Member States, be limited to checking compliance with the conditions set out in Article 3.
2. For the duration of the Olympic and/or Paralympic Games:
 - (a) entry and exit stamps shall be affixed to the first free page of the travel document of those members of the Olympic family for whom it is necessary to affix such stamps in accordance with Article 10(1) of the Schengen Borders Code. On first entry, the visa number shall be indicated on that same page;
 - (b) the conditions for entry provided for in Article 5(1)(c) of the Schengen Borders Code shall be presumed to be fulfilled once a member of the Olympic family has been duly accredited.
3. Paragraph 2 shall apply to members of the Olympic family who are third-country nationals, whether or not they are subject to the visa requirement under Regulation (EC) No 539/2001.

ANNEX XII

ANNUAL STATISTICS ON UNIFORM VISAS, VISAS WITH LIMITED TERRITORIAL VALIDITY AND AIRPORT TRANSIT VISAS

Data to be submitted to the Commission within the deadline set out in Article 46 for each location where individual Member States issue visas:

- total of A visas applied for (including multiple A visas),
- total of A visas issued (including multiple A visas),
- total of multiple A visas issued,
- total of A visas not issued (including multiple A visas),
- total of C visas applied for (including multiple-entry C visas),
- total of C visas issued (including multiple-entry C visas),
- total of multiple-entry C visas issued,
- total of C visas not issued (including multiple-entry C visas),
- total of LTV visas issued.

General rules for the submission of data:

- the data for the complete previous year shall be compiled in one single file,
- the data shall be provided using the common template provided by the Commission,
- data shall be available for the individual locations where the Member State concerned issue visas and grouped by third country,
- 'Not issued' covers data on refused visas and applications where the examination has been discontinued as provided for in Article 8(2).

In the event of data being neither available nor relevant for one particular category and a third country, Member States shall leave the cell empty (and not enter '0' (zero), 'N.A.' (non-applicable) or any other value).

ANNEX XIII

CORRELATION TABLE

Provision of this Regulation	Provision of the Schengen Convention (CSA), Common Consular Instructions (CCI) or of the Schengen Executive Committee (SCH/Com-ex) replaced
TITLE I	
GENERAL PROVISIONS	
Article 1 Objective and scope	CCI, Part I.1. Scope (CSA Articles 9 and 10)
Article 2 Definitions (1)-(4)	CCI: Part I. 2. Definitions and types of visas CCI: Part IV 'Legal basis' CSA: Articles 11(2), 14(1), 15, 16
TITLE II	
AIRPORT TRANSIT VISA	
Article 3 Third-country nationals required to hold an airport transit visa	Joint Action 96/197/JHA, CCI, Part I. 2.1.1
TITLE III	
PROCEDURES AND CONDITIONS FOR ISSUING VISAS	
CHAPTER I	
<i>Authorities taking part in the procedures relating to applications</i>	
Article 4 Authorities competent for taking part in the procedures relating to applications	CCI Part II. 4., CSA, Art. 12(1), Regulation (EC) No 415/2003
Article 5 Member State competent for examining and deciding on an application	CCI, Part II 1.1(a) (b), CSA Article 12(2)
Article 6 Consular territorial competence	CCI, Part II, 1.1 and 3
Article 7 Competence to issue visas to third-country nationals legally present within the territory of a Member State	—
Article 8 Representation agreements	CCI, Part II, 1.2

CHAPTER II

Application

Article 9 Practical modalities for lodging an application	CCI, Annex 13, note (Article 10(1))
Article 10 General rules for lodging an application	—
Article 11 Application form	CCI, Part III. 1.1.
Article 12 Travel document	CCI, Part III. 2. (a), CSA, Article 13(1) and (2)
Article 13 Biometric identifiers	CCI, Part III. 1.2 (a) and (b)
Article 14 Supporting documents	CCI, Part III.2(b) and Part V.1.4, Com-ex (98) 57
Article 15 Travel medical insurance	CCI, Part V, 1.4
Article 16 Visa fee	CCI Part VII. 4. and Annex 12
Article 17 Service fee	CCI, Part VII, 1.7

CHAPTER III

Examination of and decision on an application

Article 18 Verification of consular competence	—
Article 19 Admissibility	—
Article 20 Stamp indicating that an application is admissible	CCI, Part VIII, 2
Article 21 Verification of entry conditions and risk assessment	CCI, Part III.4 and Part V.1.
Article 22 Prior consultation of central authorities of other Member States	CCI, Part II, 2.3 and Part V, 2.3(a)-(d)
Article 23 Decision on the application	CCI, Part V. 2.1 (second indent), 2.2, CCI

CHAPTER IV

Issuing of the visa

Article 24 Issuing of a uniform visa	CCI, Part V, 2.1
Article 25 Issuing of a visa with limited territorial validity	CCI, Part V, 3, Annex 14, CSA 11(2), 14(1) and 16
Article 26 Issuing of an airport transit visa	CCI, Part I, 2.1.1 — Joint Action 96/197/JHA
Article 27 Filling in the visa sticker	CCI, Part VI.1-2-3-4
Article 28 Invalidation of a completed visa sticker	CCI, Part VI, 5.2
Article 29 Affixing a visa sticker	CCI, Part VI, 5.3
Article 30 Rights derived from an issued visa	CCI, Part I, 2.1, last sentence
Article 31 Information of central authorities of other Member States	—
Article 32 Refusal of a visa	—

CHAPTER V

Modification of an issued visa

Article 33 Extension	Com-ex (93) 21
Article 34 Annulment and revocation	Com-ex (93) 24 and Annex 14 to the CCI

CHAPTER VI

Visas issued at the external borders

Article 35 Visas applied for at the external border	Regulation (EC) No 415/2003
Article 36 Visas issued to seafarers in transit at the external border	

TITLE IV

ADMINISTRATIVE MANAGEMENT AND ORGANISATION

Article 37 Organisation of visa sections	CCI, VII, 1-2-3
Article 38 Resources for examining applications and monitoring of consulates	—
	CCI, Part VII, 1A
Article 39 Conduct of staff	CCI, Part III.5
Article 40 Forms of cooperation	CCI, Part VII, 1AA
Article 41 Cooperation between Member States	
Article 42 Recourse to honorary consuls	CCI, Part VII, AB
Article 43 Cooperation with external service providers	CCI, Part VII, 1B
Article 44 Encryption and secure transfer of data	CCI, Part II, 1.2, PART VII, 1.6, sixth, seventh, eighth and ninth subparagraphs
Article 45 Member States' cooperation with commercial intermediaries	CCI, VIII, 5.2
Article 46 Compilation of statistics	SCH Com-ex (94) 25 and (98) 12
Article 47 Information to the general public	—

TITLE V

LOCAL SCHENGEN COOPERATION

Article 48 Local Schengen cooperation between Member States' consulates	CCI, VIII, 1-3-4
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TITLE VI

FINAL PROVISIONS

Article 49 Arrangements in relation to the Olympic Games and Paralympic Games	—
Articles 50 Amendments to the Annexes	—
Article 51 Instructions on the practical application of the Visa Code	—
Article 52 Committee procedure	—
Article 53 Notification	—
Article 54 Amendments to Regulation (EC) No 767/2008	—
Article 55 Amendments to Regulation (EC) No 562/2006	—
Article 56 Repeals	—
Article 57 Monitoring and evaluation	—
Article 58 Entry into force	—

ANNEXES

Annex I Harmonised application form	CCI, Annex 16
Annex II Non-exhaustive list of supporting documents	Partially CCI, V, 1.4.
Annex III Uniform format and use of the stamp indicating that a visa application is admissible	CCI, VIII, 2
Annex IV Common list of third countries, listed in Annex I to Regulation (EC) No 539/2001 whose nationals are required to be in possession of an airport transit visa when passing through the international transit area of airports situated on the territory of the Member States	CCI, Annex 3, Part I
Annex V List of residence permits entitling their holders to transit through the airports of Member States without being required to hold an airport transit visa	CCI, Annex 3, Part III
Annex VI Standard form for notifying and motivating refusal, annulment or revocation of a visa	—
Annex VII Filling in the visa sticker	CCI, Part VI, 1-4, Annex 10
Annex VIII Affixing the visa sticker	CCI, Part VI, 5.3
Annex IX Rules for issuing visas at the border to seafarers in transit subject to visa requirements	Regulation (EC) No 415/2003, Annexes I and II
Annex X List of minimum requirements to be included in the legal instrument in the case of cooperation with external service providers	CCI, Annex 19
Annex XI Specific procedures and conditions facilitating the issuing of visas to members of the Olympic Family participating in the Olympic Games and Paralympic Games	—
Annex XII Annual statistics on uniform visas, visas with limited territorial validity and airport transit visas	—

CHARTER OF FUNDAMENTAL RIGHTS OF THE
EUROPEAN UNION

(2012/C 326/02)

PREAMBLE	395
TITLE I DIGNITY	396
TITLE II FREEDOMS	397
TITLE III EQUALITY	399
TITLE IV SOLIDARITY	401
TITLE V CITIZENS' RIGHTS	403
TITLE VI JUSTICE	405
TITLE VII GENERAL PROVISIONS GOVERNING THE INTERPRETATION AND APPLI- CATION OF THE CHARTER	406

CHARTER OF FUNDAMENTAL RIGHTS OF THE
EUROPEAN UNION

The European Parliament, the Council and the Commission solemnly proclaim the following text as the Charter of Fundamental Rights of the European Union.

CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

Preamble

The peoples of Europe, in creating an ever closer union among them, are resolved to share a peaceful future based on common values.

Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law. It places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice.

The Union contributes to the preservation and to the development of these common values while respecting the diversity of the cultures and traditions of the peoples of Europe as well as the national identities of the Member States and the organisation of their public authorities at national, regional and local levels; it seeks to promote balanced and sustainable development and ensures free movement of persons, services, goods and capital, and the freedom of establishment.

To this end, it is necessary to strengthen the protection of fundamental rights in the light of changes in society, social progress and scientific and technological developments by making those rights more visible in a Charter.

This Charter reaffirms, with due regard for the powers and tasks of the Union and for the principle of subsidiarity, the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Union and by the Council of Europe and the case-law of the Court of Justice of the European Union and of the European Court of Human Rights. In this context the Charter will be interpreted by the courts of the Union and the Member States with due regard to the explanations prepared under the authority of the Praesidium of the Convention which drafted the Charter and updated under the responsibility of the Praesidium of the European Convention.

Enjoyment of these rights entails responsibilities and duties with regard to other persons, to the human community and to future generations.

The Union therefore recognises the rights, freedoms and principles set out hereafter.

TITLE I**DIGNITY***Article 1***Human dignity**

Human dignity is inviolable. It must be respected and protected.

*Article 2***Right to life**

1. Everyone has the right to life.
2. No one shall be condemned to the death penalty, or executed.

*Article 3***Right to the integrity of the person**

1. Everyone has the right to respect for his or her physical and mental integrity.
2. In the fields of medicine and biology, the following must be respected in particular:
 - (a) the free and informed consent of the person concerned, according to the procedures laid down by law;
 - (b) the prohibition of eugenic practices, in particular those aiming at the selection of persons;
 - (c) the prohibition on making the human body and its parts as such a source of financial gain;
 - (d) the prohibition of the reproductive cloning of human beings.

*Article 4***Prohibition of torture and inhuman or degrading treatment or punishment**

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

*Article 5***Prohibition of slavery and forced labour**

1. No one shall be held in slavery or servitude.
2. No one shall be required to perform forced or compulsory labour.
3. Trafficking in human beings is prohibited.

TITLE II
FREEDOMS

Article 6

Right to liberty and security

Everyone has the right to liberty and security of person.

Article 7

Respect for private and family life

Everyone has the right to respect for his or her private and family life, home and communications.

Article 8

Protection of personal data

1. Everyone has the right to the protection of personal data concerning him or her.
2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.
3. Compliance with these rules shall be subject to control by an independent authority.

Article 9

Right to marry and right to found a family

The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights.

Article 10

Freedom of thought, conscience and religion

1. Everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance.
2. The right to conscientious objection is recognised, in accordance with the national laws governing the exercise of this right.

*Article 11***Freedom of expression and information**

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.
2. The freedom and pluralism of the media shall be respected.

*Article 12***Freedom of assembly and of association**

1. Everyone has the right to freedom of peaceful assembly and to freedom of association at all levels, in particular in political, trade union and civic matters, which implies the right of everyone to form and to join trade unions for the protection of his or her interests.
2. Political parties at Union level contribute to expressing the political will of the citizens of the Union.

*Article 13***Freedom of the arts and sciences**

The arts and scientific research shall be free of constraint. Academic freedom shall be respected.

*Article 14***Right to education**

1. Everyone has the right to education and to have access to vocational and continuing training.
2. This right includes the possibility to receive free compulsory education.
3. The freedom to found educational establishments with due respect for democratic principles and the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions shall be respected, in accordance with the national laws governing the exercise of such freedom and right.

*Article 15***Freedom to choose an occupation and right to engage in work**

1. Everyone has the right to engage in work and to pursue a freely chosen or accepted occupation.
2. Every citizen of the Union has the freedom to seek employment, to work, to exercise the right of establishment and to provide services in any Member State.
3. Nationals of third countries who are authorised to work in the territories of the Member States are entitled to working conditions equivalent to those of citizens of the Union.

*Article 16***Freedom to conduct a business**

The freedom to conduct a business in accordance with Union law and national laws and practices is recognised.

*Article 17***Right to property**

1. Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest.

2. Intellectual property shall be protected.

*Article 18***Right to asylum**

The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union (hereinafter referred to as 'the Treaties').

*Article 19***Protection in the event of removal, expulsion or extradition**

1. Collective expulsions are prohibited.

2. No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.

TITLE III

EQUALITY

*Article 20***Equality before the law**

Everyone is equal before the law.

*Article 21***Non-discrimination**

1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.
2. Within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited.

*Article 22***Cultural, religious and linguistic diversity**

The Union shall respect cultural, religious and linguistic diversity.

*Article 23***Equality between women and men**

Equality between women and men must be ensured in all areas, including employment, work and pay.

The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex.

*Article 24***The rights of the child**

1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.
2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.
3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.

*Article 25***The rights of the elderly**

The Union recognises and respects the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life.

*Article 26***Integration of persons with disabilities**

The Union recognises and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community.

TITLE IV

SOLIDARITY*Article 27***Workers' right to information and consultation within the undertaking**

Workers or their representatives must, at the appropriate levels, be guaranteed information and consultation in good time in the cases and under the conditions provided for by Union law and national laws and practices.

*Article 28***Right of collective bargaining and action**

Workers and employers, or their respective organisations, have, in accordance with Union law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action.

*Article 29***Right of access to placement services**

Everyone has the right of access to a free placement service.

*Article 30***Protection in the event of unjustified dismissal**

Every worker has the right to protection against unjustified dismissal, in accordance with Union law and national laws and practices.

*Article 31***Fair and just working conditions**

1. Every worker has the right to working conditions which respect his or her health, safety and dignity.
2. Every worker has the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave.

Article 32

Prohibition of child labour and protection of young people at work

The employment of children is prohibited. The minimum age of admission to employment may not be lower than the minimum school-leaving age, without prejudice to such rules as may be more favourable to young people and except for limited derogations.

Young people admitted to work must have working conditions appropriate to their age and be protected against economic exploitation and any work likely to harm their safety, health or physical, mental, moral or social development or to interfere with their education.

Article 33

Family and professional life

1. The family shall enjoy legal, economic and social protection.
2. To reconcile family and professional life, everyone shall have the right to protection from dismissal for a reason connected with maternity and the right to paid maternity leave and to parental leave following the birth or adoption of a child.

Article 34

Social security and social assistance

1. The Union recognises and respects the entitlement to social security benefits and social services providing protection in cases such as maternity, illness, industrial accidents, dependency or old age, and in the case of loss of employment, in accordance with the rules laid down by Union law and national laws and practices.
2. Everyone residing and moving legally within the European Union is entitled to social security benefits and social advantages in accordance with Union law and national laws and practices.
3. In order to combat social exclusion and poverty, the Union recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources, in accordance with the rules laid down by Union law and national laws and practices.

Article 35

Health care

Everyone has the right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices. A high level of human health protection shall be ensured in the definition and implementation of all the Union's policies and activities.

*Article 36***Access to services of general economic interest**

The Union recognises and respects access to services of general economic interest as provided for in national laws and practices, in accordance with the Treaties, in order to promote the social and territorial cohesion of the Union.

*Article 37***Environmental protection**

A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development.

*Article 38***Consumer protection**

Union policies shall ensure a high level of consumer protection.

TITLE V

CITIZENS' RIGHTS

*Article 39***Right to vote and to stand as a candidate at elections to the European Parliament**

1. Every citizen of the Union has the right to vote and to stand as a candidate at elections to the European Parliament in the Member State in which he or she resides, under the same conditions as nationals of that State.
2. Members of the European Parliament shall be elected by direct universal suffrage in a free and secret ballot.

*Article 40***Right to vote and to stand as a candidate at municipal elections**

Every citizen of the Union has the right to vote and to stand as a candidate at municipal elections in the Member State in which he or she resides under the same conditions as nationals of that State.

*Article 41***Right to good administration**

1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union.

2. This right includes:
 - (a) the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;
 - (b) the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;
 - (c) the obligation of the administration to give reasons for its decisions.
3. Every person has the right to have the Union make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States.
4. Every person may write to the institutions of the Union in one of the languages of the Treaties and must have an answer in the same language.

Article 42

Right of access to documents

Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the institutions, bodies, offices and agencies of the Union, whatever their medium.

Article 43

European Ombudsman

Any citizen of the Union and any natural or legal person residing or having its registered office in a Member State has the right to refer to the European Ombudsman cases of maladministration in the activities of the institutions, bodies, offices or agencies of the Union, with the exception of the Court of Justice of the European Union acting in its judicial role.

Article 44

Right to petition

Any citizen of the Union and any natural or legal person residing or having its registered office in a Member State has the right to petition the European Parliament.

Article 45

Freedom of movement and of residence

1. Every citizen of the Union has the right to move and reside freely within the territory of the Member States.
2. Freedom of movement and residence may be granted, in accordance with the Treaties, to nationals of third countries legally resident in the territory of a Member State.

*Article 46***Diplomatic and consular protection**

Every citizen of the Union shall, in the territory of a third country in which the Member State of which he or she is a national is not represented, be entitled to protection by the diplomatic or consular authorities of any Member State, on the same conditions as the nationals of that Member State.

TITLE VI

JUSTICE

*Article 47***Right to an effective remedy and to a fair trial**

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

*Article 48***Presumption of innocence and right of defence**

1. Everyone who has been charged shall be presumed innocent until proved guilty according to law.
2. Respect for the rights of the defence of anyone who has been charged shall be guaranteed.

*Article 49***Principles of legality and proportionality of criminal offences and penalties**

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national law or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed. If, subsequent to the commission of a criminal offence, the law provides for a lighter penalty, that penalty shall be applicable.

2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles recognised by the community of nations.

3. The severity of penalties must not be disproportionate to the criminal offence.

Article 50

Right not to be tried or punished twice in criminal proceedings for the same criminal offence

No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law.

TITLE VII

GENERAL PROVISIONS GOVERNING THE INTERPRETATION AND APPLICATION OF THE CHARTER

Article 51

Field of application

1. The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.

2. The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.

Article 52

Scope and interpretation of rights and principles

1. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

2. Rights recognised by this Charter for which provision is made in the Treaties shall be exercised under the conditions and within the limits defined by those Treaties.

3. In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.

4. In so far as this Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions.

5. The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality.

6. Full account shall be taken of national laws and practices as specified in this Charter.

7. The explanations drawn up as a way of providing guidance in the interpretation of this Charter shall be given due regard by the courts of the Union and of the Member States.

Article 53

Level of protection

Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions.

Article 54

Prohibition of abuse of rights

Nothing in this Charter shall be interpreted as implying any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms recognised in this Charter or at their limitation to a greater extent than is provided for herein.

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The above text adapts the wording of the Charter proclaimed on 7 December 2000, and will replace it as from the date of entry into force of the Treaty of Lisbon.

EXPLANATIONS (*) RELATING TO THE CHARTER OF FUNDAMENTAL RIGHTS

(2007/C 303/02)

These explanations were originally prepared under the authority of the Praesidium of the Convention which drafted the Charter of Fundamental Rights of the European Union. They have been updated under the responsibility of the Praesidium of the European Convention, in the light of the drafting adjustments made to the text of the Charter by that Convention (notably to Articles 51 and 52) and of further developments of Union law. Although they do not as such have the status of law, they are a valuable tool of interpretation intended to clarify the provisions of the Charter.

TITLE I — DIGNITY

Explanation on Article 1 — Human dignity

The dignity of the human person is not only a fundamental right in itself but constitutes the real basis of fundamental rights. The 1948 Universal Declaration of Human Rights enshrined human dignity in its preamble: 'Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.' In its judgment of 9 October 2001 in Case C-377/98 *Netherlands v European Parliament and Council* [2001] ECR I-7079, at grounds 70 — 77, the Court of Justice confirmed that a fundamental right to human dignity is part of Union law.

It results that none of the rights laid down in this Charter may be used to harm the dignity of another person, and that the dignity of the human person is part of the substance of the rights laid down in this Charter. It must therefore be respected, even where a right is restricted.

Explanation on Article 2 — Right to life

1. Paragraph 1 of this Article is based on the first sentence of Article 2(1) of the ECHR, which reads as follows:

'1. Everyone's right to life shall be protected by law ...'.

2. The second sentence of the provision, which referred to the death penalty, was superseded by the entry into force of Article 1 of Protocol No 6 to the ECHR, which reads as follows:

'The death penalty shall be abolished. No-one shall be condemned to such penalty or executed.'

Article 2(2) of the Charter is based on that provision.

3. The provisions of Article 2 of the Charter correspond to those of the above Articles of the ECHR and its Protocol. They have the same meaning and the same scope, in accordance with Article 52(3) of the Charter. Therefore, the 'negative' definitions appearing in the ECHR must be regarded as also forming part of the Charter:

(a) Article 2(2) of the ECHR:

'Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:

(a) in defence of any person from unlawful violence;

(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

(*) Editor's note: References to article numbers in the Treaties have been updated and some minor technical errors have been corrected.

(c) in action lawfully taken for the purpose of quelling a riot or insurrection.’

(b) Article 2 of Protocol No 6 to the ECHR:

‘A State may make provision in its law for the death penalty in respect of acts committed in time of war or of imminent threat of war; such penalty shall be applied only in the instances laid down in the law and in accordance with its provisions...’.

Explanation on Article 3 — Right to the integrity of the person

1. In its judgment of 9 October 2001 in Case C-377/98 *Netherlands v European Parliament and Council* [2001] ECR-I 7079, at grounds 70, 78 to 80, the Court of Justice confirmed that a fundamental right to human integrity is part of Union law and encompasses, in the context of medicine and biology, the free and informed consent of the donor and recipient.
2. The principles of Article 3 of the Charter are already included in the Convention on Human Rights and Biomedicine, adopted by the Council of Europe (ETS 164 and additional protocol ETS 168). The Charter does not set out to depart from those principles, and therefore prohibits only reproductive cloning. It neither authorises nor prohibits other forms of cloning. Thus it does not in any way prevent the legislature from prohibiting other forms of cloning.
3. The reference to eugenic practices, in particular those aiming at the selection of persons, relates to possible situations in which selection programmes are organised and implemented, involving campaigns for sterilisation, forced pregnancy, compulsory ethnic marriage among others, all acts deemed to be international crimes in the Statute of the International Criminal Court adopted in Rome on 17 July 1998 (see its Article 7(1)(g)).

Explanation on Article 4 — Prohibition of torture and inhuman or degrading treatment or punishment

The right in Article 4 is the right guaranteed by Article 3 of the ECHR, which has the same wording: ‘No one shall be subjected to torture or to inhuman or degrading treatment or punishment’. By virtue of Article 52(3) of the Charter, it therefore has the same meaning and the same scope as the ECHR Article.

Explanation on Article 5 — Prohibition of slavery and forced labour

1. The right in Article 5(1) and (2) corresponds to Article 4(1) and (2) of the ECHR, which has the same wording. It therefore has the same meaning and scope as the ECHR Article, by virtue of Article 52(3) of the Charter. Consequently:
 - no limitation may legitimately affect the right provided for in paragraph 1,
 - in paragraph 2, ‘forced or compulsory labour’ must be understood in the light of the ‘negative’ definitions contained in Article 4(3) of the ECHR:

‘For the purpose of this article the term “forced or compulsory labour” shall not include:

- (a) any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention;
- (b) any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service;

- (c) any service exacted in case of an emergency or calamity threatening the life or well-being of the community;
 - (d) any work or service which forms part of normal civic obligations.’.
2. Paragraph 3 stems directly from human dignity and takes account of recent developments in organised crime, such as the organisation of lucrative illegal immigration or sexual exploitation networks. The Annex to the Europol Convention contains the following definition which refers to trafficking for the purpose of sexual exploitation: ‘traffic in human beings: means subjection of a person to the real and illegal sway of other persons by using violence or menaces or by abuse of authority or intrigue with a view to the exploitation of prostitution, forms of sexual exploitation and assault of minors or trade in abandoned children’. Chapter VI of the Convention implementing the Schengen Agreement, which has been integrated into the Union’s *acquis*, in which the United Kingdom and Ireland participate, contains the following wording in Article 27(1) which refers to illegal immigration networks: ‘The Contracting Parties undertake to impose appropriate penalties on any person who, for financial gain, assists or tries to assist an alien to enter or reside within the territory of one of the Contracting Parties in breach of that Contracting Party’s laws on the entry and residence of aliens.’ On 19 July 2002, the Council adopted a framework decision on combating trafficking in human beings (OJ L 203, 1.8.2002, p. 1) whose Article 1 defines in detail the offences concerning trafficking in human beings for the purposes of labour exploitation or sexual exploitation, which the Member States must make punishable by virtue of that framework decision.

TITLE II — FREEDOMS

Explanation on Article 6 — Right to liberty and security

The rights in Article 6 are the rights guaranteed by Article 5 of the ECHR, and in accordance with Article 52(3) of the Charter, they have the same meaning and scope. Consequently, the limitations which may legitimately be imposed on them may not exceed those permitted by the ECHR, in the wording of Article 5:

- ‘1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
- (a) the lawful detention of a person after conviction by a competent court;
 - (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
 - (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
 - (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
 - (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
 - (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.
3. Everyone arrested or detained in accordance with the provisions of paragraph 1.c of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.
4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.'

The rights enshrined in Article 6 must be respected particularly when the European Parliament and the Council adopt legislative acts in the area of judicial cooperation in criminal matters, on the basis of Articles 82, 83 and 85 of the Treaty on the Functioning of the European Union, notably to define common minimum provisions as regards the categorisation of offences and punishments and certain aspects of procedural law.

Explanation on Article 7 — Respect for private and family life

The rights guaranteed in Article 7 correspond to those guaranteed by Article 8 of the ECHR. To take account of developments in technology the word 'correspondence' has been replaced by 'communications'.

In accordance with Article 52(3), the meaning and scope of this right are the same as those of the corresponding article of the ECHR. Consequently, the limitations which may legitimately be imposed on this right are the same as those allowed by Article 8 of the ECHR:

- '1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'

Explanation on Article 8 — Protection of personal data

This Article has been based on Article 286 of the Treaty establishing the European Community and Directive 95/46/EC of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ L 281, 23.11.1995, p. 31) as well as on Article 8 of the ECHR and on the Council of Europe Convention of 28 January 1981 for the Protection of Individuals with regard to Automatic Processing of Personal Data, which has been ratified by all the Member States. Article 286 of the EC Treaty is now replaced by Article 16 of the Treaty on the Functioning of the European Union and Article 39 of the Treaty on European Union. Reference is also made to Regulation (EC) No 45/2001 of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (OJ L 8, 12.1.2001, p. 1). The above-mentioned Directive and Regulation contain conditions and limitations for the exercise of the right to the protection of personal data.

Explanation on Article 9 — Right to marry and right to found a family

This Article is based on Article 12 of the ECHR, which reads as follows: ‘Men and women of marriageable age have the right to marry and to found a family according to the national laws governing the exercising of this right.’ The wording of the Article has been modernised to cover cases in which national legislation recognises arrangements other than marriage for founding a family. This Article neither prohibits nor imposes the granting of the status of marriage to unions between people of the same sex. This right is thus similar to that afforded by the ECHR, but its scope may be wider when national legislation so provides.

Explanation on Article 10 — Freedom of thought, conscience and religion

The right guaranteed in paragraph 1 corresponds to the right guaranteed in Article 9 of the ECHR and, in accordance with Article 52(3) of the Charter, has the same meaning and scope. Limitations must therefore respect Article 9(2) of the Convention, which reads as follows: ‘Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.’

The right guaranteed in paragraph 2 corresponds to national constitutional traditions and to the development of national legislation on this issue.

Explanation on Article 11 — Freedom of expression and information

1. Article 11 corresponds to Article 10 of the European Convention on Human Rights, which reads as follows:

- ‘1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.’

Pursuant to Article 52(3) of the Charter, the meaning and scope of this right are the same as those guaranteed by the ECHR. The limitations which may be imposed on it may therefore not exceed those provided for in Article 10(2) of the Convention, without prejudice to any restrictions which the competition law of the Union may impose on Member States’ right to introduce the licensing arrangements referred to in the third sentence of Article 10(1) of the ECHR.

2. Paragraph 2 of this Article spells out the consequences of paragraph 1 regarding freedom of the media. It is based in particular on Court of Justice case-law regarding television, particularly in Case C-288/89 (judgment of 25 July 1991, *Stichting Collectieve Antennevoorziening Gouda and others* [1991] ECR I-4007), and on the Protocol on the system of public broadcasting in the Member States annexed to the EC Treaty and now to the Treaties, and on Council Directive 89/552/EC (particularly its seventeenth recital).

Explanation on Article 12 — Freedom of assembly and of association

1. Paragraph 1 of this Article corresponds to Article 11 of the ECHR, which reads as follows:

- ‘1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.’

The meaning of the provisions of paragraph 1 of this Article 12 is the same as that of the ECHR, but their scope is wider since they apply at all levels including European level. In accordance with Article 52(3) of the Charter, limitations on that right may not exceed those considered legitimate by virtue of Article 11(2) of the ECHR.

2. This right is also based on Article 11 of the Community Charter of the Fundamental Social Rights of Workers.
3. Paragraph 2 of this Article corresponds to Article 10(4) of the Treaty on European Union.

Explanation on Article 13 — Freedom of the arts and sciences

This right is deduced primarily from the right to freedom of thought and expression. It is to be exercised having regard to Article 1 and may be subject to the limitations authorised by Article 10 of the ECHR.

Explanation on Article 14 — Right to education

1. This Article is based on the common constitutional traditions of Member States and on Article 2 of the Protocol to the ECHR, which reads as follows:

‘No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.’

It was considered useful to extend this Article to access to vocational and continuing training (see point 15 of the Community Charter of the Fundamental Social Rights of Workers and Article 10 of the Social Charter) and to add the principle of free compulsory education. As it is worded, the latter principle merely implies that as regards compulsory education, each child has the possibility of attending an establishment which offers free education. It does not require all establishments which provide education or vocational and continuing training, in particular private ones, to be free of charge. Nor does it exclude certain specific forms of education having to be paid for, if the State takes measures to grant financial compensation. In so far as the Charter applies to the Union, this means that in its training policies the Union must respect free compulsory education, but this does not, of course, create new powers. Regarding the right of parents, it must be interpreted in conjunction with the provisions of Article 24.

2. Freedom to found public or private educational establishments is guaranteed as one of the aspects of freedom to conduct a business but it is limited by respect for democratic principles and is exercised in accordance with the arrangements defined by national legislation.

Explanation on Article 15 — Freedom to choose an occupation and right to engage in work

Freedom to choose an occupation, as enshrined in Article 15(1), is recognised in Court of Justice case-law (see *inter alia* judgment of 14 May 1974, Case 4/73 *Nold* [1974] ECR 491, paragraphs 12 to 14 of the grounds; judgment of 13 December 1979, Case 44/79 *Hauer* [1979] ECR 3727; judgment of 8 October 1986, Case 234/85 *Keller* [1986] ECR 2897, paragraph 8 of the grounds).

This paragraph also draws upon Article 1(2) of the European Social Charter, which was signed on 18 October 1961 and has been ratified by all the Member States, and on point 4 of the Community Charter of the Fundamental Social Rights of Workers of 9 December 1989. The expression ‘working conditions’ is to be understood in the sense of Article 156 of the Treaty on the Functioning of the European Union.

Paragraph 2 deals with the three freedoms guaranteed by Articles 26, 45, 49 and 56 of the Treaty on the Functioning of the European Union, namely freedom of movement for workers, freedom of establishment and freedom to provide services.

Paragraph 3 has been based on Article 153(1)(g) of the Treaty on the Functioning of the European Union, and on Article 19(4) of the European Social Charter signed on 18 October 1961 and ratified by all the Member States. Article 52(2) of the Charter is therefore applicable. The question of recruitment of seamen having the nationality of third States for the crews of vessels flying the flag of a Member State of the Union is governed by Union law and national legislation and practice.

Explanation on Article 16 — Freedom to conduct a business

This Article is based on Court of Justice case-law which has recognised freedom to exercise an economic or commercial activity (see judgments of 14 May 1974, Case 4/73 *Nold* [1974] ECR 491, paragraph 14 of the grounds, and of 27 September 1979, Case 230-78 *SpA Eridiana and others* [1979] ECR 2749, paragraphs 20 and 31 of the grounds) and freedom of contract (see *inter alia* *Sukkerfabriken Nykøbing* judgment, Case 151/78 [1979] ECR 1, paragraph 19 of the grounds, and judgment of 5 October 1999, C-240/97 *Spain v Commission* [1999] ECR I-6571, paragraph 99 of the grounds) and Article 119(1) and (3) of the Treaty on the Functioning of the European Union, which recognises free competition. Of course, this right is to be exercised with respect for Union law and national legislation. It may be subject to the limitations provided for in Article 52(1) of the Charter.

Explanation on Article 17 — Right to property

This Article is based on Article 1 of the Protocol to the ECHR:

‘Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.’

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.’

This is a fundamental right common to all national constitutions. It has been recognised on numerous occasions by the case-law of the Court of Justice, initially in the *Hauer* judgment (13 December 1979, [1979] ECR 3727). The wording has been updated but, in accordance with Article 52(3), the meaning and scope of the right are the same as those of the right guaranteed by the ECHR and the limitations may not exceed those provided for there.

Protection of intellectual property, one aspect of the right of property, is explicitly mentioned in paragraph 2 because of its growing importance and Community secondary legislation. Intellectual property covers not only literary and artistic property but also *inter alia* patent and trademark rights and associated rights. The guarantees laid down in paragraph 1 shall apply as appropriate to intellectual property.

Explanation on Article 18 — Right to asylum

The text of the Article has been based on TEC Article 63, now replaced by Article 78 of the Treaty on the Functioning of the European Union, which requires the Union to respect the Geneva Convention on refugees. Reference should be made to the Protocols relating to the United Kingdom and Ireland, annexed to the Treaties, and to Denmark, to determine the extent to which those Member States implement Union law in this area and the extent to which this Article is applicable to them. This Article is in line with the Protocol on Asylum annexed to the Treaties.

Explanation on Article 19 — Protection in the event of removal, expulsion or extradition

Paragraph 1 of this Article has the same meaning and scope as Article 4 of Protocol No 4 to the ECHR concerning collective expulsion. Its purpose is to guarantee that every decision is based on a specific examination and that no single measure can be taken to expel all persons having the nationality of a particular State (see also Article 13 of the Covenant on Civil and Political Rights).

Paragraph 2 incorporates the relevant case-law from the European Court of Human Rights regarding Article 3 of the ECHR (see *Ahmed v. Austria*, judgment of 17 December 1996, 1996-VI, p. 2206, and *Soering*, judgment of 7 July 1989).

TITLE III — EQUALITY

Explanation on Article 20 — Equality before the law

This Article corresponds to a general principle of law which is included in all European constitutions and has also been recognised by the Court of Justice as a basic principle of Community law (judgment of 13 November 1984, Case 283/83 *Racke* [1984] ECR 3791, judgment of 17 April 1997, Case C-15/95 *EARL* [1997] ECR I-1961, and judgment of 13 April 2000, Case C-292/97 *Karlsson* [2000] ECR 2737).

Explanation on Article 21 — Non-discrimination

Paragraph 1 draws on Article 13 of the EC Treaty, now replaced by Article 19 of the Treaty on the Functioning of the European Union, Article 14 of the ECHR and Article 11 of the Convention on Human Rights and Biomedicine as regards genetic heritage. In so far as this corresponds to Article 14 of the ECHR, it applies in compliance with it.

There is no contradiction or incompatibility between paragraph 1 and Article 19 of the Treaty on the Functioning of the European Union which has a different scope and purpose: Article 19 confers power on the Union to adopt legislative acts, including harmonisation of the Member States' laws and regulations, to combat certain forms of discrimination, listed exhaustively in that Article. Such legislation may cover action of Member State authorities (as well as relations between private individuals) in any area within the limits of the Union's powers. In contrast, the provision in Article 21(1) does not create any power to enact anti-discrimination laws in these areas of Member State or private action, nor does it lay down a sweeping ban of discrimination in such wide-ranging areas. Instead, it only addresses discriminations by the institutions and bodies of the Union themselves, when exercising powers conferred under the Treaties, and by Member States only when they are implementing Union law. Paragraph 1 therefore does not alter the extent of powers granted under Article 19 nor the interpretation given to that Article.

Paragraph 2 corresponds to the first paragraph of Article 18 of the Treaty on the Functioning of the European Union and must be applied in compliance with that Article.

Explanation on Article 22 — Cultural, religious and linguistic diversity

This Article has been based on Article 6 of the Treaty on European Union and on Article 151(1) and (4) of the EC Treaty, now replaced by Article 167(1) and (4) of the Treaty on the Functioning of the European Union, concerning culture. Respect for cultural and linguistic diversity is now also laid down in Article 3(3) of the Treaty on European Union. The Article is also inspired by Declaration No 11 to the Final Act of the Amsterdam Treaty on the status of churches and non-confessional organisations, now taken over in Article 17 of the Treaty on the Functioning of the European Union.

Explanation on Article 23 — Equality between women and men

The first paragraph has been based on Articles 2 and 3(2) of the EC Treaty, now replaced by Article 3 of the Treaty on European Union and Article 8 of the Treaty on the Functioning of the European Union which impose the objective of promoting equality between men and women on the Union, and on Article 157(1) of the Treaty on the Functioning of the European Union. It draws on Article 20 of the revised European Social Charter of 3 May 1996 and on point 16 of the Community Charter on the rights of workers.

It is also based on Article 157(3) of the Treaty on the Functioning of the European Union and Article 2(4) of Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.

The second paragraph takes over in shorter form Article 157(4) of the Treaty on the Functioning of the European Union which provides that the principle of equal treatment does not prevent the maintenance or adoption of measures providing for specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers. In accordance with Article 52(2), the present paragraph does not amend Article 157(4).

Explanation on Article 24 — The rights of the child

This Article is based on the New York Convention on the Rights of the Child signed on 20 November 1989 and ratified by all the Member States, particularly Articles 3, 9, 12 and 13 thereof.

Paragraph 3 takes account of the fact that, as part of the establishment of an area of freedom, security and justice, the legislation of the Union on civil matters having cross-border implications, for which Article 81 of the Treaty on the Functioning of the European Union confers power, may include notably visiting rights ensuring that children can maintain on a regular basis a personal and direct contact with both of their parents.

Explanation on Article 25 — The rights of the elderly

This Article draws on Article 23 of the revised European Social Charter and Articles 24 and 25 of the Community Charter of the Fundamental Social Rights of Workers. Of course, participation in social and cultural life also covers participation in political life.

Explanation on Article 26 — Integration of persons with disabilities

The principle set out in this Article is based on Article 15 of the European Social Charter and also draws on point 26 of the Community Charter of the Fundamental Social Rights of Workers.

TITLE IV — SOLIDARITY

Explanation on Article 27 — Workers' right to information and consultation within the undertaking

This Article appears in the revised European Social Charter (Article 21) and in the Community Charter on the rights of workers (points 17 and 18). It applies under the conditions laid down by Union law and by national laws. The reference to appropriate levels refers to the levels laid down by Union law or by national laws and practices, which might include the European level when Union legislation so provides. There is a considerable Union *acquis* in this field: Articles 154 and 155 of the Treaty on the Functioning of the European Union, and Directives 2002/14/EC (general framework for informing and consulting employees in the European Community), 98/59/EC (collective redundancies), 2001/23/EC (transfers of undertakings) and 94/45/EC (European works councils).

Explanation on Article 28 — Right of collective bargaining and action

This Article is based on Article 6 of the European Social Charter and on the Community Charter of the Fundamental Social Rights of Workers (points 12 to 14). The right of collective action was recognised by the European Court of Human Rights as one of the elements of trade union rights laid down by Article 11 of the ECHR. As regards the appropriate levels at which collective negotiation might take place, see the explanation given for the above Article. The modalities and limits for the exercise of collective action, including strike action, come under national laws and practices, including the question of whether it may be carried out in parallel in several Member States.

Explanation on Article 29 — Right of access to placement services

This Article is based on Article 1(3) of the European Social Charter and point 13 of the Community Charter of the Fundamental Social Rights of Workers.

Explanation on Article 30 — Protection in the event of unjustified dismissal

This Article draws on Article 24 of the revised Social Charter. See also Directive 2001/23/EC on the safeguarding of employees' rights in the event of transfers of undertakings, and Directive 80/987/EEC on the protection of employees in the event of the insolvency of their employer, as amended by Directive 2002/74/EC.

Explanation on Article 31 — Fair and just working conditions

1. Paragraph 1 of this Article is based on Directive 89/391/EEC on the introduction of measures to encourage improvements in the safety and health of workers at work. It also draws on Article 3 of the Social Charter and point 19 of the Community Charter on the rights of workers, and, as regards dignity at work, on Article 26 of the revised Social Charter. The expression 'working conditions' is to be understood in the sense of Article 156 of the Treaty on the Functioning of the European Union.
2. Paragraph 2 is based on Directive 93/104/EC concerning certain aspects of the organisation of working time, Article 2 of the European Social Charter and point 8 of the Community Charter on the rights of workers.

Explanation on Article 32 — Prohibition of child labour and protection of young people at work

This Article is based on Directive 94/33/EC on the protection of young people at work, Article 7 of the European Social Charter and points 20 to 23 of the Community Charter of the Fundamental Social Rights of Workers.

Explanation on Article 33 — Family and professional life

Article 33(1) is based on Article 16 of the European Social Charter.

Paragraph 2 draws on Council Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding and Directive 96/34/EC on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC. It is also based on Article 8 (protection of maternity) of the European Social Charter and draws on Article 27 (right of workers with family responsibilities to equal opportunities and equal treatment) of the revised Social Charter. 'Maternity' covers the period from conception to weaning.

Explanation on Article 34 — Social security and social assistance

The principle set out in Article 34(1) is based on Articles 153 and 156 of the Treaty on the Functioning of the European Union, Article 12 of the European Social Charter and point 10 of the Community Charter on the rights of workers. The Union must respect it when exercising the powers conferred on it by Articles 153 and 156 of the Treaty on the Functioning of the European Union. The reference to social services relates to cases in which such services have been introduced to provide certain advantages but does not imply that such services must be created where they do not exist. 'Maternity' must be understood in the same sense as in the preceding Article.

Paragraph 2 is based on Articles 12(4) and 13(4) of the European Social Charter and point 2 of the Community Charter of the Fundamental Social Rights of Workers and reflects the rules arising from Regulation (EEC) No 1408/71 and Regulation (EEC) No 1612/68.

Paragraph 3 draws on Article 13 of the European Social Charter and Articles 30 and 31 of the revised Social Charter and point 10 of the Community Charter. The Union must respect it in the context of policies based on Article 153 of the Treaty on the Functioning of the European Union.

Explanation on Article 35 — Health care

The principles set out in this Article are based on Article 152 of the EC Treaty, now replaced by Article 168 of the Treaty on the Functioning of the European Union, and on Articles 11 and 13 of the European Social Charter. The second sentence of the Article takes over Article 168(1).

Explanation on Article 36 — Access to services of general economic interest

This Article is fully in line with Article 14 of the Treaty on the Functioning of the European Union and does not create any new right. It merely sets out the principle of respect by the Union for the access to services of general economic interest as provided for by national provisions, when those provisions are compatible with Union law.

Explanation on Article 37 — Environmental protection

The principles set out in this Article have been based on Articles 2, 6 and 174 of the EC Treaty, which have now been replaced by Article 3(3) of the Treaty on European Union and Articles 11 and 191 of the Treaty on the Functioning of the European Union.

It also draws on the provisions of some national constitutions.

Explanation on Article 38 — Consumer protection

The principles set out in this Article have been based on Article 169 of the Treaty on the Functioning of the European Union.

TITLE V — CITIZENS' RIGHTS

Explanation on Article 39 — Right to vote and to stand as a candidate at elections to the European Parliament

Article 39 applies under the conditions laid down in the Treaties, in accordance with Article 52(2) of the Charter. Article 39(1) corresponds to the right guaranteed in Article 20(2) of the Treaty on the Functioning of the European Union (cf. also the legal base in Article 22 of the Treaty on the Functioning of the European Union for the adoption of detailed arrangements for the exercise of that right) and Article 39(2) corresponds to Article 14(3) of the Treaty on European Union. Article 39(2) takes over the basic principles of the electoral system in a democratic State.

Explanation on Article 40 — Right to vote and to stand as a candidate at municipal elections

This Article corresponds to the right guaranteed by Article 20(2) of the Treaty on the Functioning of the European Union (cf. also the legal base in Article 22 of the Treaty on the Functioning of the European Union for the adoption of detailed arrangements for the exercise of that right). In accordance with Article 52(2) of the Charter, it applies under the conditions defined in these Articles in the Treaties.

Explanation on Article 41 — Right to good administration

Article 41 is based on the existence of the Union as subject to the rule of law whose characteristics were developed in the case-law which enshrined *inter alia* good administration as a general principle of law (see *inter alia* Court of Justice judgment of 31 March 1992 in Case C-255/90 P *Burban* [1992] ECR I-2253, and Court of First Instance judgments of 18 September 1995 in Case T-167/94 *Nölle* [1995] ECR II-2589, and 9 July 1999 in Case T-231/97 *New Europe Consulting and others* [1999] ECR II-2403). The wording for that right in the first two paragraphs results from the case-law (Court of Justice judgment of 15 October 1987 in Case 222/86 *Heylens* [1987] ECR 4097, paragraph 15 of the grounds, judgment of 18 October 1989 in Case 374/87 *Orkem* [1989] ECR 3283, judgment of 21 November 1991 in Case C-269/90 *TU München* [1991] ECR I-5469, and Court of First Instance judgments of 6 December 1994 in Case T-450/93 *Lisrestal* [1994] ECR II-1177, 18 September 1995 in Case T-167/94 *Nölle* [1995] ECR II-2589) and the wording regarding the obligation to give reasons comes from Article 296 of the Treaty on the Functioning of the European Union (cf. also the legal base in Article 298 of the Treaty on the Functioning of the European Union for the adoption of legislation in the interest of an open, efficient and independent European administration).

Paragraph 3 reproduces the right now guaranteed by Article 340 of the Treaty on the Functioning of the European Union. Paragraph 4 reproduces the right now guaranteed by Article 20(2)(d) and Article 25 of the Treaty on the Functioning of the European Union. In accordance with Article 52(2) of the Charter, those rights are to be applied under the conditions and within the limits defined by the Treaties.

The right to an effective remedy, which is an important aspect of this question, is guaranteed in Article 47 of this Charter.

Explanation on Article 42 — Right of access to documents

The right guaranteed in this Article has been taken over from Article 255 of the EC Treaty, on the basis of which Regulation (EC) No 1049/2001 has subsequently been adopted. The European Convention has extended this right to documents of institutions, bodies and agencies generally, regardless of their form (see Article 15(3) of the Treaty on the Functioning of the European Union). In accordance with Article 52(2) of the Charter, the right of access to documents is exercised under the conditions and within the limits for which provision is made in Article 15(3) of the Treaty on the Functioning of the European Union.

Explanation on Article 43 — European Ombudsman

The right guaranteed in this Article is the right guaranteed by Articles 20 and 228 of the Treaty on the Functioning of the European Union. In accordance with Article 52(2) of the Charter, it applies under the conditions defined in these two Articles.

Explanation on Article 44 — Right to petition

The right guaranteed in this Article is the right guaranteed by Articles 20 and 227 of the Treaty on the Functioning of the European Union. In accordance with Article 52(2) of the Charter, it applies under the conditions defined in these two Articles.

Explanation on Article 45 — Freedom of movement and of residence

The right guaranteed by paragraph 1 is the right guaranteed by Article 20(2)(a) of the Treaty on the Functioning of the European Union (cf. also the legal base in Article 21; and the judgment of the Court of Justice of 17 September 2002, Case C-413/99 *Baumbast* [2002] ECR I-7091). In accordance with Article 52(2) of the Charter, those rights are to be applied under the conditions and within the limits defined by the Treaties.

Paragraph 2 refers to the power granted to the Union by Articles 77, 78 and 79 of the Treaty on the Functioning of the European Union. Consequently, the granting of this right depends on the institutions exercising that power.

Explanation on Article 46 — Diplomatic and consular protection

The right guaranteed in this Article is the right guaranteed by Article 20 of the Treaty on the Functioning of the European Union (cf. also the legal base in Article 23). In accordance with Article 52(2) of the Charter, it applies under the conditions defined in these two Articles.

TITLE VI — JUSTICE

Explanation on Article 47 — Right to an effective remedy and to a fair trial

The first paragraph is based on Article 13 of the ECHR:

‘Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.’

However, in Union law the protection is more extensive since it guarantees the right to an effective remedy before a court. The Court of Justice enshrined that right in its judgment of 15 May 1986 as a general principle of Union law (Case 222/84 *Johnston* [1986] ECR 1651; see also judgment of 15 October 1987, Case 222/86 *Heylens* [1987] ECR 4097 and judgment of 3 December 1992, Case C-97/91 *Borelli* [1992] ECR I-6313). According to the Court, that general principle of Union law also applies to the Member States when they are implementing Union law. The inclusion of this precedent in the Charter has not been intended to change the system of judicial review laid down by the Treaties, and particularly the rules relating to admissibility for direct actions before the Court of Justice of the European Union. The European Convention has considered the Union’s system of judicial review including the rules on admissibility, and confirmed them while amending them as to certain aspects, as reflected in Articles 251 to 281 of the Treaty on the Functioning of the European Union, and in particular in the fourth paragraph of Article 263. Article 47 applies to the institutions of the Union and of Member States when they are implementing Union law and does so for all rights guaranteed by Union law.

The second paragraph corresponds to Article 6(1) of the ECHR which reads as follows:

'In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.'

In Union law, the right to a fair hearing is not confined to disputes relating to civil law rights and obligations. That is one of the consequences of the fact that the Union is a community based on the rule of law as stated by the Court in Case 294/83, *'Les Verts' v European Parliament* (judgment of 23 April 1986, [1986] ECR 1339). Nevertheless, in all respects other than their scope, the guarantees afforded by the ECHR apply in a similar way to the Union.

With regard to the third paragraph, it should be noted that in accordance with the case-law of the European Court of Human Rights, provision should be made for legal aid where the absence of such aid would make it impossible to ensure an effective remedy (ECHR judgment of 9 October 1979, *Airey*, Series A, Volume 32, p. 11). There is also a system of legal assistance for cases before the Court of Justice of the European Union.

Explanation on Article 48 — Presumption of innocence and right of defence

Article 48 is the same as Article 6(2) and (3) of the ECHR, which reads as follows:

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
3. Everyone charged with a criminal offence has the following minimum rights:
 - (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
 - (b) to have adequate time and facilities for the preparation of his defence;
 - (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
 - (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
 - (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.'

In accordance with Article 52(3), this right has the same meaning and scope as the right guaranteed by the ECHR.

Explanation on Article 49 — Principles of legality and proportionality of criminal offences and penalties

This Article follows the traditional rule of the non-retroactivity of laws and criminal sanctions. There has been added the rule of the retroactivity of a more lenient penal law, which exists in a number of Member States and which features in Article 15 of the Covenant on Civil and Political Rights.

Article 7 of the ECHR is worded as follows:

- ‘1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.’

In paragraph 2, the reference to ‘civilised’ nations has been deleted; this does not change the meaning of this paragraph, which refers to crimes against humanity in particular. In accordance with Article 52(3), the right guaranteed here therefore has the same meaning and scope as the right guaranteed by the ECHR.

Paragraph 3 states the general principle of proportionality between penalties and criminal offences which is enshrined in the common constitutional traditions of the Member States and in the case-law of the Court of Justice of the Communities.

Explanation on Article 50 — Right not to be tried or punished twice in criminal proceedings for the same criminal offence

Article 4 of Protocol No 7 to the ECHR reads as follows:

- ‘1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.
2. The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and the penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.
3. No derogation from this Article shall be made under Article 15 of the Convention.’

The ‘*non bis in idem*’ rule applies in Union law (see, among the many precedents, the judgment of 5 May 1966, Joined Cases 18/65 and 35/65 *Gutmann v Commission* [1966] ECR 149 and a recent case, the decision of the Court of First Instance of 20 April 1999, Joined Cases T-305/94 and others *Limburgse Vinyl Maatschappij NV v Commission* [1999] ECR II-931). The rule prohibiting cumulation refers to cumulation of two penalties of the same kind, that is to say criminal-law penalties.

In accordance with Article 50, the ‘*non bis in idem*’ rule applies not only within the jurisdiction of one State but also between the jurisdictions of several Member States. That corresponds to the *acquis* in Union law; see Articles 54 to 58 of the Schengen Convention and the judgment of the Court of Justice of 11 February 2003, C-187/01 *Gözütok* [2003] ECR I-1345, Article 7 of the Convention on the Protection of the European Communities’ Financial Interests and Article 10 of the Convention on the fight against corruption. The very limited exceptions in those Conventions permitting the Member States to derogate from the ‘*non bis in idem*’ rule are covered by the horizontal clause in Article 52(1) of the Charter concerning limitations. As regards the situations referred to by Article 4 of Protocol No 7, namely the application of the principle within the same Member State, the guaranteed right has the same meaning and the same scope as the corresponding right in the ECHR.

TITLE VII — GENERAL PROVISIONS GOVERNING THE INTERPRETATION AND APPLICATION OF THE CHARTER

Explanation on Article 51 — Field of application

The aim of Article 51 is to determine the scope of the Charter. It seeks to establish clearly that the Charter applies primarily to the institutions and bodies of the Union, in compliance with the principle of subsidiarity. This provision was drafted in keeping with Article 6(2) of the Treaty on European Union, which required the Union to respect fundamental rights, and with the mandate issued by the Cologne European Council. The term ‘institutions’ is enshrined in the Treaties. The expression ‘bodies, offices and agencies’ is commonly used in the Treaties to refer to all the authorities set up by the Treaties or by secondary legislation (see, e.g., Articles 15 or 16 of the Treaty on the Functioning of the European Union).

As regards the Member States, it follows unambiguously from the case-law of the Court of Justice that the requirement to respect fundamental rights defined in the context of the Union is only binding on the Member States when they act in the scope of Union law (judgment of 13 July 1989, Case 5/88 *Wachauf* [1989] ECR 2609; judgment of 18 June 1991, Case C-260/89 *ERT* [1991] ECR I-2925; judgment of 18 December 1997, Case C-309/96 *Annibaldi* [1997] ECR I-7493). The Court of Justice confirmed this case-law in the following terms: ‘In addition, it should be remembered that the requirements flowing from the protection of fundamental rights in the Community legal order are also binding on Member States when they implement Community rules ...’ (judgment of 13 April 2000, Case C-292/97 [2000] ECR I-2737, paragraph 37 of the grounds). Of course this rule, as enshrined in this Charter, applies to the central authorities as well as to regional or local bodies, and to public organisations, when they are implementing Union law.

Paragraph 2, together with the second sentence of paragraph 1, confirms that the Charter may not have the effect of extending the competences and tasks which the Treaties confer on the Union. Explicit mention is made here of the logical consequences of the principle of subsidiarity and of the fact that the Union only has those powers which have been conferred upon it. The fundamental rights as guaranteed in the Union do not have any effect other than in the context of the powers determined by the Treaties. Consequently, an obligation, pursuant to the second sentence of paragraph 1, for the Union’s institutions to promote principles laid down in the Charter may arise only within the limits of these same powers.

Paragraph 2 also confirms that the Charter may not have the effect of extending the field of application of Union law beyond the powers of the Union as established in the Treaties. The Court of Justice has already established this rule with respect to the fundamental rights recognised as part of Union law (judgment of 17 February 1998, C-249/96 *Grant* [1998] ECR I-621, paragraph 45 of the grounds). In accordance with this rule, it goes without saying that the reference to the Charter in Article 6 of the Treaty on European Union cannot be understood as extending by itself the range of Member State action considered to be ‘implementation of Union law’ (within the meaning of paragraph 1 and the above-mentioned case-law).

Explanation on Article 52 — Scope and interpretation of rights and principles

The purpose of Article 52 is to set the scope of the rights and principles of the Charter, and to lay down rules for their interpretation. Paragraph 1 deals with the arrangements for the limitation of rights. The wording is based on the case-law of the Court of Justice: ‘... it is well established in the case-law of the Court that restrictions may be imposed on the exercise of fundamental rights, in particular in the context of a common organisation of the market, provided that those restrictions in fact correspond to objectives of general interest pursued by the Community and do not constitute, with regard to the aim pursued, disproportionate and unreasonable interference undermining the very substance of those rights’ (judgment of 13 April 2000, Case C-292/97, paragraph 45 of the grounds). The reference to general interests recognised by the Union covers both the objectives mentioned in Article 3 of the Treaty on European Union and other interests protected by specific provisions of the Treaties such as Article 4(1) of the Treaty on European Union and Articles 35(3), 36 and 346 of the Treaty on the Functioning of the European Union.

Paragraph 2 refers to rights which were already expressly guaranteed in the Treaty establishing the European Community and have been recognised in the Charter, and which are now found in the Treaties (notably the rights derived from Union citizenship). It clarifies that such rights remain subject to the conditions and limits applicable to the Union law on which they are based, and for which provision is made in the Treaties. The Charter does not alter the system of rights conferred by the EC Treaty and taken over by the Treaties.

Paragraph 3 is intended to ensure the necessary consistency between the Charter and the ECHR by establishing the rule that, in so far as the rights in the present Charter also correspond to rights guaranteed by the ECHR, the meaning and scope of those rights, including authorised limitations, are the same as those laid down by the ECHR. This means in particular that the legislator, in laying down limitations to those rights, must comply with the same standards as are fixed by the detailed limitation arrangements laid down in the ECHR, which are thus made applicable for the rights covered by this paragraph, without thereby adversely affecting the autonomy of Union law and of that of the Court of Justice of the European Union.

The reference to the ECHR covers both the Convention and the Protocols to it. The meaning and the scope of the guaranteed rights are determined not only by the text of those instruments, but also by the case-law of the European Court of Human Rights and by the Court of Justice of the European Union. The last sentence of the paragraph is designed to allow the Union to guarantee more extensive protection. In any event, the level of protection afforded by the Charter may never be lower than that guaranteed by the ECHR.

The Charter does not affect the possibilities of Member States to avail themselves of Article 15 ECHR, allowing derogations from ECHR rights in the event of war or of other public dangers threatening the life of the nation, when they take action in the areas of national defence in the event of war and of the maintenance of law and order, in accordance with their responsibilities recognised in Article 4(1) of the Treaty on European Union and in Articles 72 and 347 of the Treaty on the Functioning of the European Union.

The list of rights which may at the present stage, without precluding developments in the law, legislation and the Treaties, be regarded as corresponding to rights in the ECHR within the meaning of the present paragraph is given hereafter. It does not include rights additional to those in the ECHR.

1. Articles of the Charter where both the meaning and the scope are the same as the corresponding Articles of the ECHR:
 - Article 2 corresponds to Article 2 of the ECHR,
 - Article 4 corresponds to Article 3 of the ECHR,
 - Article 5(1) and (2) corresponds to Article 4 of the ECHR,
 - Article 6 corresponds to Article 5 of the ECHR,
 - Article 7 corresponds to Article 8 of the ECHR,
 - Article 10(1) corresponds to Article 9 of the ECHR,
 - Article 11 corresponds to Article 10 of the ECHR without prejudice to any restrictions which Union law may impose on Member States' right to introduce the licensing arrangements referred to in the third sentence of Article 10(1) of the ECHR,

- Article 17 corresponds to Article 1 of the Protocol to the ECHR,
 - Article 19(1) corresponds to Article 4 of Protocol No 4,
 - Article 19(2) corresponds to Article 3 of the ECHR as interpreted by the European Court of Human Rights,
 - Article 48 corresponds to Article 6(2) and(3) of the ECHR,
 - Article 49(1) (with the exception of the last sentence) and (2) correspond to Article 7 of the ECHR.
2. Articles where the meaning is the same as the corresponding Articles of the ECHR, but where the scope is wider:
- Article 9 covers the same field as Article 12 of the ECHR, but its scope may be extended to other forms of marriage if these are established by national legislation,
 - Article 12(1) corresponds to Article 11 of the ECHR, but its scope is extended to European Union level,
 - Article 14(1) corresponds to Article 2 of the Protocol to the ECHR, but its scope is extended to cover access to vocational and continuing training,
 - Article 14(3) corresponds to Article 2 of the Protocol to the ECHR as regards the rights of parents,
 - Article 47(2) and (3) corresponds to Article 6(1) of the ECHR, but the limitation to the determination of civil rights and obligations or criminal charges does not apply as regards Union law and its implementation,
 - Article 50 corresponds to Article 4 of Protocol No 7 to the ECHR, but its scope is extended to European Union level between the Courts of the Member States,
 - Finally, citizens of the European Union may not be considered as aliens in the scope of the application of Union law, because of the prohibition of any discrimination on grounds of nationality. The limitations provided for by Article 16 of the ECHR as regards the rights of aliens therefore do not apply to them in this context.

The rule of interpretation contained in paragraph 4 has been based on the wording of Article 6(3) of the Treaty on European Union and takes due account of the approach to common constitutional traditions followed by the Court of Justice (e.g., judgment of 13 December 1979, Case 44/79 *Hauer* [1979] ECR 3727; judgment of 18 May 1982, Case 155/79 *AM&S* [1982] ECR 1575). Under that rule, rather than following a rigid approach of ‘a lowest common denominator’, the Charter rights concerned should be interpreted in a way offering a high standard of protection which is adequate for the law of the Union and in harmony with the common constitutional traditions.

Paragraph 5 clarifies the distinction between ‘rights’ and ‘principles’ set out in the Charter. According to that distinction, subjective rights shall be respected, whereas principles shall be observed (Article 51(1)). Principles may be implemented through legislative or executive acts (adopted by the Union in accordance with its powers, and by the Member States only when they implement Union law); accordingly, they become significant for the Courts only when such acts are interpreted or reviewed. They do not however give rise to direct claims for positive action by the Union’s institutions or Member States authorities. This is consistent both with case-law of the Court of Justice (cf. notably case-law on the ‘precautionary principle’ in Article 191(2) of the Treaty on the Functioning of the European Union: judgment of the CFI of 11 September 2002, Case T-13/99 *Pfizer v Council*, with numerous references to earlier case-law; and a series of judgments on Article 33 (ex-39) on the principles of agricultural law, e.g. judgment of the Court of Justice in Case 265/85 *Van den Berg* [1987] ECR 1155: scrutiny of the principle of market stabilisation and of reasonable expectations) and with the approach of the Member States’ constitutional systems to ‘principles’, particularly in the field of social law. For illustration, examples for principles, recognised in the Charter include e.g. Articles 25, 26 and 37. In some cases, an Article of the Charter may contain both elements of a right and of a principle, e.g. Articles 23, 33 and 34.

Paragraph 6 refers to the various Articles in the Charter which, in the spirit of subsidiarity, make reference to national laws and practices.

Explanation on Article 53 — Level of protection

This provision is intended to maintain the level of protection currently afforded within their respective scope by Union law, national law and international law. Owing to its importance, mention is made of the ECHR.

Explanation on Article 54 — Prohibition of abuse of rights

This Article corresponds to Article 17 of the ECHR:

‘Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.’.

JUDGMENT OF THE COURT (Second Chamber)

31 March 2011 (*)

(Free movement of capital – Direct taxation – Taxation of income from the letting of immovable property – Deductibility of annuities paid to a relative in the context of an anticipated succession inter vivos – Condition of being subject to unlimited tax liability in the Member State at issue)

In Case C-450/09,

REFERENCE for a preliminary ruling under Article 234 EC from the Niedersächsisches Finanzgericht (Germany), made by decision of 14 October 2009, received at the Court on 19 November 2009, in the proceedings

Ulrich Schröder

v

Finanzamt Hameln,

THE COURT (Second Chamber),

composed of J.N. Cunha Rodrigues, President of the Chamber, A. Arabadjiev, U. Löhmus (Rapporteur), A. Ó Caoimh and P. Lindh, Judges,

Advocate General: Y. Bot,

Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 10 November 2010,

after considering the observations submitted on behalf of:

- Mr Schröder, by R. Geck, Rechtsanwalt,
- the Finanzamt Hameln, by P. Klose, acting as Agent,
- the German Government, by C. Blaschke, acting as Agent,
- the French Government, by G. de Bergues and J.-S. Pilczer, acting as Agents,
- the European Commission, by R. Lyal and W. Mölls, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 9 December 2010,

gives the following

Judgment

- 1 This reference for a preliminary ruling concerns the interpretation of Articles 18 TFEU and 63 TFEU.
- 2 The reference has been made in proceedings between Mr Schröder and the Finanzamt Hameln (Tax Office Hameln, Germany) concerning the refusal by the Finanzamt Hameln to authorise the deduction of the annuity paid by Mr Schröder to his mother from the income derived from the letting of immovable property situated in Germany and acquired by him, *inter alia*, in the context of an anticipated succession *inter vivos*.

Legal context

European Union law

- 3 Article 1(1) of Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty [article repealed by the Treaty of Amsterdam] (OJ 1988 L 178, p. 5) provides:

‘Without prejudice to the following provisions, Member States shall abolish restrictions on movements of capital taking place between persons resident in Member States. To facilitate application of this Directive, capital movements shall be classified in accordance with the Nomenclature in Annex I.’

- 4 The capital movements listed in Annex I to Directive 88/361 include, in section XI of that annex, personal capital movements, which in turn include gifts and inheritances.

National law

- 5 Paragraph 1 of the Law on Income Tax (Einkommensteuergesetz), in the version applicable at the time of the facts in the main proceedings (BGBl. 2002 I, p. 4210; ‘the EStG’), provides, *inter alia*, that natural persons who have their domicile or habitual residence in Germany are subject to unlimited income tax liability, whereas those who are not domiciled or habitually resident in Germany are subject to limited income tax liability in the case where they receive income of German origin within the meaning of Paragraph 49 of the EStG. Income coming under Paragraph 49 includes that derived from the letting of immovable property situated in Germany.

- 6 Paragraph 10 of the EStG is entitled ‘Special expenditure’. Subparagraph 1 of that paragraph states as follows:

‘The following expenses shall constitute special expenditure where they are not business or occupational expenses:

...

- 1a. annuities and permanent burdens based on specific obligations, which have no economic link to income which is not taken into consideration in the assessment of tax; ...’

- 7 Paragraph 50 of the EStG contains specific provisions concerning persons with limited tax liability. Under subparagraph 1:

‘Persons with limited tax liability may deduct business expenses (Paragraph 4(4) to (8)) or occupational expenses (Paragraph 9) only to the extent that those expenses are economically linked to income of German origin. ... Paragraphs ... 10 ... do not apply. ...’

The dispute in the main proceedings and the question referred for a preliminary ruling

8 Mr Schröder is a German national who is resident and employed in Belgium.

9 By a document of 27 April 1992 certified by a notary, he acquired from his parents immovable property situated in Germany, which was subject to a right of usufruct in their favour. By a document of 2 December 2002 certified by a notary, other immovable property situated in Germany was transferred by their mother to Mr Schröder and his brother by means of anticipated succession *inter vivos*. The rights of usufruct which their mother had hitherto enjoyed over several properties were transformed into an annuity under the terms of which, from 1 December 2002, Mr Schröder and his brother each had to pay their mother a monthly sum of EUR 1 000.

10 For the year 2002, Mr Schröder received, in Germany, income of EUR 2 785 from the letting of the property acquired in 1992 and EUR 749.50 from the property held jointly by him and his brother.

11 The Finanzamt Hameln based the tax notice addressed to Mr Schröder in respect of the year 2002 on the sum of those two amounts and refused to take into account the annuity of EUR 1 000 paid by him in December 2002.

12 Mr Schröder brought an action against that refusal before the Niedersächsisches Finanzgericht (Finance Court of Lower Saxony). That court states that the possibility for a person such as Mr Schröder's brother, who resides in Germany and is, as a result, subject to unlimited income tax liability, to deduct from the taxable amount such an annuity as a category of special expenditure coming under Paragraph 10(1)(1a) of the EStG is well established in the case-law of the Bundesfinanzhof (Federal Finance Court). The Bundesfinanzhof, according to the Niedersächsisches Finanzgericht, takes the view that, in relation to immovable property transferred by means of anticipated succession *inter vivos*, the payments agreed, such as annuities, do not constitute consideration, or partial consideration, and it excludes those payments in full from the calculation of income.

13 However, according to the referring court, a person such as Mr Schröder, who, as a non-resident, is subject only to limited income tax liability in Germany, is not entitled to deduct such an annuity from his taxable income because Paragraph 50(1) of the EStG excludes the application of Paragraph 10 of the EStG to him.

14 The referring court has doubts as to whether this difference in the tax treatment of resident and non-resident taxpayers is compatible with European Union law and, in particular, with Article 63 TFEU.

15 In those circumstances, the Niedersächsisches Finanzgericht decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Is a situation where a relative with limited tax liability in the Federal Republic of Germany, unlike a person with unlimited tax liability, may not deduct from his total income, as special expenditure, annuities paid in connection with income from letting or leasing contrary to Articles [63 TFEU] and [18 TFEU]?’

Consideration of the question referred

Admissibility

16 The German Government takes the view that the reference for a preliminary ruling is inadmissible on

the ground that the referring court fails to provide information concerning the factual circumstances and the legal context sufficient to enable the Member States, in particular, to comment on the present proceedings in full knowledge of the facts. First, there is no detailed information concerning the manner in which the immovable property was transferred to Mr Schröder, the termination of the existing rights of usufruct and the payment of the monthly annuity. Second, there is insufficient information concerning the content and interpretation of the national legislation regarding special expenditure, within the meaning of Paragraph 10 of the EStG, and the differences between that expenditure and other categories of expenditure, such as business expenses and occupational expenses. In the absence of such detailed information, it is not possible to analyse the link between certain expenses of a non-resident taxpayer and his taxable income in order to determine whether such a taxpayer has been subject to unlawful discrimination.

- 17 In that regard, it should be recalled that the Court may reject a reference for a preliminary ruling submitted by a national court only where it is quite obvious that the interpretation of European Union law that is sought is unrelated to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, *inter alia*, Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 61, and Case C-97/09 *Schmelz* [2010] ECR I-0000, paragraph 29).
- 18 With regard, more particularly, to the information that must be provided to the Court in an order for reference, that information does not serve only to enable the Court to provide answers which will be of use to the referring court; it must also enable the governments of the Member States, and other interested parties, to submit observations in accordance with Article 23 of the Statute of the Court of Justice. For those purposes, it is necessary that the national court should define the factual and legislative context of the questions which it is asking or, at the very least, explain the factual circumstances on which those questions are based (see, to that effect, Case C-345/06 *Heinrich* [2009] ECR I-1659, paragraphs 30 and 31, and Case C-42/07 *Liga Portuguesa de Futebol Profissional and Bwin International* [2009] ECR I-7633, paragraph 40).
- 19 However, in view of the division of responsibilities between the national courts and the Court of Justice on which the procedure referred to in Article 267 TFEU is based, the referring court cannot be required to make all the findings of fact and of law required by its judicial function before it may bring the matter before the Court. It is sufficient that both the subject-matter of the dispute in the main proceedings and the main issues raised for the European Union legal order may be understood from the reference for a preliminary ruling, in order to enable the Member States to submit their observations in accordance with Article 23 of the Statute of the Court of Justice and to participate effectively in the proceedings before the Court (*Liga Portuguesa de Futebol Profissional and Bwin International*, paragraph 41, and Case C-439/08 *VEBIC* [2010] ECR I-0000, paragraph 47).
- 20 In the present case, as is apparent from paragraphs 8 to 13 of the present judgment, the order for reference explains clearly, first, how the immovable property owned by Mr Schröder in Germany was acquired and the origin of the annuity which he is required to pay to his mother and, second, the effect of the national legislation at issue in the main proceedings with regard to the non-deductibility of that annuity from his taxable income. In addition, the referring court states that the resolution of the dispute which has been brought before it depends on its establishing whether the difference in treatment between a resident taxpayer and a non-resident taxpayer is compatible with European Union law.
- 21 Those elements are sufficient to explain the subject-matter of the dispute in the main proceedings and the main issues raised by it for the European Union legal order and to enable the Court to provide an answer which will be of use to the referring court. It should also be pointed out that the French

Government and the European Commission have been able to submit to the Court detailed written observations on the question referred.

22 In the light of the foregoing, the reference for a preliminary ruling must be regarded as admissible.

Substance

23 By its question, the referring court asks, in essence, whether Articles 18 TFEU and 63 TFEU must be interpreted as precluding legislation of a Member State which, while allowing a resident taxpayer to deduct annuities paid to a relative who transferred to him immovable property situated in the territory of that State from the rental income generated by that property, does not allow such a deduction to be made by a non-resident taxpayer.

24 First, it is necessary to identify the provision of the FEU Treaty which is applicable to a situation such as that in the main proceedings.

25 With regard to Article 63 TFEU, it is settled case-law that, in the absence of a definition in the Treaty of ‘movement of capital’ within the meaning of Article 63(1) TFEU, the nomenclature which constitutes Annex I to Directive 88/361 retains an indicative value, even though that directive was adopted on the basis of Articles 69 and 70(1) of the EEC Treaty (Articles 67 to 73 of the EEC Treaty were replaced by Articles 73b to 73g of the EC Treaty, which themselves became Articles 56 EC to 60 EC), it being understood that, according to the third paragraph of the introduction to that annex, the nomenclature which it contains is not exhaustive as regards the notion of movements of capital (see, *inter alia*, Case C-318/07 *Persche* [2009] ECR I-359, paragraph 24 and the case-law cited; Case C-182/08 *Glaxo Wellcome* [2009] ECR I-8591, paragraph 39; Case C-35/08 *Busley and Cibrian Fernandez* [2009] ECR I-9807, paragraph 17; and Case C-25/10 *Missionswerk Werner Heukelbach* [2011] ECR I-0000, paragraph 15).

26 In that regard, the Court has already held that inheritances and gifts, which fall under section XI of Annex I to Directive 88/361, entitled ‘Personal Capital Movements’, constitute movements of capital within the meaning of Article 63 TFEU, except in cases where their constituent elements are confined within a single Member State (see, to that effect, *Persche*, paragraph 27; *Busley and Cibrian Fernandez*, paragraph 18; and *Missionswerk Werner Heukelbach*, paragraph 16).

27 Consequently, it must be held that the transfer of immovable property situated in Germany, as a gift or by means of anticipated succession *inter vivos*, to a natural person resident in Belgium comes within the scope of Article 63 TFEU.

28 As regards Article 18 TFEU, which lays down a general prohibition of all discrimination on grounds of nationality, it should be noted that that provision applies independently only to situations governed by European Union law for which the Treaty does not lay down any specific rules of non-discrimination (see, *inter alia*, Case C-443/06 *Hollmann* [2007] ECR I-8491, paragraph 28 and the case-law cited; Case C-311/08 *SGI* [2010] ECR I-0000, paragraph 31; and *Missionswerk Werner Heukelbach*, paragraph 18).

29 Since the Treaty provisions on the free movement of capital are applicable and provide specific rules on non-discrimination, Article 18 TFEU is not applicable to the main proceedings (see *Hollmann*, paragraph 29, and *Missionswerk Werner Heukelbach*, paragraph 19).

30 Second, it should be noted that the measures prohibited by Article 63(1) TFEU, as restrictions on the movement of capital, include those which are liable to discourage non-residents from making

investments in a Member State or from maintaining such investments (see, to that effect, Case C-377/07 *STEKO Industriemontage* [2009] ECR I-299, paragraphs 23 and 24 and the case-law cited).

- 31 With regard to the legislation at issue in the main proceedings, a natural person who is not domiciled or habitually resident in Germany is, according to Paragraph 49 of the EStG, liable to income tax in that Member State in respect of income derived from the letting of immovable property situated in Germany. In contrast to resident taxpayers, a non-resident taxpayer may not, under Paragraph 50 of the EStG, deduct from that income an annuity, such as that paid by Mr Schröder to his mother in the context of the anticipated succession *inter vivos*, as special expenditure within the meaning of Paragraph 10(1)(1a) of the EStG.
- 32 Less favourable tax treatment reserved for non-residents alone might deter them from acquiring or retaining immovable property situated in Germany (see, by analogy, Case C-512/03 *Blanckaert* [2005] ECR I-7685, paragraph 39). It might also deter German residents from naming, as beneficiaries of an anticipated succession *inter vivos*, persons resident in a Member State other than the Federal Republic of Germany (see, by analogy, *Missionswerk Werner Heukelbach*, paragraph 25).
- 33 Such legislation constitutes, therefore, a restriction on the free movement of capital which is prohibited, in principle, by Article 63 TFEU.
- 34 It is true that, according to Article 65(1)(a) TFEU, Article 63 TFEU is without prejudice to the right of Member States to distinguish, in their tax law, between taxpayers who are not in the same situation with regard to their place of residence.
- 35 However, it is important to distinguish unequal treatment permitted under Article 65(1)(a) TFEU from arbitrary discrimination or disguised restrictions prohibited under Article 65(3) TFEU. In order for national tax legislation such as that at issue in the main proceedings, which distinguishes between resident and non-resident taxpayers, to be regarded as compatible with the Treaty provisions on the free movement of capital, the difference in treatment must relate to situations which are not objectively comparable or must be justified by an overriding reason in the public interest. Moreover, in order to be justified, the difference in treatment must not go beyond what is necessary in order to attain the objective of the legislation in question (see *Persche*, paragraph 41, and Case C-510/08 *Mattner* [2010] ECR I-0000, paragraph 34).
- 36 It is thus necessary to examine whether, in the circumstances of the dispute in the main proceedings, the situation of non-residents is comparable to that of residents.
- 37 In that regard, it is settled case-law that, in relation to direct taxes, the situations of residents and non-residents within a State are not, as a rule, comparable, since the income received in the territory of a Member State by a non-resident is in most cases only a part of his total income, which is concentrated at his place of residence, and because a non-resident's personal ability to pay tax, determined by reference to his aggregate income and his personal and family circumstances, is easier to assess at the place where his personal and financial interests are centred, which in general is the place where he is habitually resident (Case C-279/93 *Schumacker* [1995] ECR I-225, paragraphs 31 and 32; Case C-234/01 *Gerritse* [2003] ECR I-5933, paragraph 43; and Case C-562/07 *Commission v Spain* [2009] ECR I-9553, paragraph 46).
- 38 Furthermore, the fact that a Member State does not grant to a non-resident certain tax benefits which it grants to a resident is not, as a rule, discriminatory, having regard to the objective differences

between the situation of residents and that of non-residents, from the point of view both of the source of their income and of their personal ability to pay tax or their personal and family circumstances (*Schumacker*, paragraph 34; *Gerritse*, paragraph 44; and *Commission v Spain*, paragraph 47).

39 In the present case, it is not in dispute that the rental income generated in the course of 2002 by the immovable property owned by Mr Schröder in Germany constituted only a small part of the overall income received by him during that year.

40 However, the Court has held, in relation to expenses, such as business expenses which are directly linked to an activity which has generated taxable income in a Member State, that residents and non-residents of that State are in a comparable situation, with the result that legislation of that State which denies non-residents, in matters of taxation, the right to deduct such expenses, while, on the other hand, allowing residents to do so, risks operating mainly to the detriment of nationals of other Member States and therefore constitutes indirect discrimination on grounds of nationality (see *Gerritse*, paragraphs 27 and 28; Case C-346/04 *Conijn* [2006] ECR I-6137, paragraph 20; Case C-290/04 *FKP Scorpio Konzertproduktionen* [2006] ECR I-9461, paragraph 49; Case C-345/04 *Centro Equestre da Lezíria Grande* [2007] ECR I-1425, paragraph 23; Case C-11/07 *Eckelkamp and Others* [2008] ECR I-6845, paragraph 50; and Case C-43/07 *Arens-Sikken* [2008] ECR I-6887, paragraph 44).

41 It follows that legislation such as that at issue in the main proceedings would in principle be contrary to Article 63 TFEU if the annuity paid by Mr Schröder to his mother were to be regarded as expenditure directly linked to the activity of Mr Schröder in letting the immovable property situated in Germany which was transferred to him by his parents.

42 The German Government takes the view that there is no direct link in the present case. According to it, such an annuity, classified as special expenditure coming under Paragraph 10(1)(1a) of the EStG, differs from business expenses and occupational expenses which, under Paragraph 50(1) of the EStG, can be deducted by a taxpayer with limited tax liability in so far as they represent the consideration for the acquisition of a source of income. The payment of such an annuity, it argues, is not the normal or legal consequence of the receipt of rental income but forms part of a family support arrangement, with the amount being fixed not by reference to the value of the assets transferred but according to the personal needs of the recipient and the debtor's general economic ability to pay, matters which can be adequately assessed only by the Member State in which the debtor is resident. Also in that context, the French Government observes that the amount of the annuity is affected neither by the lack of rental income nor, conversely, by the receipt of very substantial income.

43 Those arguments cannot be accepted. Even assuming that the amount of an annuity, such as that paid by Mr Schröder, is determined on the basis of the ability of the debtor to pay and the recipient's personal needs, the fact remains that the existence of a direct link within the meaning of the case-law cited in paragraph 40 of the present judgment results, not from a correlation, of whatever kind, between the amount of the expenditure in question and that of the taxable income, but from the fact that that expenditure is inextricably linked to the activity which gives rise to that income (see, in that regard, *Centro Equestre da Lezíria Grande*, paragraph 25).

44 Thus, the Court has taken the view that expenses occasioned by the activity in question are directly linked to that activity (see, to that effect, *Gerritse*, paragraphs 9 and 27, and *Centro Equestre da Lezíria Grande*, paragraph 25) and are, thus, necessary in order to carry out that activity. Likewise, such a direct link was accepted with regard to costs incurred in obtaining tax advice required in order to prepare a tax return, the duty to file such a return resulting from the receipt of income in the Member State concerned (see *Conijn*, paragraph 22).

- 45 According to the order for reference, the immovable property transferred to Mr Schröder was, at least in part, subject to rights of usufruct which were converted into a monthly annuity which he is required to pay to his mother. It therefore appears that the undertaking to pay that annuity results from the transfer of that property, that undertaking having been necessary to enable Mr Schröder to assume ownership of the property and, consequently, generate the rental income at issue in the main proceedings which is subject to tax in Germany.
- 46 The view must therefore be taken that, to the extent that Mr Schröder's undertaking to pay the annuity to his mother results from the transfer to him of immovable property situated in Germany – that being a matter for the referring court to establish – that annuity constitutes an expense directly linked to the use of that property, with the result that Mr Schröder is in that regard in a situation comparable to that of a resident taxpayer.
- 47 In those circumstances, national provisions which, in matters of income tax, deny non-residents the right to deduct such an expense, while that right is, by contrast, granted to residents, is, in the absence of valid justification, contrary to Article 63 TFEU.
- 48 No overriding reason in the public interest has been invoked by the German Government or contemplated by the referring court.
- 49 In view of the foregoing, the answer to the question referred is that Article 63 TFEU must be interpreted as precluding legislation of a Member State which, while allowing a resident taxpayer to deduct the annuities paid to a relative who transferred to him immovable property situated in the territory of that State from the rental income derived from that property, does not grant such a deduction to a non-resident taxpayer, in so far as the undertaking to pay those annuities results from the transfer of that property.

Costs

- 50 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

Article 63 TFEU must be interpreted as precluding legislation of a Member State which, while allowing a resident taxpayer to deduct the annuities paid to a relative who transferred to him immovable property situated in the territory of that State from the rental income derived from that property, does not grant such a deduction to a non-resident taxpayer, in so far as the undertaking to pay those annuities results from the transfer of that property.

[Signatures]

* Language of the case: German.

JUDGMENT OF THE COURT (First Chamber)

14 March 2013 (*)

(Competition – Article 101(1) TFEU – Application of similar national regulations – Jurisdiction of the Court – Bilateral agreements between an insurance company and car repairers relating to hourly repair charges – Charges paid depending on the number of insurance contracts concluded for the insurance company by those repairers in their capacity as brokers – Concept of ‘agreement having as its object the restriction of competition’)

In Case C-32/11,

REQUEST for a preliminary ruling under Article 267 TFEU from the Magyar Köztársaság Legfelsőbb Bírósága (Hungary), made by decision of 13 October 2010, received at the Court on 21 January 2011, in the proceedings

Allianz Hungária Biztosító Zrt,

Generali-Providencia Biztosító Zrt,

Gépjármű Márkakereskedők Országos Szövetsége,

Magyar Peugeot Márkakereskedők Biztosítási Alkusz Kft,

Paragon-Alkusz Zrt., the legal successor of the Magyar Opelkereskedők Bróker Kft

v

Gazdasági Versenyhivatal,

THE COURT (First Chamber),

composed of A. Tizzano, President of the Chamber, M. Ilešič (Rapporteur), A. Borg Barthet, M. Safjan and M. Berger, Judges,

Advocate General: P. Cruz Villalón,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 7 June 2012,

after considering the observations submitted on behalf of:

- Allianz Hungária Biztosító Zrt, by Z. Hegymegi-Barakonyi and P. Vörös, ügyvédek,
- Generali-Providencia Biztosító Zrt, by G. Fejes and L. Scheuer-Szabó, ügyvédek,
- the Hungarian Government, Z. Fehér, K. Szijjártó and K. Molnár, acting as Agents,
- the European Commission, by V. Bottka, L. Malferrari and M. Kellerbauer, acting as Agents,

– the EFTA Surveillance Authority, by X. Lewis and M. Schneider, acting as Agents
after hearing the Opinion of the Advocate General at the sitting on 25 October 2012,
gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 101(1) TFEU.

2 The request has been made in the context of a dispute between the companies Allianz Hungária Biztosító Zrt ('Allianz'), Generali-Providencia Biztosító Zrt ('Generali'), Magyar Peugeot Márkakereskedők Biztosítási Alkusz Kft ('Peugeot Márkakereskedők') and Paragon-Alkusz Zrt, the legal successor of the Magyar Opelkereskedők Bróker Kft ('Opelkereskedők') and the association Gépjármű Márkakereskedők Országos Szövetsége ('GÉMOSZ'), on the one hand, and the Gazdasági Versenyhivatal (the competition authority) ('the GVH'), on the other hand, concerning a decision taken by the latter imposing fines on those undertakings and on Porsche Biztosítási Alkusz Kft ('Porsche Biztosítási') for having concluded a series of agreements with an anti-competitive object ('the contested decision').

Legal context

Hungarian legislation

3 The preamble to Law No LVII of 1996 on the prohibition of unfair market practices and the restriction of competition (A tisztességtelen piaci magatartás és a versenykorlátozás tilalmáról szóló 1996. évi LVII. Törvény) ('Tpvt') states:

'The public interest in the maintenance of competition on the market, which benefits economic efficiency, social development and the interests of consumers and undertakings which respect business integrity, requires that the State ensure free and fair economic competition by means of legal regulation. That necessitates the adoption of rules of competition law which preclude market practices contrary to the requirements of fair competition or which restrict economic competition, prevent concentrations of undertakings which are damaging to competition, while respecting the requisite organisational and procedural conditions. In order to fulfil those objectives, the Parliament – aware of the need to harmonise European Community rules and the practice of Hungarian law in the field of competition – adopts the following law ...'.

4 Paragraph 11(1) and (2) of the Tpvt, entitled 'Prohibition of agreements restricting competition' provides:

'1. All agreements between undertakings and all decisions by associations of undertakings, bodies governed by public law, associations and other similar entities ... which have as their object, or which have or are likely to have as their effect, the prevention, restriction or distortion of competition are prohibited. Agreements concluded between undertakings which are not independent of each other cannot be covered by this definition.

2. The prohibition shall apply in particular to:

- (a) directly or indirectly fixing purchase or selling prices or any other trading conditions;
- (b) limiting or controlling production, distribution, technical development or investments;
- (c) sharing supply markets, limiting the choice of suppliers and excluding certain consumers for the purchase of various goods;
- (d) market sharing, excluding sales or restricting the choice of types of sale;
- (repealed)
- (f) preventing market access;
- (g) cases where, in relation to transactions of the same value or type, there is discrimination between the parties to the contract, in particular as regards pricing, payment deadlines, terms and methods of sale and purchase, which put certain parties to the contract at a competitive disadvantage;
- (h) making the conclusion of the contract subject to the acceptance of obligations which do not, whether according to their character or according to commercial practice, have any connection with the purpose of those contracts.'

5 According to the explanatory memorandum for the TpvT, the proposal in Paragraph 11 was justified by the following considerations:

'Significant changes with very important economic consequences are expected in the field of antitrust law. The main reason for the changes is the harmonisation of the law. ... Article 85 of the EEC Treaty sets out a general prohibition of agreements and prohibits both horizontal and vertical agreements. ... In the field of agreements, the proposal confirms the principle of general prohibition – like the law on capital markets and Article 85 of the EEC Treaty. That means that the regulation lays down the principle of the general prohibition of agreements and adopts the system of exceptions and derogations. ... Paragraph 11(1) of the proposal does not prohibit merely everything which restricts or excludes (prevents) competition, as does the law on capital markets, but also, in accordance with Article 85 of the EEC Treaty, everything which distorts competition. ... Apart from the general prohibition of agreements, the proposal – based on the regulatory approach applied in the law on capital markets and in Article 85 of the EEC Treaty – draws up a non-exhaustive list of examples of typical agreements which restrict competition. That list is broader than that in the law on capital markets and is similar to the list of agreements appearing in Article 85(1) of the EEC Treaty.'

The dispute in the main proceedings and the question submitted for a preliminary ruling

- 6 Once a year, the Hungarian insurers, and in particular Allianz and Generali, agree with the repair shops conditions and rates applicable to repair services payable by the insurer in the case of accidents involving insured vehicles. Those shops are thus able to carry out repairs immediately according to the conditions and rates agreed with the insurer.
- 7 Since the end of 2002, many authorised dealers which also operate as repair shops have requested GÉMOSZ, the national association of authorised dealers, to negotiate on their behalf annual framework agreements with the insurers concerning hourly charges for the repair of damaged cars.
- 8 Those dealers are connected with the insurers in two ways. First, they repair, in the event of accidents,

cars insured by the insurers and, secondly, they act as intermediaries for the insurers by offering, as agents of their own insurance brokers or associated brokers, car insurance to their customers on the occasion of the sale or repair of vehicles.

- 9 During 2004 and 2005, framework agreements were concluded between GÉMOSZ and Allianz. Allianz later concluded individual agreements with those dealers on the basis of the framework agreements. Those agreements provided that the dealers would receive higher remuneration for car repairs where Allianz car insurance made up a certain percentage of the insurance sold by the dealer.
- 10 During that time, Generali did not conclude any framework agreements with GÉMOSZ, but rather individual agreements with those dealers. While those agreements did not contain a written clause concerning increased remuneration like those included in the Allianz agreements, the GVH nevertheless found that, in practice, Generali provided similar commercial incentives.
- 11 By the contested decision, the GVH found that those agreements and other agreements concluded by the five applicants in the main proceedings and by Porsche Biztosítási were incompatible with Paragraph 11 of the Tptv. Those agreements can be summarised as follows:
- horizontal agreements consisting of three decisions taken by GÉMOSZ between 2003 and 2005, which set out ‘recommended prices’ to the authorised dealers for car repairs and which were applicable to the insurers;
 - framework agreements concluded in 2004 and 2005 between GÉMOSZ and Allianz and individual agreements concluded at the same time between certain authorised dealers and Allianz and Generali respectively, which made the hourly repair charge dependent on the number of insurance policies signed;
 - various agreements concluded between 2000 and 2005 respectively between Allianz and Generali, on the one part, and Peugeot Márkakereskedők, Opelkereskedők and Porsche Biztosítási as insurance brokers, on the other, seeking to influence their practices by specifying a minimum number or percentage of car insurance policies to be obtained by the broker over a given period of time and by providing that the broker’s remuneration be fixed according to the number of policies taken out with the insurer.
- 12 The GVH found that that bundle of agreements, considered together and individually, had as its object the restriction of competition in the car insurance contracts market and the car repair services market. The GVH held that, as there was no impact on intra-Community trade, Article 101 TFEU was not applicable to those agreements and that their unlawfulness derived solely from domestic competition law. On the basis of that unlawfulness, it prohibited the continuation of the practices in question and imposed fines in the following amounts: HUF 5 319 000 000 on Allianz, HUF 1 046 000 000 on Generali, HUF 360 000 000 on GÉMOSZ, HUF 13 600 000 on Peugeot Márkakereskedők and HUF 45 000 000 on Opelkereskedők.
- 13 Following the action for annulment brought by the applicants in the main proceedings, the Fővárosi Bíróság (Budapest Municipal Court) partially reversed the contested decision, which, however, was restored on appeal by decision of the Fővárosi Ítéltábla (Regional Court of Appeal, Budapest).
- 14 The applicants in the main proceedings appealed against that judgment before the Legfelsőbb Bíróság (Hungarian Supreme Court), claiming in particular that the agreements in question did not have as their object the restriction of competition.

- 15 The Legfelsőbb Bíróság notes, first, that the wording of Paragraph 11(1) of the TpvT is almost identical to that of Article 101(1) TFEU and that the interpretation of Paragraph 11 of the TpvT, which will ultimately be adopted with respect to the agreements at issue, will in the future also have an impact on the interpretation of Article 101 TFEU in that Member State. That court points out, moreover, that there is a clear interest in having a uniform interpretation of the provisions and concepts of European Union law. The Legfelsőbb Bíróság notes, secondly, that the Court has not yet given judgment with regard to whether agreements such as those at issue in the main proceedings can be treated as ‘agreements which, by their nature, are restrictive of competition by reason of their object’.
- 16 Accordingly, the Legfelsőbb Bíróság decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

‘Do bilateral agreements between an insurance company and individual car repairers, or between an insurance company and a car repairers’ association, under which the hourly repair charge paid by the insurance company to the repairer for the repair of vehicles insured by the insurance company depends, among other things, on the number and percentage of insurance policies taken out with the insurance company through the repairer, acting as the insurance broker for the insurance company in question, qualify as agreements which have as their object the prevention, restriction or distortion of competition, and thus contravene Article 101(1) TFEU?’

The jurisdiction of the Court

- 17 Allianz, Generali, the Hungarian Government and the European Commission consider that the Court has jurisdiction to answer the question submitted even though Article 101(1) TFEU is not applicable to the main proceedings because the agreements at issue in those proceedings do not have an impact on intra-Community trade.
- 18 The Commission, supported on this point during the hearing by Generali and the Hungarian Government, refers to the special connection between Article 101 TFEU and Paragraph 11 of the TpvT, which stems not only from the use of identical concepts, but also from the decentralised system of applying competition law established by Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ 2003 L 1, p. 1). It is apparent, moreover, from the order for reference that the Legfelsőbb Bíróság will follow the guidelines provided by the Court and that it will apply them uniformly in both purely internal situations and in situations in which Article 101 TFEU is also applicable. Allianz claims, in particular, that the European Union has an interest in the uniform interpretation of a provision reproducing European Union law, such as Paragraph 11 of the TpvT.
- 19 In that regard, it must be recalled that, under Article 267 TFEU, the Court has jurisdiction to give preliminary rulings concerning the interpretation of the Treaties and acts of the EU institutions. In the context of cooperation between the Court and the national courts, established by Article 267 TFEU, it is for the national courts alone to assess, in view of the special features of each case, both the need for a preliminary ruling in order to enable them to give their judgment and the relevance of the questions which they put to the Court. Consequently, where questions submitted by national courts concern the interpretation of a provision of EU law, the Court is, in principle, obliged to give a ruling (see Case C-482/10 *Cicala* [2011] ECR I-0000, paragraphs 15 and 16 and the case-law cited).
- 20 Applying that case-law, the Court has repeatedly held that it has jurisdiction to give preliminary rulings on questions concerning European Union law in situations where the facts of the cases being

considered by the national courts were outside the direct scope of European Union law but where those provisions had been rendered applicable by domestic law, which adopted, for internal situations, the same approach as that provided for under European Union law. In those circumstances, it is clearly in the interest of the European Union that, in order to forestall future differences of interpretation, provisions or concepts taken from European Union law should be interpreted uniformly, irrespective of the circumstances in which they are to apply (see, to that effect, *inter alia*, Joined Cases C-297/88 and C-197/89 *Dzodzi* [1990] ECR I-3763, paragraph 37; Case C-28/95 *Leur-Bloem* [1997] ECR I-4161, paragraphs 27 and 32; Case C-1/99 *Kofisa Italia* [2001] ECR I-207, paragraph 32; Case C-217/05 *Confederación Española de Empresarios de Estaciones de Servicio* [2006] ECR I-11987, paragraph 19; Case C-280/06 *ETI and Others* [2007] ECR I-10893, paragraph 21; Case C-352/08 *Modehuis A. Zwijnenburg* [2010] ECR I-4303, paragraph 33; and Case C-603/10 *Pelati* [2012] ECR I-0000, paragraph 18).

- 21 Concerning this request for a preliminary ruling, it should be noted that Paragraph 11(1) and (2) of the TpvT faithfully reproduces Article 101(1) TFEU. It is clearly apparent, moreover, from the preamble to and the explanatory memorandum for the TpvT that the Hungarian legislature sought to harmonise domestic competition law with that of the European Union and that, in particular, Paragraph 11(1) aims to prohibit ‘in application of Article 85 of the EEC Treaty’, now Article 101 TFEU, ‘everything which distorts competition’. It is therefore not contested that that legislature decided to treat internal situations and situations governed by European Union law in the same way.
- 22 Moreover, it follows from the order for reference that the Legfelsőbb Bíróság considers that the concepts referred to in Paragraph 11(1) of the TpvT must in fact be interpreted in the same way as the equivalent concepts in Article 101(1) TFEU and that it is bound in that regard by the interpretation of those concepts provided by the Court.
- 23 In those circumstances, it must be held that the Court has jurisdiction to answer the question submitted, concerning Article 101(1) TFEU, even though the latter provision does not directly govern the situation at issue in the main proceedings.

Admissibility of the request for a preliminary ruling

- 24 The Hungarian Government disputes the admissibility of the request for a preliminary ruling on the ground that the facts set out by the referring court do not contain all the information necessary to allow the Court to give a useful answer to the question submitted to it. That government claims *inter alia* that, in order to determine whether the bilateral agreements to which the question refers had as their object the restriction of competition, it is necessary to take into account not only those agreements, but the whole of the system of agreements and of the fact that they are mutually reinforcing.
- 25 The EFTA Surveillance Authority, without raising the inadmissibility of that request, notes also that the referring court does not explain the economic and legal context of the agreements at issue in the main proceedings, so that it is difficult to provide it with a useful answer.
- 26 According to settled case-law, the Court may refuse to rule on a question submitted by a national court only where it is quite obvious that the interpretation of European Union law that is sought bears no relation to the actual facts of the main action or its subject-matter, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, *inter alia*, Case C-379/98 *PreussenElektra* [2001] ECR I-2099, paragraph 39; Joined Cases C-94/04 and C-202/04 *Cipolla and Others* [2006] ECR

I-11421, paragraph 25; and Case C-180/11 *Bericap Záródástechnikai* [2012] ECR I-0000, paragraph 58).

- 27 With regard, more particularly, to the information that must be provided to the Court in an order for reference, that information does not serve only to enable the Court to provide answers which will be of use to the national court; it must also enable the governments of the Member States and other interested parties to submit observations in accordance with Article 23 of the Statute of the Court of Justice of the European Union. For those purposes, it is necessary that the national court should define the factual and legislative context of the questions which it is asking or, at the very least, explain the factual circumstances on which those questions are based (see Case C-25/11 *Varzim Sol* [2012] ECR I-0000, paragraph 30 and the case-law cited).
- 28 The order for reference contains an adequate description of the legal and factual context to the dispute in the main proceedings, and the information provided by the referring court makes it possible for the significance of the question referred to be determined. Thus, the order for reference has given the interested parties a genuine opportunity to submit observations in accordance with Article 23 of the Statute of the Court of Justice, as is indeed shown by the content of the observations submitted to the Court.
- 29 On the basis of the information included in the order for reference, the Court is, moreover, able to provide the Legfelsőbb Bíróság with a useful answer. In that regard, it should be noted that, in the context of the procedure referred to in Article 267 TFEU, which is based on a clear separation of functions between the national courts and the Court of Justice, the role of the latter is limited to interpreting the provisions of European Union law referred to it, in this case, Article 101(1) TFEU. Therefore, it is not for the Court, but for the Legfelsőbb Bíróság to apply that interpretation to the present case and thus to determine in the end whether, taking account of all of the information relevant to the situation in the main proceedings and the economic and legal context of which it forms a part, the agreements at issue have as their object the restriction of competition. Consequently, even if the order for reference does not set out that information and that context in sufficient detail so as to enable that determination to be carried out, such a lacuna does not affect the Court's fulfilment of the task assigned to it by Article 267 TFEU.
- 30 The request for a preliminary ruling is therefore admissible.

Consideration of the question submitted for a preliminary ruling

- 31 By its question, the referring court asks, in essence, whether Article 101(1) TFEU must be interpreted as meaning that agreements whereby car insurance companies come to bilateral arrangements, either with car dealers acting as car repair shops, or with an association representing the latter, concerning the hourly charge to be paid by the insurance company for repairs to vehicles insured by it, stipulating that that charge depends, inter alia, on the number and percentage of insurance contracts that the dealer has sold as intermediary for that company, can be considered a restriction of competition 'by object' within the meaning of that provision.
- 32 Allianz and Generali consider that such agreements do not constitute a restriction 'by object' and can therefore be treated as infringing Article 101(1) TFEU solely to the extent that it is shown that they are in fact likely to produce anti-competitive effects. By contrast, the Hungarian Government and the Commission suggest that the question submitted be answered in the affirmative. The EFTA Surveillance Authority considers that the answer to that question depends on the extent to which those agreements

harm competition, which should be determined by the referring court.

- 33 It must first of all be recalled that, to be caught by the prohibition laid down in Article 101(1) TFEU, an agreement must have ‘as [its] object or effect the prevention, restriction or distortion of competition within the internal market’. According to established case-law since the judgment in Case 56/65 *LTM* [1966] ECR 337, the alternative nature of that requirement, indicated by the conjunction ‘or’, leads, first of all, to the need to consider the precise object of the agreement in the economic context in which it is to be applied.
- 34 Accordingly, where the anti-competitive object of the agreement is established it is not necessary to examine its effects on competition. Where, however, the analysis of the content of the agreement does not reveal a sufficient degree of harm to competition, the effects of the agreement should then be considered and, for it to be caught by the prohibition, it is necessary to find that factors are present which show that competition has in fact been prevented, restricted or distorted to an appreciable extent (see Case C-8/08 *T-Mobile Netherlands and Others* [2009] ECR I-4529, paragraphs 28 and 30; Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P *GlaxoSmithKline Services and Others v Commission and Others* [2009] ECR I-9291, paragraph 55; Joined Cases C-403/08 and C-429/08 *Football Association Premier League and Others* [2011] ECR I-0000, paragraph 135; and Case C-439/09 *Pierre Fabre Dermo-Cosmétique* [2011] ECR I-0000, paragraph 34).
- 35 The distinction between ‘infringements by object’ and ‘infringements by effect’ arises from the fact that certain forms of collusion between undertakings can be regarded, by their very nature, as being injurious to the proper functioning of normal competition (see Case C-209/07 *Beef Industry Development Society and Barry Brothers* [2008] ECR I-8637, paragraph 17; *T-Mobile Netherlands and Others*, paragraph 29; and Case C-226/11 *Expedia* [2012] ECR I-0000, paragraph 36).
- 36 In order to determine whether an agreement involves a restriction of competition ‘by object’, regard must be had to the content of its provisions, its objectives and the economic and legal context of which it forms a part (see *GlaxoSmithKline Services and Others v Commission and Others*, paragraph 58; *Football Association Premier League and Others*, paragraph 136; and *Pierre Fabre Dermo-Cosmétique*, paragraph 35). When determining that context, it is also appropriate to take into consideration the nature of the goods or services affected, as well as the real conditions of the functioning and structure of the market or markets in question (see *Expedia*, paragraph 21 and the case-law cited).
- 37 In addition, although the parties’ intention is not a necessary factor in determining whether an agreement is restrictive, there is nothing prohibiting the competition authorities, the national courts or the Courts of the European Union from taking that factor into account (see, to that effect, *GlaxoSmithKline Services and Others v Commission and Others*, paragraph 58 and the case-law cited).
- 38 The Court has, moreover, already held that, in order for the agreement to be regarded as having an anti-competitive object, it is sufficient that it has the potential to have a negative impact on competition, that is to say, that it be capable in an individual case of resulting in the prevention, restriction or distortion of competition within the internal market. Whether and to what extent, in fact, such an effect results can only be of relevance for determining the amount of any fine and assessing any claim for damages (see *T-Mobile Netherlands and Others*, paragraph 31).

- 39 Concerning the agreements referred to in the question submitted, it should be noted that they relate to

the hourly charge to be paid by the insurance company to car dealers, acting as repair shops, for the repair of cars in the event of accidents. They provide that that charge is increased in accordance with the number and percentage of insurance contracts that the dealer sells for that company.

40 Such agreements therefore link the remuneration for the car repair service to that for the car insurance brokerage. The linkage of those two different services is possible because of the fact that the dealers act in relation to the insurers in a dual capacity, namely as intermediaries or brokers, offering car insurance to their customers at the time of sale or repair of vehicles, and as repair shops, repairing vehicles after accidents on behalf of the insurers.

41 However, while the establishment of such a link between two activities which are in principle independent does not automatically mean that the agreement concerned has as its object the restriction of competition, it can nevertheless constitute an important factor in determining whether that agreement is by its nature injurious to the proper functioning of normal competition, which is the case, in particular, where the independence of those activities is necessary for that functioning.

42 Moreover, it is necessary to take account of the fact that such an agreement is likely to affect not only one, but two markets, in this case those of car insurance and car repair services, and that its object must be determined with respect to the two markets concerned.

43 In that regard, it must, first, be noted that, in contrast to the view apparently held by Allianz and Generali, the fact that both cases concern vertical relationships in no way excludes the possibility that the agreement at issue in the main proceedings constitutes a restriction of competition 'by object'. While vertical agreements are, by their nature, often less damaging to competition than horizontal agreements, they can, nevertheless, in some cases, also have a particularly significant restrictive potential. The Court has thus already held on several occasions that a vertical agreement had as its object the restriction of competition (see Joined Cases 56/64 and 58/64 *Consten and Grundig v Commission* [1966] ECR 429; Case 19/77 *Miller International Schallplatten v Commission* [1978] ECR 131; Case 243/83 *Binon* [1985] ECR 2015; and *Pierre Fabre Dermo-Cosmétique*).

44 Next, with regard to determining the object of the agreements at issue in the main proceedings with respect to the car insurance market, it should be noted that, by such agreements, insurance companies such as Allianz and Generali aim to maintain or increase their market shares.

45 It is not disputed that, if there was a horizontal agreement or a concerted practice between those two companies designed to partition the market, such an agreement or practice would have to be treated as a restriction by object and would also result in the unlawfulness of the vertical agreements concluded in order to implement that agreement or practice. Allianz and Generali dispute however that they acted in agreement or concert and claim that the contested decision found that there was no such agreement or practice. It is for the referring court to check the accuracy of those claims and, to the extent that it is enabled under domestic law, to determine whether there is enough evidence to establish the existence of an agreement or concerted practice between Allianz and Generali.

46 Nevertheless, even if there is no agreement or concerted practice between those insurance companies, it will still be necessary to determine whether, taking account of the economic and legal context of which they form a part, the vertical agreements at issue in the main proceedings are sufficiently injurious to competition on the car insurance market as to amount to a restriction of competition by object.

47 That could in particular be the case where, as is claimed by the Hungarian Government, domestic law requires that dealers acting as intermediaries or insurance brokers must be independent from the

insurance companies. That government claims, in that regard, that those dealers do not act on behalf of an insurer, but on behalf of the policyholder and it is their job to offer the policyholder the insurance which is the most suitable for him amongst the offers of various insurance companies. It is for the referring court to determine whether, in those circumstances and in light of the expectations of those policyholders, the proper functioning of the car insurance market is likely to be significantly disrupted by the agreements at issue in the main proceedings.

- 48 Furthermore, those agreements would also amount to a restriction of competition by object in the event that the referring court found that it is likely that, having regard to the economic context, competition on that market would be eliminated or seriously weakened following the conclusion of those agreements. In order to determine the likelihood of such a result, that court should in particular take into consideration the structure of that market, the existence of alternative distribution channels and their respective importance and the market power of the companies concerned.
- 49 Finally, with regard to determining the object of the agreements at issue in the main proceedings with respect to the car repair service market, it is necessary to take account of the fact that those agreements appear to have been concluded on the basis of ‘recommended prices’ established in the three decisions taken by GÉMOSZ from 2003 to 2005. In that context, it is for the referring court to determine the exact nature and scope of those decisions (see, to that effect, *Case C-260/07 Pedro IV Servicios* [2009] ECR I-2437, paragraphs 78 and 79).
- 50 In the event that that court holds that the decisions taken by GÉMOSZ during that period in fact had as their object the restriction of competition by harmonising hourly charges for car repairs and that, by the agreements at issue, the insurance companies voluntarily confirmed those decisions, which can be assumed where the insurance company concluded an agreement directly with GÉMOSZ, the unlawfulness of those decisions would vitiate those agreements, which would then also be considered a restriction of competition by object.
- 51 In the light of all of the foregoing considerations, the answer to the question submitted is that Article 101(1) TFEU must be interpreted as meaning that agreements whereby car insurance companies come to bilateral arrangements, either with car dealers acting as car repair shops or with an association representing those dealers, concerning the hourly charge to be paid by the insurance company for repairs to vehicles insured by it, stipulating that that charge depends, inter alia, on the number and percentage of insurance contracts that the dealer has sold as intermediary for that company, can be considered a restriction of competition ‘by object’ within the meaning of that provision, where, following a concrete and individual examination of the wording and aim of those agreements and of the economic and legal context of which they form a part, it is apparent that they are, by their very nature, injurious to the proper functioning of normal competition on one of the two markets concerned.

Costs

- 52 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) hereby rules:

Article 101(1) TFEU must be interpreted as meaning that agreements whereby car insurance companies come to bilateral arrangements, either with car dealers acting as car repair shops

or with an association representing those dealers, concerning the hourly charge to be paid by the insurance company for repairs to vehicles insured by it, stipulating that that charge depends, inter alia, on the number and percentage of insurance contracts that the dealer has sold as intermediary for that company, can be considered to be a restriction of competition ‘by object’ within the meaning of that provision, where, following a concrete and individual examination of the wording and aim of those agreements and of the economic and legal context of which they form a part, it is apparent that they are, by their very nature, injurious to the proper functioning of normal competition on one of the two markets concerned.

[Signatures]

* Language of the case: Hungarian.



Hilary Term
[2013] UKSC 42

On appeal from: [2007] EWCA Civ 938

JUDGMENT

**Her Majesty's Revenue and Customs (Appellant) v
Aimia Coalition Loyalty UK Limited (formerly
known as Loyalty Management UK Limited)
(Respondent) (No. 2)**

before

**Lord Hope, Deputy President
Lord Walker
Lord Wilson
Lord Reed
Lord Carnwath**

JUDGMENT GIVEN ON

20 June 2013

Heard on 24 and 25 October 2012

Appellant
Philippa Whipple QC
Suzanne Lambert

Written Submissions
David Anderson QC
Matthew Donmall

(Instructed by the Solicitor
and General Counsel for
HM Revenue and
Customs, Solicitor's
Office, HM Revenue and
Customs)

Respondent
David Milne QC
Michael Conlon QC

Written Submissions
Lord Pannick QC
Iain Steele

(Instructed by Hogan
Lovells International LLP)

LORD REED (with whom Lord Hope, Lord Walker, Lord Wilson and Lord Carnwath agree)

1. When the court issued its previous judgment on this appeal ([2013] UKSC 15), it allowed the parties an opportunity to make written submissions as to the form of the order to be made. The Commissioners then made submissions inviting the court to make a further reference to the Court of Justice of the European Union under article 267 of the Treaty on the Functioning of the European Union. LMUK made submissions opposing such a reference and inviting the court to dismiss the appeal.

2. Summarising matters developed at much greater length in the submissions, the Commissioners have put forward two principal arguments in favour of a further reference. First, they submit that a national court is obliged under EU law to make a further reference if it finds the ruling of the CJEU on the first reference to be incomplete or unsatisfactory. In support of that submission, they refer to the judgment in *Wiinsche Handelsgesellschaft GmbH & Co v Federal Republic of Germany* (Case 69/85) [1986] ECR 947, in which the court said at para 15 that the authority of a preliminary ruling does not preclude the national court from properly taking the view that it is necessary to make a further reference before giving judgment. The court added that such a procedure may be justified when the national court encounters difficulties in understanding or applying the judgment, when it refers a fresh question of law to the court, or when it submits new considerations which might lead the court to give a different answer to a question submitted earlier.

3. Secondly, the Commissioners submit that there must be an issue of EU law raised in the present appeal on which a decision is necessary, and which cannot be considered to be *acte clair*, given the difference of view on the court.

4. In relation to the first point, LMUK point out correctly that the court did not in its earlier judgment question the European court's ruling on any question of EU law. On the contrary, the court recognised the binding character of the European court's judgment on questions as to the validity, meaning or effect of any EU instrument: see paras 56, 103 and 119. The court proceeded however on the basis of a more comprehensive consideration of the facts of the case than that set out in the reference to the European court: see for example paras 38, 40, 48 and 49. A different view of the facts from that on which the European court had based its ruling might of course necessitate a further reference in order to obtain further guidance, but it cannot be said that it would necessarily do so. On a different view of the facts, the difficulty which had led to the reference might no longer arise.

5. That was the position in the present case, in the view of the majority of the court. They considered that, with the benefit of hindsight, there had in reality been no need for a reference in the first place: see paras 30, 87 and 118. They noted that the

European court had itself considered that the case raised no new point of law: see paras 34, 55, 87 and 118. They considered the judgment of the European court in order to identify the principles which it had applied to the incomplete account of the facts which it had been requested to consider: see for example para 56. They then applied the principles established by the case law of the European court to the more comprehensive account of the facts which, in their judgment, this court required to consider: see paras 73-75 and 78-82. On that view of the case, there is no question of EU law which now requires to be elucidated, and therefore no need for a further reference.

6. In relation to the second point, as I have explained the majority of the court considered that the case could be decided by applying well-established principles to the particular facts. They also noted, as I have mentioned, that the European court had dealt with the reference on the basis that it raised no new point of law. That was also acknowledged by the minority of the court: para 129. Although the minority of the court questioned the approach adopted in the majority judgments to the application of EU law and to the judgment of the European court, those criticisms were not accepted by the majority, and they are not regarded by the court as now requiring or justifying a further reference. In so far as the minority raised issues of fairness under domestic law, they raise no issue of European law suitable for the European court.

7. In the circumstances, including the European court's own assessment that the case raised no new point of EU law, the court does not consider that a further reference to the European court is necessary. It would be unfortunate if the position were otherwise, bearing in mind that this litigation has already lasted since 2003.



Hilary Term
[2013] UKSC 15

On appeal from: [2007] EWCA Civ 938

JUDGMENT

**Her Majesty's Revenue and Customs (Appellant) v
Aimia Coalition Loyalty UK Limited (formerly
known as Loyalty Management UK Limited)
(Respondent)**

before

**Lord Hope, Deputy President
Lord Walker
Lord Wilson
Lord Reed
Lord Carnwath**

JUDGMENT GIVEN ON

13 March 2013

Heard on 24 and 25 October 2012

Appellant

Philippa Whipple QC
Suzanne Lambert
(Instructed by VAT &
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Solicitor's Office, HM
Revenue and Customs)

Respondent

David Milne QC
Michael Conlon QC
(Instructed by Hogan
Lovells International LLP)

LORD REED

Introduction

1. This appeal concerns the well-known Nectar scheme. Its essential elements as at the relevant time can be summarised as follows. A member of the scheme has an account with Aimia Coalition Loyalty UK Ltd, formerly called Loyalty Management UK Ltd (“LMUK”), the promoter of the scheme, and is issued with a Nectar card. When a member purchases goods or services from a retailer which has agreed with LMUK to participate in the scheme in relation to the issue of “points”, the retailer swipes the Nectar card and the member’s account with LMUK is electronically credited with a number of points. The member is then entitled to use the points to receive goods or services, either at no cost or at a reduced cost, from a retailer which has agreed with LMUK to participate in the scheme in relation to the “redemption” of points. When the member receives goods or services from that retailer, the retailer swipes the Nectar card and the member’s account with LMUK is electronically debited with the number of points which have been redeemed.

2. The scheme involves four parties: (1) the promoter of the scheme, LMUK; (2) the members of the scheme (“collectors”); (3) retailers of goods and services (“sponsors”), who pay for their customers, if they produce a Nectar card, to have points credited to their accounts with LMUK when they have purchased goods or services and their cards are swiped; and (4) other retailers of goods and services (“redeemers”), from whom collectors receive goods and services, at no cost or at a reduced cost, when their cards are swiped and points are debited to their accounts.

3. The scheme depends upon a network of contracts between LMUK and the three other parties. First, LMUK agrees with the collectors the terms upon which their accounts are operated, including an obligation on the part of LMUK that it will ensure that the collectors can obtain points when they purchase goods or services from sponsors, and that it will make goods and services available to the collectors at no cost, or at a reduced cost, when they redeem their points. LMUK provides the members with information about the identities of sponsors and redeemers, the particular goods and services which can be obtained using the points, and the number of points required in order to receive the goods or services in question.

4. Secondly, LMUK agrees with the sponsors that it will credit collectors’ accounts with the points for which the sponsor has agreed to pay and will secure

that goods and services are made available to collectors on their redemption of the points. In return, the sponsors make payments to LMUK based on the number of points credited to collectors' accounts, at an agreed value per point, together with an annual marketing fee. Each sponsor is granted by LMUK the exclusive right to participate in the Nectar scheme in a particular market sector. The contract entered into between LMUK and each sponsor provides that their agreement does not create a relationship of partnership or agency.

5. Thirdly, LMUK agrees with the redeemers that they will provide collectors with specified goods and services upon the redemption of the applicable number of points, and will in addition provide a number of other services to LMUK, in return for the payment of "service charges" by LMUK based on the number of points redeemed, at an agreed value per point. That value is lower than the value agreed with the sponsors. In relation to the other services which redeemers are required to supply, they must for example provide LMUK with information about problems affecting the quality or availability of goods and services, provide customer data and other information which LMUK requires for marketing purposes, grant permission for the use of their names and brands in marketing material, handle complaints by collectors and replace faulty goods. The commercial arrangements between LMUK and each of the redeemers are negotiated individually. The sponsors and collectors are not involved in these negotiations and are not normally in a position to know what arrangements have been made. In particular, since a sponsor or collector does not normally know the agreed redemption value of the points, it is not normally in a position to know the price paid by LMUK to a redeemer for the provision of particular goods and services: a price which will however be less than the amount which the sponsor paid LMUK for the issue of the points in question to the collector.

6. The three contracts involved in the scheme, described in the preceding paragraphs, are separate from, and should not be confused with, the contracts between the sponsors and the collectors, or the contracts between the collectors and the redeemers. In particular, the purchase of goods or services by a collector from a sponsor is a separate transaction, between different parties, from the crediting of points by LMUK to a collector's account, or the payment of LMUK by a sponsor in respect of those points.

7. As is apparent from this summary of the arrangements, which reflects the findings of fact made by the Value Added Tax and Duties Tribunal ("the tribunal"), to refer to "points" being "issued", "purchased" and "redeemed" is to speak metaphorically. The "points" are a means of describing the collectors' contractual rights to receive goods and services at no cost or at a reduced cost. The sponsors pay LMUK for the grant of those rights to collectors. LMUK uses part of its receipts from the sponsors to pay the redeemers to provide collectors with the goods and services in accordance with their rights. LMUK derives its profits from

the difference between its receipts from the sponsors and its payments to the redeemers.

8. In essence, therefore, when sponsors pay LMUK for the points issued to collectors, they are paying LMUK for granting the collectors the right to receive goods and services in exchange for their points. The redeemers provide the collectors with the goods and services to which their points entitle them, and LMUK pays the redeemers the redemption value of the points. It is thus by means of the redeemers' performance of their contractual obligations to LMUK that LMUK fulfils the obligations which it has undertaken to the sponsors and collectors and so carries on its business.

9. Since points are used by collectors to obtain goods or services, they may be regarded as a means of payment for those goods or services. The amount paid for the right to obtain the goods or services is the amount paid to LMUK by the sponsors for the issue of the points which the collector uses. The amount received by the redeemer, following the provision of the goods or services, is the lesser amount which it is paid by LMUK.

10. It is common ground that the provision of points to collectors in return for payment by the sponsors is a taxable supply by LMUK. When LMUK charges VAT on the payments which it receives from the sponsors, it is therefore charging VAT on the amount which it receives as consideration for granting to collectors the right to receive goods and services in exchange for the points. The redeemers in turn charge VAT on the payments which they receive from LMUK. The VAT is charged at the standard rate, regardless of whether the goods and services provided to the collectors are zero-rated or exempt, on the basis that it is charged in respect of a service supplied by the redeemers to LMUK.

11. The facts of this case, as I have described them, are both complex and unusual. In particular, the business operated by LMUK differs in fundamental respects from sales promotion or customer loyalty schemes which are operated by retailers as part of their own business, and under which the issue of points or vouchers does not involve a taxable supply. That being so, LMUK's business cannot be assumed to fall within the scope of decided cases concerned with schemes of the latter kind. Rather than relying upon inexact analogies with other forms of business, it is essential to bear in mind the particular characteristics of the business carried on by LMUK when considering the issue raised in the present appeal.

12. The issue in dispute is whether LMUK is entitled to deduct as input tax the VAT element of the payments which it makes to the redeemers. LMUK contends

that the payments are the consideration for the redeemers' supply to it of the services for which it has contracted with them. Since that supply is made to LMUK for the purpose of its business, it maintains that it is entitled to deduct the VAT as input tax in accordance with article 17 of Council Directive 77/388/EEC of 17 May 1977 ("the Sixth Directive"), as implemented by the Value Added Tax Act 1994. The Commissioners on the other hand decided in 2003 that the payments were third party consideration for the redeemers' supply of goods and services to collectors, and that any VAT charged on such a supply was therefore not deductible by LMUK as input tax. LMUK appealed to the tribunal against that decision.

The relevant legislation

13. The relevant EU legislation is contained in Council Directive 67/227/EEC of 11 April 1967 on the harmonisation of legislation of Member States concerning turnover taxes ("the First Directive"), and the Sixth Directive, as amended by Council Directive 95/7/EC of 10 April 1995. These are translated into domestic law by the Value Added Tax Act 1994. It is sufficient to refer to the EU provisions.

14. Article 2 of the First Directive describes the basic system of value added tax:

"The principle of the common system of value added tax involves the application to goods and services of a general tax on consumption exactly proportional to the price of the goods and services, whatever the number of transactions which take place in the production and distribution process before the stage at which tax is charged.

On each transaction, value added tax, calculated on the price of the goods or services at the rate applicable to such goods or services, shall be chargeable after deduction of the amount of value added tax borne directly by the various cost components.

The common system of value added tax shall be applied up to and including the retail trade stage."

15. Article 2 of the Sixth Directive provides:

“The following shall be subject to value added tax: (1) the supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such . . .”

Articles 5 and 6 define “supply of goods” and “supply of services” respectively. The former means “the transfer of the right to dispose of tangible property as owner”. The latter means, generally, “any transaction which does not constitute a supply of goods within the meaning of article 5”.

16. Article 11 defines the taxable amount. It provides, so far as relevant:

“(A) Within the territory of the country 1. The taxable amount shall be: (a) in respect of supplies of goods and services..., everything which constitutes the consideration which has been or is to be obtained by the supplier from the purchaser, the customer or a third party for such supplies....”

Article 17(2) allows a taxable person the right, “in so far as the goods and services are used for the purpose of his taxable transactions”, the right to deduct VAT due or paid “in respect of goods or services supplied or to be supplied to him by another taxable person.”

The decision of the tribunal

17. The tribunal allowed LMUK’s appeal against the Commissioners’ decision ([2005] BVC 2628). It considered that the transactions in question could only be understood in the context of the arrangements between LMUK, the sponsors, the redeemers and the collectors viewed as a whole. Assessing the commercial and economic reality of the case on that basis, the tribunal concluded that “the proper analysis of the transaction under which a [redeemer] provides goods to a [collector] in return for points is that the [redeemer] is providing a service to [LMUK] in assisting it to discharge its obligation to [collectors]” (para 60). The tribunal reached the same conclusion in relation to the provision of services to collectors.

18. The tribunal further concluded that LMUK’s payments to redeemers were consideration only for the supply of the service which it received from them. In that regard, the tribunal applied the principle, established by the case law of the Court of Justice of the European Union, that the concept of consideration requires a direct link between the goods or services provided and the consideration received. The tribunal considered that LMUK was provided by redeemers with a

19. In the view of the tribunal, the only taxable supply for which LMUK provided consideration was therefore the supply of services to itself. Since that was a supply to a taxable person for the purpose of its business, it followed that the VAT element of the amounts for which the redeemers invoiced LMUK was deductible as input tax.

20. The tribunal declined to make a preliminary reference to the Court of Justice, observing that the real issue in the appeal did not concern the interpretation of the relevant directives but rather concerned the correct analysis of the facts.

The decision of the High Court

21. The Commissioners appealed against the tribunal's decision: it is relevant to recall that an appeal lies on a point of law only. The appeal was allowed by the High Court ([2007] STC 536). Lindsay J noted that, when goods were provided by a redeemer to a collector, that must be a supply of goods to the collector. That followed from the definition of a supply of goods in article 5(1) of the Sixth Directive ("the transfer of the right to dispose of tangible property as owner") as interpreted by the Court of Justice, notably in *Auto Lease Holland BV v Bundesamt für Finanzen* (Case C-185/01) [2003] ECR I-1317; [2005] STC 598: a case to which it will be necessary to return. Since there were passages in the tribunal's decision where it had said that goods should be regarded as being supplied to LMUK, it followed that the tribunal had in that respect erred in law. Lindsay J considered that this error was material to the tribunal's decision.

22. Lindsay J stated that whether a redeemer's provision of goods or services to a collector was wholly for points or partly for points, what the redeemer received had to include what LMUK became obliged to pay him upon his having supplied the collector. On that basis the service charge paid by LMUK to the redeemer was third party consideration for that supply. It followed that the payments made by LMUK to the redeemers could not also be consideration for the supply of services to LMUK.

23. Ultimately, Lindsay J stated that he preferred the argument of the Commissioners because "it seems to me the more consistent with the requirements,

illustrated in *Auto Lease* and the coupon cases, that one should stand back and look at the characteristics of the provision and payment in issue in a relatively robust and commonsensical way” (para 78). In that regard, emphasis was placed upon the fact that the payments made by LMUK were related to the number of points redeemed, and upon the absence of any separately identifiable fee for the services provided to LMUK other than the provision of goods and services to collectors.

The decision of the Court of Appeal

24. LMUK’s appeal against the decision of the High Court was allowed by the Court of Appeal ([2008] STC 59). Chadwick LJ, in a judgment with which the other members of the Court of Appeal agreed, regarded the decision of the House of Lords in *Customs and Excise Commissioners v Redrow Group plc* [1999] 1 WLR 408; [1999] STC 161 as authority for two propositions: first, that a supplier could be treated as making, in the same transaction, both a supply of services to one person and a supply of different services to another person; and secondly, that in addressing a claim for input tax by one of those persons, the relevant questions were (1) whether that person had made a payment to the supplier, (2) whether the payment was consideration for the services supplied to him, and (3) whether the services were used or to be used in the course of a business carried on by that person.

25. Applying the approach adopted by Lord Millett in the case of *Customs and Excise Commissioners v Plantiflor Ltd* [2002] UKHL 33; [2002] 1 WLR 2287; [2002] STC 1132, to which it will be necessary to return, Chadwick LJ observed that it might be said that LMUK made a supply of services to the collectors: it granted them rights which they could exercise to obtain goods and services. When a collector received goods and services from a redeemer, the redeemer made two different supplies. One was the supply of the goods and services to the collector; the other was the supply to LMUK of the services of providing the rewards to the collector and providing the agreed information and other services to LMUK. In relation to the supply by the redeemer to LMUK, the answer to each of the three relevant questions identified in *Redrow* was an affirmative: (1) LMUK made a payment to the redeemer, (2) that payment was consideration for services supplied by the redeemer to LMUK, since LMUK received something of value in return for the payment, and (3) the services supplied by the redeemer to LMUK were used or to be used in the course of LMUK's business of operating the scheme.

26. It followed that there was a supply of services by the redeemer to LMUK and that the supply was made for a consideration. If that was correct, it was not in dispute that LMUK was entitled to input tax credit in respect of the VAT paid on that supply.

27. Chadwick LJ also observed that it was important to keep in mind the tribunal's finding that the collector's right to receive goods and services was a right which he acquired when he was credited with points. The sponsor paid LMUK for the issue of the points, and thus for the grant of that right. LMUK accounted to the tax authorities for the output tax. The tax authorities therefore received VAT at that time on the supply of the right to receive goods and services in exchange for the points. If, when the collector exercised that right, the provision of the goods or services was treated as a taxable supply to him, the tax authorities would receive not only VAT on the amount paid for the right to obtain those goods and services but also VAT on the amount paid to satisfy that right. If, on the other hand, the provision of the goods and services to the collector formed part of a service supplied by the redeemer to LMUK, the tax authorities would still receive from LMUK the VAT chargeable on the amount paid for the collector's right to obtain those goods and services (and on any additional amount paid by the collector when it exercised that right) but account would also be taken of LMUK's entitlement to deduct as input tax the VAT element of the amount which it had to pay in order to satisfy that right.

28. The Court of Appeal declined to make a reference to the Court of Justice. Chadwick LJ observed that the real issue in the appeal was not as to the interpretation of Community legislation, or as to the effect to be given to judgments of the Court of Justice, but as to how principles which were not in doubt should be applied to the particular facts. That was an issue which the Court of Justice would expect the national court to resolve.

The preliminary reference

29. The Commissioners appealed against the decision of the Court of Appeal to the House of Lords. It is that appeal which is now before this court. The House referred the following questions to the Court of Justice for a preliminary ruling:

“In circumstances where a taxable person (‘the promoter’) is engaged in the business of running a multi-participant customer loyalty rewards programme (the ‘scheme’), pursuant to which the promoter enters into various agreements as follows:

- (a) Agreements with various companies referred to as ‘sponsors’ under which the sponsors issue ‘points’ to customers of the sponsors (‘collectors’) who purchase goods or services from the sponsors and the sponsors make payments to the promoter;

(b) Agreements with the collectors which include provisions such that, when they purchase goods and/or services from the sponsors, they will receive points which they can redeem for goods and/or services; and

(c) Agreements with various companies (known as 'redeemers') under which the redeemers agree, among other things, to provide goods and/or services to collectors at a price which is less than would otherwise be payable or for no cash payment when the collector redeems the points and in return the promoter pays a 'service charge' which is calculated according to the number of points redeemed with that redeemer during the relevant period;

1. How are articles 14, 24 and 73 of the Council Directive 2006/112/EC of 28 November 2006 [the VAT Directive] (formerly Articles 5, 6 and 11(A)(1)(a) of Council Directive 77/388/EEC of 17 May 1977 [the Sixth Directive]) to be interpreted where payments are made by the promoter to the redeemers?

2. In particular, are those provisions to be interpreted such that the payments of the kind made by the promoter to redeemers are to be characterised as:

(a) consideration solely for the supply of services by the redeemers to the promoter; or

(b) consideration solely for the supply of goods and services by the redeemers to the collectors; or

(c) consideration in part for the supply of services by the redeemers to the promoter and in part for the supply of goods and/or services by the redeemers to the collectors?

3. If the answer to question 2 is (c), so that the service charge is consideration for two supplies by the redeemers, one to the promoter and the other to the collectors, what are the criteria laid down by Community law to determine how a charge such as the service charge is to be apportioned between those two supplies?"

30. The House of Lords' reasons for concluding that it was necessary that a preliminary reference should be made are not recorded. Although the case was not straightforward, the view of the tribunal and of the Court of Appeal, that the issue in the case was as to how established principles should be applied to the particular facts, was one for which there was in my view much to be said. More importantly, it is apparent from what followed that the reference did not make sufficiently clear to the Court of Justice what the central issues were, as they emerged from the judgment of the Court of Appeal: issues which had appeared to the highest court in this country to be of such difficulty that a reference was required. Nor did the reference direct the attention of the Court of Justice to the facts found by the tribunal which bore most directly upon those issues.

31. In relation to the facts, for example, the statement that "the sponsors issue 'points' to customers" was a very compressed, and potentially misleading, way of describing the arrangement under which the sponsor's computer communicates electronically with LMUK when a collector's card is swiped, LMUK then credits the collector's account with the rights represented by "points", and the sponsor pays LMUK for the grant of those rights. That compressed description gave no indication of how different the arrangement was from that involved in a typical loyalty rewards scheme, where a retailer issues points to its customers: on the contrary, it tended to suggest that the LMUK scheme was of a similar character. Nor was it explained that, unlike the position in a typical loyalty rewards scheme, where no identifiable consideration is given for the issuing of points (as, for example, in *Kuwait Petroleum (GB) Ltd v Customs and Excise Commissioners* (Case C-48/97) [1999] STC 488, the issuing of points by LMUK was accepted by both parties to be a taxable supply. Nor was it explained that LMUK therefore accounted for VAT on the consideration given for the supply to collectors of the right to receive rewards.

32. In relation to the issues emerging from the judgment of the Court of Appeal, one such was what might be described as the *Redrow* issue: that is to say, whether, considering the transactions in question in the context of the scheme as a whole, the payments made by LMUK to the redeemers were most aptly regarded as the consideration paid for the supply of services to it by the redeemers, which it required for the purposes of its business: services which included the provision of goods and services to collectors. A second issue, closely related to the first, was whether the principle that VAT is neutral in its effect upon taxable persons required that LMUK, having accounted for VAT on its supply of the right to receive the goods and services provided by redeemers, should be able to deduct the VAT element of the costs which it incurred in order to satisfy that right.

33. As a consequence of these aspects of the reference, a situation was created in which, instead of the dialogue between the Court of Justice and national courts

which is the essence of the preliminary reference procedure, there was a danger that the ruling of the Court of Justice would fail to address the issues which lay at the heart of the appeal before the referring court.

34. The Court of Justice joined the reference with another, in the case of *Baxi Group Ltd v Commissioners for Her Majesty's Revenue and Customs* [2008] STC 491, which was concerned with a loyalty scheme of an entirely different character. It appears to have considered that both cases alike involved the straightforward application of established principles, since it determined them without a submission from the Advocate General. In terms of article 20, paragraph 5 of its Statute, it may do so only “where it considers that the case raises no new point of law”.

The preliminary ruling

35. In its judgment *Commissioners for Her Majesty's Revenue and Customs v Loyalty Management UK Ltd and Baxi Group Ltd* (Joined Cases C-53/09 and C-55/09) [2010] STC 2651, the Court of Justice reformulated the questions so as to ask the following:

“whether, in the context of a customer loyalty reward scheme such as those at issue in the main proceedings:

- payments made by the operator of the scheme at issue to redeemers who supply loyalty rewards to customers must be considered, in Case C-53/09, as third-party consideration for a supply of goods to those customers, and/or, as the case may be, for a supply of services made by those redeemers for the benefit of those customers, and/or as the consideration for a supply of services made by those redeemers for the benefit of the operator of that scheme”.

36. The court answered the question which it had formulated as follows:

“Payments made by the operator of the scheme concerned to redeemers who supply loyalty rewards to customers must be regarded, in Case C-53/09, as being the consideration, paid by a third party, for a supply of goods to those customers or, as the case may be, a supply of services to them. It is, however, for the referring court to determine whether those payments also include the

consideration for a supply of services corresponding to a separate service.”

The judgment of the Court of Justice

37. In its judgment, the court made a preliminary observation about the limited nature of the reference, and the fact that it did not touch on the relationship between LMUK and the sponsors:

“It must also be stated, in relation to Case C-53/09, that neither the questions referred by the national court nor the views exchanged before the Court of Justice touched on the relationship between the sponsors and the operator of the loyalty reward scheme, namely LMUK. Consequently, the court will confine its assessment to the questions as referred by the national court.” (para 32)

38. It is readily understandable that the Court of Justice should have made that preliminary observation. The case law of the court, including its judgment in the present case, indicates that, when determining the relevant supply in which a taxable person engages, regard must be had to all the circumstances in which the transaction or combination of transactions takes place. In the present case, in particular, it would be impossible to answer the questions on a proper footing without considering as a whole the relationships between LMUK, the sponsors, the collectors and the redeemers. The Court of Justice was not however in a position to consider the matter in that way.

39. This preliminary observation also implied that the assessment by the Court of Justice would leave out of account matters which had been regarded as being of importance in the national proceedings. In particular, the tribunal and the Court of Appeal had, as I have explained, attached significance to the undisputed fact that LMUK made taxable supplies when it granted to collectors, in return for payment by the sponsors, the right to receive goods and services from redeemers.

40. The Court of Justice then carried out an evaluation of the facts of the case on that limited basis. It stated that it was evident from the orders for reference that the loyalty rewards schemes at issue in both the present case and the *Baxi* case were designed to encourage customers to make their purchases from particular traders. To that end, the court said, LMUK, in the present case, and Baxi’s sub-contractor, @1, in the *Baxi* case, “provide a number of services linked to the operation of those schemes” (para 41). The court appears therefore to have inferred from the reference that the present case, like the *Baxi* case, concerned a scheme

operated by traders with the assistance of a third party. That approach does not however fully reflect the facts found by the tribunal, by which this court is bound. LMUK did not provide a number of services linked to the operation of the scheme: it operated the scheme. The scheme was established by LMUK. It was designed to earn profits for LMUK, and to provide benefits to its millions of members (according to the evidence, 40% of UK households), as well as to the retailers who took part.

41. The court did not mention that the services provided by LMUK included the supply of the right to receive the rewards. Nor did it mention that the payments made by LMUK to redeemers for the provision of the rewards were met out of the consideration which it received from sponsors for the supply of the right to receive the rewards. As I have explained, these matters had not been focused in the reference. They had however played an important part in the reasoning of the Court of Appeal.

42. On the basis of its assessment of the economic reality, the Court of Justice concluded, in the first place, that loyalty rewards were supplied by the redeemers to the collectors. That much was not in dispute between the parties, and had been understood by the Court of Appeal.

43. The court then considered whether the transactions between the collectors and the redeemers constituted supplies of goods or services to the collectors within the meaning of the Sixth Directive. In a case where the transaction involved the provision of goods, the court held that that must constitute a supply of goods within the meaning of article 5(1) of the Sixth Directive, since there was a transfer by the redeemer to the collector of the right to dispose of tangible property as owner. In a case where the transaction did not constitute a supply of goods, it held that it must constitute a supply of services within the meaning of article 6(1) of the Sixth Directive, since the transaction did not constitute a supply of goods, and article 6(1) defines the expression “supply of services” as meaning any transaction which does not constitute a supply of goods. These matters also were not in dispute and had been understood by the national courts.

44. The court next considered whether the supply of goods or services by the redeemer to the collector was a taxable supply. As I have explained, that depended upon whether the supply was effected for consideration. The court noted that it followed from its case law that, in order for that requirement to be satisfied, there must be a direct link between the goods or service provided and the consideration received. These matters had been understood by the national courts.

45. The court then addressed the possibility that collectors might have provided consideration for the supply of the rewards when they purchased goods and services from sponsors. It noted that the price which customers paid to the sponsors was the same whether the customers were collectors or not. The court referred to its earlier judgment in *Kuwait Petroleum (GB) Ltd v Customs and Excise Commissioners* (Case C-48/97) [1999] STC 488. That case had concerned a loyalty rewards scheme operated by a petrol retailer, under which customers received points which they could exchange for goods. Since the customers paid the same price for their petrol regardless of whether they took the points or not, the court held that the price could not be regarded as containing an element representing the value of the points or of the goods for which they were exchanged. The sale of the petrol which gave rise to the award of points, on the one hand, and the supply of goods in exchange for the points, on the other hand, were therefore two separate transactions. In the view of the court, it followed that, in the case at hand, the sale of goods and services giving rise to the award of points, on the one hand, and the supply of goods and services in return for points, on the other hand, were also two separate transactions.

46. So far as it went, that conclusion was uncontentious. What is however significant is that the court did not address the possibility that the sponsors might have provided consideration for the supply of the rewards when they paid LMUK for the points issued to collectors, as the Court of Appeal's judgment had suggested. The court again left out of account the fact (1) that the award of points was a taxable supply by LMUK, separate from the supply of goods or services by the sponsor, (2) that, as a consequence of LMUK's having made that supply, the collectors were entitled to receive goods and services at no cost or at a reduced cost, and LMUK had to make goods and services available to them on that basis, and (3) that it paid redeemers to provide those goods and services on that basis. These features had not been present in the *Kuwait* case.

47. The court continued at para 57:

“In that regard, it is evident from the order for reference in Case C-53/09 that the exchange of points by the customers with the redeemers gives rise to the making of a payment by LMUK to those redeemers. The amount of that payment is the sum total of the charges, which are of a fixed amount for each point redeemed against all or part of the price of the loyalty reward. In that context, it must be considered that, as maintained by the United Kingdom Government, that payment corresponds to the consideration for the supply of the loyalty rewards.”

48. On the basis of the approach to the facts which the court had adopted, its conclusion is unsurprising. As I have explained, however, the terms of the reference resulted in the court's approaching the facts on a different basis from that which the referring court was bound to adopt. It left out of account a number of matters found by the tribunal and relied upon by LMUK before the national courts, including (1) the fact that sponsors pay LMUK for the grant to collectors of the right to receive goods and services, (2) the fact that LMUK meets the cost of the provision of goods and services to collectors out of those payments, (3) the fact that LMUK has, in return for those payments, granted collectors the right to receive goods and services without further payment or at a reduced cost, (4) the fact that collectors obtaining goods and services from redeemers are therefore exercising a right which has already been paid for, (5) the fact that the provision of goods and services by the redeemers is the means by which LMUK discharges its obligations to sponsors and collectors and (6) the fact that the payments made by LMUK to redeemers are therefore an essential cost of its business. More generally, as I have explained, the court does not appear to have assessed the transactions in question in the context of the arrangements considered as a whole, or determined on that basis what they amounted to in terms of economic reality. Nor is it apparent that the court took into account, in reaching its conclusion, the fact that (1) LMUK was agreed to make a taxable supply when it granted to collectors the right to receive goods and services at no cost or at a reduced cost, and (2) collectors receiving goods and services on that basis were therefore exercising a right for which LMUK had already been paid, and the consideration for which had already been subject to VAT.

49. The court is not of course to be criticised for failing to take these matters into account. As I have explained, they were not focused in the reference, and the court understandably confined its assessment to the matters raised in the questions referred.

50. The question whether there was also a supply of services to the promoter of the scheme was considered by the court principally in relation to the scheme with which the *Baxi* case was concerned. That scheme was of a different character from the Nectar scheme. It was an in-house scheme under which Baxi issued points to its own customers, which they could redeem in order to obtain rewards in the form of goods. The operation of the scheme had been subcontracted to an operator, @1, which purchased the rewards and supplied them to customers in return for points. Baxi paid @1 the retail sale price of the rewards. The court held that there was a supply of goods by @1 to the customers.

51. It was against that background that the court considered Baxi's contention that (in the court's words) the consideration for the payment did not correspond to a supply of goods, but to a complex service under which the supply of rewards to customers was one of a number of services. On the facts of the case, the court

concluded that the payments made by Baxi could be divided into two elements, each of which corresponded to a separate service: the supply of the rewards to the customers on the one hand, and the service supplied by @1 to Baxi on the other.

52. In relation to the present case, the court stated at para 64:

“By contrast, in Case C-53/09, LMUK has, in both its written and oral observations, asserted that the payments which it makes to the redeemers are not the consideration for two or more separate services. It is, however, for the referring court to determine whether that is the case.”

The issues now arising

53. The first issue which now arises is how this court should apply the ruling of the Court of Justice.

54. Article 267 TFEU confers on the Court of Justice jurisdiction to give preliminary rulings concerning (a) the interpretation of the Treaties and (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union. In the present case, it is the court’s jurisdiction to rule on the interpretation of the VAT directives which is relevant. On the other hand, putting the matter very broadly, the evaluation of the facts of the case, and the application of EU law to those facts, are in general functions of the national courts. The relevant principles were summarised more precisely by the Court of Justice in *AC-ATEL Electronics Vertriebs GmbH v Hauptzollamt München-Mitte* (Case C-30/93) [1994] ECR I-2305, paras 16-18:

“16. On that point, it should be borne in mind that Article [267] of the Treaty is based on a clear separation of functions between the national courts and the Court of Justice, so that, when ruling on the interpretation or validity of Community provisions, the latter is empowered to do so only on the basis of the facts which the national court puts before it (see the judgment in Case 104/77 *Oehlschläger v Hauptzollamt Emmerich* [1978] ECR 791, point 4).

17. It is not for the Court of Justice, but for the national court, to ascertain the facts which have given rise to the dispute and to establish the consequences which they have for the judgment which it is required to deliver (see the judgment in Case 17/81 *Pabst & Richarz v Hauptzollamt Oldenburg* [1982] ECR 1331, paragraph 12).

18. It is, moreover, solely for the national court before which the dispute has been brought, and which must assume the responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of each case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the question which it submits to the court (see the judgments in Case 247/86 *Alsatel v Novasam* [1988] ECR 5987, paragraph 8, and in Case C-127/92 *Enderby v Frenchay Health Authority and Secretary of State for Health* [1993] ECR I-5535, paragraph 10).”

55. As I have explained, the Court of Justice recognised that the reference in the present case raised no new point of law. The court however endeavoured to clarify how established principles applied in the circumstances of the case, so far as they emerged from the reference. It is particularly unfortunate in those circumstances that, as I have explained, the reference failed to reflect fully either the facts on the basis of which this court must proceed or the issues at the heart of the dispute, with the consequence that the Court of Justice did not fully address those facts or those issues.

56. The Court of Justice’s analysis of the legal issues focused in the reference, on the basis of the facts as it understood them, is not open to question. This court is required by section 3(1) of the European Communities Act 1972 (as amended by section 3 of and the Schedule to the European Union (Amendment) Act 2008) to determine “any question ... as to the validity, meaning or effect of any EU instrument” in accordance with “any relevant decision of the European Court”. Nevertheless, this court’s responsibility for the decision of the present case on the basis of all the relevant factual circumstances, and all the arguments presented, requires it to take into account all the facts found by the tribunal, including those elements left out of account by the Court of Justice, and to consider all those arguments, including those which were not reflected in the questions referred. That responsibility under domestic law is also recognised in EU law, as the Court of Justice explained at paragraphs 17 and 18 of its *AC-ATEL* judgment. In the exceptional circumstances of this case, this court cannot therefore treat the ruling of the Court of Justice as dispositive of its decision, in so far as it was based upon an incomplete evaluation of the facts found by the tribunal or addressed questions which failed fully to reflect those arguments. This court must nevertheless reach its decision in the light of such guidance as to the law as can be derived from the judgment of the Court of Justice. In that regard, important aspects of the judgment include the statement that consideration of economic realities is a fundamental criterion for the application of the common system of VAT (para 39), and the statement that, where a transaction comprises a bundle of features and acts, regard must be had to all the circumstances in which the transaction in question takes place (para 60).

57. Before turning to consider the present case on that basis, it is necessary to say something about the principal authorities which are relied upon by the parties in support of their contentions.

The Redrow line of authority

58. LMUK seeks support for its contentions from the approach adopted by the House of Lords in *Customs and Excise Commissioners v Redrow Group plc* [1999] 1 WLR 408; [1999] STC 161. That case concerned a sales incentive scheme under which Redrow, a firm of housebuilders, promoted the sale of its houses to prospective customers by arranging for estate agents to value and market the customers' existing homes. This was done on the basis that the cost would be borne by Redrow, provided the customer bought a Redrow house. The House concluded that there was a supply of services by the estate agents to the customers, and simultaneously a supply of services by the estate agents to Redrow. Since the latter supply was received by Redrow for the purposes of its business, it followed that Redrow was entitled to deduct the VAT which it had paid as input tax.

59. The critical reasoning appears in the speeches of Lord Hope of Craighead and Lord Millett, with which the other members of the Committee agreed. Lord Hope said at pp 412-413:

“Questions such as who benefits from the service or who is the consumer of it are not helpful. The answers are likely to differ according to the interest which various people may have in the transaction. The matter has to be looked at from the standpoint of the person who is claiming the deduction by way of input tax. Was something being done for him for which, in the course or furtherance of a business carried on by him, he has had to pay a consideration which has attracted value added tax? The fact that someone else - in this case, the prospective purchaser - also received a service as part of the same transaction does not deprive the person who instructed the service and who has had to pay for it of the benefit of the deduction.”

60. Lord Millett's reasoning was similar, at p 418:

“The fact is that the nature of the services and the identity of the person to whom they are supplied cannot be determined independently of each other, for each defines the other. Where, then, should one begin? ... One should start with the taxpayer's claim to

deduct tax. He must identify the payment of which the tax to be deducted formed part; if the goods or services are to be paid for by someone else he has no claim to deduction. Once the taxpayer has identified the payment the question to be asked is: did he obtain anything - anything at all – used or to be used for the purposes of his business in return for that payment? This will normally consist of the supply of goods or services to the taxpayer. But it may equally well consist of the right to have goods delivered or services rendered to a third party. The grant of such a right is itself a supply of services.”

61. Applying this reasoning to the present case, LMUK argues that it is in a similar situation to *Redrow*. LMUK pays the redeemers and obtains services in return, including the provision of goods and services to the collectors in fulfilment of its contractual obligations towards them, which it uses for the purposes of its business. Following the approach adopted in *Redrow*, it is therefore entitled to deduct input tax.

62. LMUK seeks to draw further support from the decision of the House of Lords in *Customs and Excise Commissioners v Plantiflor Ltd* [2002] UKHL 33; [2002] 1 WLR 2287; [2002] STC 1132. Plantiflor sold horticultural goods by mail order, and contracted with its customers to arrange for the delivery of the goods by Parcelforce and to meet the cost of that delivery, in return for the payment by its customers of a charge for postage. It contracted with Parcelforce for the delivery of the goods in return for payment of the postage charge. Plantiflor argued that it was not accountable for output tax on the postage charges paid by its customers, since it received those payments merely as the agent of its customers rather than as consideration for any service provided by itself: it maintained that the charges were the consideration for a service supplied to the customers by Parcelforce. The majority of the House however rejected that analysis, holding that Plantiflor was acting as a principal and received consideration from its customers for providing them with the service of arranging the delivery of the plants. Parcelforce made two supplies: it supplied to the customers the service of delivering the plants they had ordered, and it supplied to Plantiflor the service of delivering the goods which it had sold.

63. These authorities were followed by the Court of Appeal in *WHA Ltd v Customs and Excise Commissioners* [2004] STC 1081. WHA was an insurance claims handler which acted on behalf of motor breakdown insurers. It entered into agreements with garages under which it authorised and paid for repairs to policyholders’ cars. The issue was whether it could deduct the VAT element of the repair bills as input tax. The Court of Appeal held that it could. It received a service from the garages, namely the carrying out of the repairs, and it did so for the purposes of its business, since it was discharging its obligations to the insurers. Although there were other beneficiaries of the repairs, namely the car owners, that

did not prevent the repairs being a supply of services to WHA. That decision is currently under appeal to this court.

64. The Commissioners contend that the decision of the Court of Justice in the present case is incompatible with that line of authority, and in particular with both the reasoning and the conclusion reached in *Redrow*, which should therefore not be followed. I cannot however find anything in the court's judgment which directly engaged with the issues considered in those cases. That indeed is part of the problem with which this court is faced, since the decision of the Court of Appeal in this case was based upon the application of the principles established in *Redrow*.

65. I see no reason to question the correctness of the conclusions reached on the facts of *Redrow* and *Plantiflor* (it would not be appropriate to express any view in relation to *WHA*, since it is under appeal). Nor do I question the reasoning. On the contrary, the passages which I have cited from the speeches of Lord Hope and Lord Millett appear to me to provide valuable guidance.

66. I would at the same time stress that the speeches in *Redrow* should not be interpreted in a manner which would conflict with the principle, stated by the Court of Justice in the present case, that consideration of economic realities is a fundamental criterion for the application of VAT. Previous House of Lords authority had emphasised the importance of recognising the substance and reality of the matter (*Customs and Excise Commissioners v Professional Footballers' Association (Enterprises) Ltd* [1993] 1 WLR 153, 157; [1993] STC 86, 90), and the judgments in *Redrow* cannot have been intended to suggest otherwise. On the contrary, the emphasis placed upon the fact that the estate agents were instructed and paid by Redrow, and had no authority to go beyond Redrow's instructions, and upon the fact that the object of the scheme was to promote Redrow's sales, indicates that the House had the economic reality of the scheme clearly in mind. When, therefore, Lord Hope posed the question, "Was something being done for him for which, in the course or furtherance of a business carried on by him, he has had to pay a consideration ...?", and Lord Millett asked, "Did he obtain anything – anything at all – used or to be used for the purposes of his business in return for that payment?", those questions should be understood as being concerned with a realistic appreciation of the transactions in question.

67. Reflecting the point just made, it is also necessary to bear in mind that consideration paid in respect of the provision of a supply of goods or services to a third party may sometimes constitute third party consideration for that supply, either in whole or in part. The speeches in *Redrow* should not be understood as excluding that possibility. Economic reality being what it is, commercial businesses do not usually pay suppliers unless they themselves are the recipient of the supply for which they are paying (even if it may involve the provision of goods

or services to a third party), but that possibility cannot be excluded *a priori*. A business may, for example, meet the cost of a supply of which it cannot realistically be regarded as the recipient in order to discharge an obligation owed to the recipient or to a third party. In such a situation, the correct analysis is likely to be that the payment constitutes third party consideration for the supply.

68. It is also important to bear in mind that decisions about the application of the VAT system are highly dependent upon the factual situations involved. A small modification of the facts can render the legal solution in one case inapplicable to another. I would therefore hesitate to treat the judgments in *Redrow* as laying down a universal rule which will necessarily determine the identity of the recipient of the supply in all cases. Given the diversity of commercial operations, it may not be possible to give exhaustive guidance on how to approach the problem correctly in all cases.

Auto Lease Holland

69. The Commissioners on the other hand rely upon the decision of the Court of Justice in *Auto Lease Holland BV v Bundesamt für Finanzen* (Case C-185/01) [2003] ECR I-1317; [2005] STC 598. That case was concerned with “fuel management agreements” between Auto Lease, a vehicle leasing company, and its lessees, under which a lessee could fill up his vehicle in the name and at the expense of Auto Lease, using a credit card issued by a credit card company, DKV. The lessee paid a monthly sum to Auto Lease based on his likely consumption of fuel, with a balancing sum being paid at the end of the year. Auto Lease contended that it was entitled to deduct the VAT paid on the fuel as input tax, on the basis that it was the recipient of the supply of the fuel.

70. The Court of Justice rejected the contention. It noted in the first place that the expression “supply of goods” was defined by article 5(1) of the Sixth Directive as meaning “the transfer of the right to dispose of tangible property as owner”. The court continued:

“34. It is common ground that the lessee is empowered to dispose of the fuel as if he were the owner of that property. He obtains the fuel directly at filling stations and Auto Lease does not at any time have the right to decide in what way the fuel must be used or to what end.

35. The argument to the effect that the fuel is supplied to Auto Lease, since the lessee purchases the fuel in the name and at the expense of that company, which advances the cost of that property,

cannot be accepted. As the Commission rightly contends, the supplies were effected at Auto Lease's expense only ostensibly. The monthly payments made to Auto Lease constitute only an advance. The actual consumption, established at the end of the year, is the financial responsibility of the lessee who, consequently, wholly bears the costs of the supply of fuel.

36. Accordingly, the fuel management agreement is not a contract for the supply of fuel, but rather a contract to finance its purchase.”

71. This decision does not appear to me to assist the Commissioners in the present case. Although the Court of Justice referred to it in its judgment, it did so in the context of identifying the recipient of a supply of goods in a situation where redemption goods are provided by a redeemer to a collector. As the court held, the recipient of that supply is the collector. That conclusion is not in dispute in this appeal: indeed, it was not in dispute before the Court of Justice.

The present case

72. The only issue which this court has to determine is whether LMUK is entitled to deduct as input tax the VAT element of the payments which it makes to the redeemers.

73. As the Court of Justice has explained many times, VAT is chargeable on each transaction in the production and distribution process only after deduction of the amount of VAT borne directly by the costs of the various price components. The court has consistently stressed that the deduction system is meant to relieve the trader entirely of the burden of the VAT payable or paid in the course of all his economic activities, and that the VAT system consequently ensures complete neutrality of taxation of all economic activities, whatever their purpose or results, provided that they are subject in principle to VAT (see for example the statement of the Grand Chamber to that effect in *Halifax plc & Others v Customs and Excise Commissioners* (Case C-255/02) [2006] Ch 387 para 78).

74. The right to deduct VAT, as an integral part of the VAT scheme, has been described by the court as a fundamental principle underlying the common system of VAT, which in principle may not be limited (see, for a recent statement to that effect, *Commissioners for Her Majesty's Revenue and Customs v RBS Deutschland Holdings GmbH* (Case C-277/09) [2010] ECR I-13805, paras 38-39).

75. The consequence of the deduction of input VAT is that the tax is charged, at each stage in the production and distribution process, only on the added value and is ultimately borne only by the final consumer (see, for a recent statement to that effect, *Lebara Ltd v Revenue and Customs Commissioners* (Case C-520/10) [2012] STC 1536, paras 24-25).

76. In the present case, the Court of Justice focused upon the relationship between redeemers and collectors. Since collectors are usually final consumers of the goods and services provided by redeemers, the principle described in paragraph 75 would suggest, at first sight, that final taxation should take place at the stage of that supply. Since no monetary consideration is paid by the collector in so far as the goods or services are exchanged for points, but a payment is subsequently made by LMUK which is based on the value of the points as agreed with the redeemer, it would be possible, if these aspects of the present case were considered in isolation, to conclude that that payment should be regarded as third party consideration for that supply, and taxed accordingly.

77. As I have explained, however, there is another dimension to the case, which the Court of Justice was not requested to consider, and which it therefore left out of account. The appeal before this court is concerned with the claim of LMUK, a taxable person, to deduct input tax. LMUK's business is of an unusual character. Through the Nectar scheme, it provides collectors with a contractual right to obtain goods and services from redeemers in exchange for points. It is common ground before this court that that is a taxable supply, and that the taxable amount is the whole of the consideration which is received by LMUK. The counterpart of the right supplied to collectors is an obligation on the part of LMUK to procure that redeemers provide goods and services in exchange for points. The payments made to redeemers constitute the cost of fulfilling that obligation, and are therefore a cost of LMUK's business.

78. Applying the principles summarised in paragraphs 73 and 74 above, VAT should be chargeable on LMUK's taxable supplies only after deduction of the VAT borne by LMUK's necessary costs. The most obvious of those costs, as I have explained, is the cost of securing that goods and services are provided to collectors in exchange for their points: that is to say, the payments made by LMUK to the redeemers. The principles summarised in paragraphs 73 and 74 therefore indicate that LMUK should be authorised to deduct from the VAT for which it is accountable the VAT charged by the redeemers, so that it accounts for VAT only on the added value for which it is responsible. Only in that way will VAT be completely neutral as regards LMUK.

79. It is implicit in that approach that the transaction between a redeemer and LMUK involves a taxable supply by the former to the latter. That analysis appears

to me to be consistent with economic reality. LMUK carries on a genuine business for its own benefit. It issues the points in its own name and on its own behalf: it is not a mere cipher for the sponsors. As a matter of economic reality, the payments which it makes to redeemers are an essential cost of its business. Its business model is to sell the right to receive goods and services, pay redeemers to provide the goods and services, and derive a profit from the difference between its income from the sponsors and its expenditure on the redeemers.

80. There is a legal relationship between the redeemer and LMUK pursuant to which there is reciprocal performance. In accepting points, which have no inherent value, in exchange for goods or services, the redeemer is acting in a manner which is only explicable because of its agreement with LMUK, under which LMUK will pay it for doing so. LMUK pays it for doing so because its business is dependent on redeemers accepting points in exchange for the provision of goods and services. The only economically realistic explanation of LMUK's behaviour is the value to LMUK itself of the redeemers' acceptance of points in exchange for the provision of goods and services.

81. In these circumstances, it can in my view be said that the remuneration received by the redeemer represents the value to LMUK of the service which the redeemer provides (cf *Tolsma v Inspecteur der Omzetbelasting Leeuwarden* (Case C-16/93) [1994] STC 509, para 14; *First National Bank of Chicago v Customs and Excise Commissioners* (Case C-172/96) [1999] QB 570; [1998] STC 850, paras 26 to 29).

82. The approach described in the foregoing paragraphs is consistent with the fundamental principle, as the Court of Justice has described it, that a taxable person is entitled to deduct the VAT payable in the course of his economic activities. The alternative approach described in paragraph 76 is not.

83. This approach is also consistent with the application of the guidance given in *Redrow*. If one asks whether, when the redeemer accepts points in exchange for the provision of goods or services to a collector, something is being done for LMUK for which, in the course or furtherance of its business, it has to pay a consideration, the answer seems to me to be in the affirmative, for the reasons given in paragraph 80.

84. If one asks, what about taxation of the supply to the final consumer, the answer is that the Commissioners have decided to treat the issue of the points to the collectors – that is to say, the award of the right to obtain goods and services from redeemers – as a taxable supply. The taxable amount is agreed to be the whole of the consideration received by LMUK for the grant of those rights: an

amount which exceeds the value received by the redeemers from LMUK when the rights are exercised. No question arises in this appeal as to whether that tax treatment is correct. Because of the principle of tax neutrality, however, that tax treatment has implications for the question in issue.

85. As the Court of Appeal pointed out, if the provision of goods or services by redeemers were treated as a taxable supply to the collector (other than to the extent to which any monetary consideration might be paid by the collector), the tax authorities would receive not only VAT on the amount received by LMUK for supplying the right to receive those goods and services, but also VAT on the amount which LMUK must pay to satisfy that right. If, on the other hand, the consideration paid by LMUK to the redeemers is regarded as the consideration for the supply of a service to LMUK (a service which encompasses the provision of goods and services to collectors), the tax authorities will still receive VAT from LMUK on the difference between the value of the supplies which it makes in the course of its business (ie its receipts from the supply of the right to receive such goods and services) and the value of the supplies which it receives for the purposes of that business (ie the cost to LMUK of satisfying that right). The tax authorities will thus recover VAT on the value added by the taxable transactions entered into by LMUK, taking the issue and redemption of points as a whole. That conclusion is in accordance with the basic principle of VAT.

Conclusion

86. For these reasons, I would be inclined to uphold the decision of the Court of Appeal and dismiss the appeal. The parties should however be afforded an opportunity to make written submissions on the form of order to be made.

LORD HOPE

87. I think that it was a pity that a preliminary ruling was sought in this case. I agree with Chadwick LJ's observation in the Court of Appeal that the real issue is not one as to the interpretation of Community legislation or as to the effect to be given to judgments of the Court of Justice, but rather as to how principles that are not themselves in doubt should be applied to particular facts: *Loyalty Management UK Limited v Commissioners for HM Revenue and Customs* [2007] EWCA Civ 938, [2008] STC 59, para 66. The CJEU seems to have taken a similar view. It did not seek an opinion from the Advocate General before it proceeded to judgment, indicating that in its view the case raised no new point of law. This places the reader at a disadvantage, as its judgment lacks the depth of reasoning which a judgment informed by an opinion would have provided. It is quite rare for the

domestic court to find itself in this position. The recent case of *O'Brien v Ministry of Justice* (Case C-393/10) [2012] 2 CMLR 25 is an excellent example of the guidance that the CJEU normally gives on issues of EU law and there are, of course, many more.

88. I also think that the questions that were referred, although agreed to by the parties and approved by the House of Lords, tended to obscure what became the real issue when the case was argued in Luxembourg. For this reason the CJEU can hardly be blamed for not addressing that issue directly when it was conducting its analysis. The situation was also complicated by the fact that in the case of *Baxi Group Ltd* (Case C-55/09), which was referred by the House to the CJEU at the same time, there was a separate set of questions designed to fit the facts of that case. The CJEU analysed the *Baxi Group Ltd* case separately in the same judgment. Its analysis of the facts of that case may have influenced its analysis of the present case to the disadvantage of its treatment of the case for LMUK.

The issue

89. Chadwick LJ said that the issue in the present case was whether there was a supply of redemption services by the redeemer to LMUK for the purposes of VAT: para 33. This is how LMUK put its case in paragraph 29 of its written observations to the CJEU:

“LMUK’s analysis is that the redeemers made supplies to *both* LMUK (redemption services) and the collectors (rewards) and that the recipient *in either case* can deduct VAT which it pays, subject to the normal rules. Only LMUK’s analysis results in the VAT being deductible (subject to the normal rules) by the person who has actually paid the VAT and ensures that the UK Government collects VAT on the amount of the consideration actually paid by the final consumer.” [emphasis added]

The words “both” and “in either case” in this analysis are important. They directed attention to the fact that LMUK’s argument was that the redeemers were making supplies in both directions.

90. The Revenue’s argument, on the other hand, was encapsulated in question (2)(b) of the reference (see para 29, above). It asked whether the provisions of articles 14, 24 and 73 of Council Directive 2006/112/EC of 28 November 2006 were to be interpreted, where payments were made by the promoter to the redeemers, such that those payments were to be characterised as consideration

“solely” for the supply of goods and/or services by the redeemers to the customers. In paragraph 9 of its written observations the Revenue said that the correct analysis was that the relevant supplies were made by the redeemers to the collectors, and that the consideration given by LMUK to the redeemers was third party consideration for those supplies.

91. The questions in paragraphs (2) (c) and (3) of the reference then asked whether the consideration was “in part” for the supply of services by the redeemers to LMUK and “in part” for supplies by the redeemers to the customers and, if so, what the criteria are for an apportionment. Their inclusion in the reference was unfortunate, as they tended to divert attention from the way the case was presented when it reached the CJEU. This was not, in the event, an analysis which was argued for by either party. It was not LMUK’s case by that stage that the consideration that it paid to the redeemers was “in part” for the supply of services by the redeemers to it and “in part” for the supply of goods and services to the customers, and that the consideration could or should be apportioned accordingly. A question which directed attention to the argument that the redeemers made supplies “both” to LMUK and the collectors, and that the recipient “in either case” could deduct the VAT which it paid on the consideration for the supply, was not included in the reference.

92. In his submissions to this court Mr Milne QC renewed the case which he had presented to the CJEU. He said that apportionment was not what his clients wanted, and emphasised that it had not been a live issue before the tribunal. LMUK’s case, looked at from its point of view (see *Customs and Excise Commissioners v Redrow Group plc* [1999] 1 WLR 408, 412; [1999] STC 161, 166), was that services were supplied to it by the redeemers for which it paid consideration and, that as the payment it made to the redeemers attracted VAT, it was entitled to deduct input tax on that amount. The scheme required the co-operation of both the sponsors and the redeemers. The redeemers were accountable for the VAT payable on the consideration which they received both for their supplies to the customers and for the services provided by them to LMUK. The customers, assuming that they were traders (as some of them were), and LMUK were both entitled to the benefit of the doctrine of fiscal neutrality.

93. In para 33 of its judgment the Court said that the essence of the questions that were put to it in LMUK’s case was whether payments made by LMUK to the redeemers must be considered as third party consideration for supplies to or for the benefit of customers (which was the Revenue’s case), or as the consideration for the supply of services made by the redeemers for the benefit of LMUK. This was an incomplete appreciation of the alternative analyses on which the Court’s interpretation of the EU legislation was sought. The argument for the Revenue was that LMUK’s ability to deduct the input tax on the consideration which it paid to the redeemers for the services that they provided for its benefit was excluded by

the fact that the payments that it made to the redeemers were third party consideration for the goods or services provided by the redeemers to the customers. LMUK's argument was that the treatment of the consideration passing between it and the redeemers should be considered separately from that passing between the redeemers and the customers.

94. A summary of the observations submitted to the CJEU is set out in paras 34 to 37 of the judgment. The Revenue's case is appropriately summarised in para 36, that the payments made by LMUK to the redeemers must be regarded as third party consideration for supplies of goods and services to the customers. LMUK's case is summarised in para 34. The summary is in these terms:

“In Case C-53/09, LMUK argues that the payments which it made to the redeemers constitute the consideration for services supplied to it by the redeemers. Those services, it submits, consist of various contractually agreed services, including the redeemers' undertaking to supply goods or services to customers without charge or at a reduced price.”

This formulation takes the point made by LMUK in paragraph 29 of its written observations. But it does not recognise the argument that the redeemers made supplies both to the collectors and to LMUK, and that the recipient in either case could deduct the VAT which it paid.

The judgment

95. The Court's reply to these observations begins in para 38. The obvious point is made in that paragraph that the system of VAT involves the application of a general tax on consumption which is exactly proportional to the price of the goods and services. In para 39 of the judgment reference is then made to economic realities as a fundamental consideration for the application of the system. Two examples are given: first, the meaning of place of business and, secondly, the identification of the person to whom goods are supplied. The second example is said to be illustrated by *Auto Lease Holland BV v Bundesamt für Finanzen* (Case C-185/01) [2003] ECR I-1317.

96. Having asked itself what the nature was of the transactions under the schemes at issue, the Court said in para 42 that the economic reality was that loyalty rewards were supplied by the redeemers to the customers. So far as it goes, this point was not in dispute. But no mention is made of the effect of applying the economic reality test to the argument that there was also a supply of services by

the redeemers to LMUK. Here again the significance of the way LMUK put its case in paragraph 29 of its written observations, where the word “both” was used, appears to have been overlooked.

97. In para 43 of its judgment the Court asks itself whether the supply of the rewards constituted a supply of goods or services effected for consideration by a taxable person. The conclusion is then drawn in para 49 that the redeemers were supplying goods and services to the customers within the meaning of articles 5(1) and 6(1) of the Sixth Directive. This is unsurprising. But it does not advance the argument, as it was already common ground between the parties. In para 50 the Court asks itself the question whether these supplies were carried out for consideration. In para 56 the point is made that article 11.A(1)(a) of the Sixth Directive provides that the consideration may be obtained from a third party.

98. There then follows para 57, which is in these terms:

“In that regard, it is evident from the order for reference in Case C-53/09 that the exchange of points by the customers with the redeemers gives rise to the making of a payment by LMUK to those redeemers. The amount of that payment is the sum total of the charges, which are of a fixed amount for each point redeemed against all or part of the price of the loyalty reward. *In that context, it must be considered that, as maintained by the United Kingdom Government, that payment corresponds to the consideration for the supply of the loyalty rewards.*” [emphasis added]

99. At first sight the sentence which I have emphasised determines this appeal in favour of the Revenue. But the proposition which I have emphasised does not include the word “solely”. Nor is any mention made of the point that LMUK made in paragraph 29 of its observations, where the word “both” was used: that the redeemers were supplying services to LMUK too, and that the payments which LMUK made to the redeemers could also be seen as consideration for services supplied to it by the redeemers. If that proposition was being rejected at this stage on the ground that it was not in accordance with the economic reality, this is not clearly stated. Nor is any reason given here for its rejection.

100. In paras 58 to 63 of the judgment there is an analysis of the issues raised by *Baxi Group Ltd* (Case C-55/09), where it was contended by Baxi that the consideration for the payment by it to the redeemer did not correspond to a supply of goods but to a complex advertising service under which the supply of loyalty rewards to customers was one of a number of services. The conclusion that the Court drew from its analysis of the facts of that case, assisted by a question

directed to this issue, was that the payment could be divided into two elements, each of which corresponded to a separate service. This was because it was possible to identify a profit margin consisting of the difference between the retail sale price of the loyalty rewards to the customer paid by Baxi and the price at which those rewards were purchased by the redeemer. Its conclusion was that the payment was the consideration for two separate supplies. It was in part consideration, paid by the third party Baxi, for a supply of goods to the customers and in part consideration for the supply of services to Baxi. The answer to the question how, in view of that conclusion, the payment was to be apportioned between these two supplies was given in para 63.

101. The judgment then sets out the conclusion that, in contrast to its conclusion in *Baxi*, the Court reached in LMUK's case. It is set out in para 64 as follows :

“By contrast, in Case C-53/09, LMUK has, in both its written and oral observations, asserted that the payments which it makes to the redeemers are not the consideration for two or more separate [supplies]. It is, however, for the referring court to determine whether that is the case.”

The first sentence is a correct statement as far as it goes. It distinguished LMUK's case from that of *Baxi*. But, for the reasons already mentioned, it does not address the question that needed to be answered. Here again, as in para 57 of its judgment, the Court seems to have overlooked the point that LMUK made in paragraph 29 of its observations that services were also supplied to LMUK by the redeemers in return for consideration paid by LMUK. If that proposition was being rejected, once again this is not clearly stated. The question which is then sent back to the referring court is not in point. LMUK was not asserting, and did not seek to argue before us, that the payments made to the redeemers were the consideration for two or more separate supplies.

102. Lastly, there are the answers that the Court gives in para 65 to the questions referred in each case. The answer to the questions referred in LMUK's case is as follows:

“[P]ayments made by the operator of the scheme concerned to redeemers who supply loyalty rewards to customers must be regarded ... as being the consideration, paid by a third party, for a supply of goods to those customers or, as the case may be, a supply of services to them. It is, however, for the referring court to determine whether those payments also include the consideration for a supply of services corresponding to a separate [supply].”

This answer brings together the points that the Court made in paras 57 and 64. Here again, it respectfully seems to me, the point that is really in issue in this case is not answered. The question sent back to the referring court must be taken to be the same as that which the Court set out in para 64. An affirmative answer to it would lead to the making of an apportionment of the consideration between the two separate services. But LMUK is not contending that there should be an apportionment. The CJEU then sets out a proposition for which LMUK was not contending and did not contend when the case came back to this court.

The response

103. We are, of course, obliged to treat any question as to the meaning or effect of any EU instrument as a question of law which must be determined as such in accordance with the principles laid down by and any relevant decision of the CJEU: section 3 of the European Communities Act 1972, as substituted by the European Union (Amendment) Act 2008, section 3 and the Schedule, Part 1. And where a question is referred to the CJEU for a preliminary ruling, it is our duty to give effect to the Court's ruling as to how the instrument must be interpreted according to the principles of EU law. We must be loyal to our Treaty obligations. But I do not read the ruling contained in this judgment as determining how the principles that it sets out are to be applied to the facts of this case. That is our responsibility. The problem that we face in looking to the judgment for guidance is that it does not say that the payments made by the promoters to the redeemers are to be characterised *solely* as consideration for the supplies by the redeemers to the customers. Nor does it say that the proposition that the redeemers made supplies in both directions and that the recipients of those supplies could deduct VAT on the payments they made must be rejected. That, as I understand the competing arguments which were advanced before us, is what is really at issue. In this situation it must be treated as an issue of fact for us to decide.

104. It is worth recalling that in para 38 of his judgment in the Court of Appeal Chadwick LJ said that the passages which he had quoted from the speeches in *Customs and Excise Commissioners v Redrow Group Plc* provided clear authority for the propositions (a) that there is no reason why, in a VAT context, a supplier (S) may not be treated as making, in the same transaction, both a supply of services to one person (P1) and a supply of different services to another person (P2); and (b) that, in addressing a claim for input tax credit by P2, to whom services have been supplied in these circumstances, the relevant question are (i) did P2 make a payment to S, (ii) was that payment consideration for services supplied to P2 and (iii) were those services used or to be used in the course of a business carried on by P2.

105. Having considered the speeches in *Customs and Excise Commissioners v Plantiflor Ltd* [2002] 1 WLR 2287; [2002] STC 1132 and the judgment of Neuberger LJ in *WHA Ltd and another v Customs and Excise Commissioners* [2004] STC 1081, Chadwick LJ observed in para 51 that the argument that found favour with Lindsay J in the present case – which was that, in a case where it was possible to identify different supplies to different recipients in the same transaction, only one could be the relevant supply for VAT purposes – was not self-evident. His own conclusion was to the contrary. Mr Milne invited us to endorse that conclusion. As he put it, the fact that there was a supply to the customers did not eliminate the possibility of their having also been the supply of a service to LMUK. The ruling that has been obtained from the CJEU does not, as I have sought to show, address this issue.

106. The question then is whether the judgment lays down any principles which are determinative of this issue. Mrs Whipple QC for the Revenue said that the question in this case all the way up has been: to whom was the supply made? She submitted that it must be taken from what the Court said in para 39 of its judgment that this question must be answered by considering the economic realities, as this was a fundamental criterion for the application of the system of VAT: *Customs and Excise Commissioners v DFDS A/S* (Case C-260/95) [1997] 1 WLR 1037, para 23 and *Planzer Luxembourg Sàrl v Bundeszentralamt für Steuern* (Case C-73/06) [2007] ECR I-5655, para 43. The judgment in *Auto Lease Holland* [2003] ECR I-1317, paras 35 and 36 showed how this test was to be applied to identify the person to whom the goods are supplied. The case of *Redrow* was wrongly decided. The economic realities of the case could show that the supply was to a third party, not to the person who paid the consideration. That was the position in this case.

107. The problem with this approach is that it does not exclude the possibility that there may, as a matter of economic reality, be two or more supplies within the same transaction. Mrs Whipple said that one must start with the economic reality, and I have no difficulty in accepting that. But what the economic reality is in a given case must surely be a question of fact for the domestic court. The statement that the Court makes in para 42 of its judgment that the economic reality is that the loyalty rewards are supplied by the redeemers to the customers is only part of the story. This is shown by the fact that the Court said in para 64 that it was for the referring court to determine whether the payments that LMUK makes to the redeemers were the consideration for two or more separate services. Presumably the test which it would have to apply, if it were to address this question, would be to consider the economic realities. If that is a question which it is proper to send back to the referring court, why is it not open to it to examine the question that the Court itself did not answer – whether it is possible, upon consideration of the economic realities, to identify two different supplies by the redeemers to two different recipients in the same transaction?

108. If, as the Court of Appeal held, it is possible to identify different supplies by the redeemers to different recipients in the transaction by which LMUK pays consideration to the redeemers, what then? It is not easy to see why the economic realities test should exclude the possibility there can be more than one relevant supply for VAT purposes. It seems to me that the judgment leaves it open to this court to determine whether, in fact and as a matter of economic reality, the redeemers may not be treated as having made, in the same transaction, both a supply of services to the customers and a supply of different services to LMUK or, as LMUK put its case in paragraph 29 of its written observations, the redeemers made supplies both to LMUK (redemption services) and to the customer (rewards). For the reasons the Court of Appeal gave, I would answer that question in the affirmative.

109. Mrs Whipple argued strongly to the contrary. She submitted that it followed from the CJEU's judgment that *Customs and Excise Commissioners v Redrow Group plc*, which the Court of Appeal applied to the facts of this case, was wrongly decided. But I am unable to find anything in the CJEU's judgment that drives us to that conclusion. The only statement of principle which it contains is that consideration of economic realities is a fundamental criterion for the application of VAT: para 39. I do not see this as undermining the way the questions of fact were determined in *Redrow* or the conclusion by the appellate committee that, as the services in respect of which Redrow claimed input tax deductions were supplied for a consideration paid to it in return, it was entitled to the benefit of the deduction. I am not persuaded that *Redrow* was wrongly decided.

110. I acknowledge, however, that some of the reasoning in *Redrow* needs to be adjusted in the light of later authority. I would not wish to alter what I said at [1999] 1 WLR 408, 412H-413A: was something being done for the person claiming the deduction for which, in the course or furtherance of a business carried on by him, he has had to pay a consideration which has attracted value added tax? But I think that Lord Millett went too far at p 418 G when he said that the question to be asked is whether the taxpayer obtained "anything – anything at all" used or to be used for the purposes of his business in return for that payment. Payment for the mere discharge of an obligation owed to a third party will not, as he may be taken to have suggested, give rise to the right to claim a deduction. A case where the taxpayer pays for a service which consists of the supply of goods or services to a third party requires a more careful and sensitive analysis, having regard to the economic realities of the transaction when looked at as a whole. It may lead to the conclusion that it was solely third party consideration, or it may not.

Conclusion

111. For the reasons I have given, do I not see the CJEU's judgment as precluding a finding in LMUK's favour that the redeemers should be treated as having made, in the same transaction and as a matter of economic reality, both a supply of goods and services to the customers and a supply of different services to LMUK, and that LMUK is entitled to input tax credit on the consideration in return for which those different services were supplied to it. In my opinion the only conclusion that can properly and fairly be reached in this case is that the Court of Appeal's decision should be affirmed. For these reasons, and for the further reasons given by Lord Reed, I would make the order that he proposes.

LORD WALKER

112. I am doubtful whether I can usefully add anything to the thorough and closely-reasoned judgments of Lord Hope and Lord Reed, with which I am in full agreement. But as this Court is divided I think it right to restate, as briefly as I can, what I see as the essential reasons for dismissing this appeal.

113. Anyone with even a passing acquaintance with value-added tax is familiar with the basic concept of the fiscal neutrality of a chain of transactions which, however short or long, leaves the burden of the tax on the ultimate consumer. In *BLP Group Plc v Customs & Excise Commissioners* (Case C-4/94) [1996] 1 WLR 174, 190, [1995] ECR I-983, 993, [1995] STC 424, 430, para 30, the Advocate General (Lenz) referred to

“... an ideal image of ‘chains of transactions’ ... intended to attach to each transaction only so much VAT liability as corresponds to the added value accruing in that transaction, so that there is to be deducted from the total amount the tax which has been occasioned by the preceding ‘link in the chain’”.

In a simple chain (a wholly linear series of transactions) each transaction in the chain must be considered separately to determine what output tax is payable and what credit is available for input tax.

114. But in developed economies wholly linear series of transactions are relatively unusual. Increasingly, businesses are organised so as to rely on subcontracting and outsourcing. Consumers are increasingly encouraged to obtain packages of goods and services put together by entrepreneurs. Many marketing

schemes (such as that run by LMUK during the period now under consideration) operate through a construct of contractual relationships of some sophistication. It is a construct that is more like a web than a chain.

115. In cases of that sort it is still necessary, in determining the proper amounts of output tax and input tax, to look separately at different parts of the web of transactions. But in determining the economic reality it is also necessary to look at the matter as a whole. This Court was not shown any authority establishing that a payment by A to B cannot be both consideration for a service supplied to A by B, and (as third-party consideration) an element of the consideration paid for a supply by B to C (in this case, the collector, who is usually, but not always, also the final consumer).

116. That negative proposition was adopted by Lindsay J in the Chancery Division in his “once and one way only” theory: [2007] STC 536, paras 58 and 76 to 80. In support of it he relied on *EC Commission v Germany* (Case C-427/98), [2002] ECR I-8315, [2003] STC 301. That was a case about a simpler promotional scheme for reduction of the retailer’s price for goods on presentation of a coupon distributed by the manufacturer to potential retail customers. But the Court of Justice’s decision related to the amount of tax on the supply by the retailer to the customer. It did not rule that the manufacturer must suffer a loss of input tax credit when it reimbursed the retailer, and it would have been inconsistent to have made such a ruling.

117. Like Lord Hope and Lord Reed I consider that *Customs & Excise Commissioners v Redrow Group Plc* [1999] 1 WLR 408 and *Customs & Excise Commissioners v Plantiflor Ltd* [2002] 1 WLR 2287 were correctly decided, and are still good law. Lord Millett’s unqualified language (“anything – anything at all”) at p 418 may be capable of being misunderstood, but in context (including his explanation at p 417 of *BLP Group Plc v Customs & Excise Commissioners*) it must be understood as referring to anything that can properly be regarded as a taxable supply. Mrs Whipple QC suggested in her oral submissions that *Plantiflor* was an exception of a relatively small and insignificant category of cases of “delivery”. But if that expression is taken, in the common modern usage, to cover the delivery of a variety of packages of outsourced services, it can be seen as more than a small or insignificant category.

118. The Court of Justice did not discern any significant issue of EU law arising on this case. The issue of economic reality is for the national court. I was one of the Law Lords who, five years ago, directed a reference to the Court of Justice, but with hindsight I recognise that it was unnecessary, and that it would have been better not to have made a reference.

119. For these reasons, and for the much fuller reasons stated by Lord Hope and Lord Reed, I would make the order proposed by Lord Reed.

LORD CARNWATH (with whom Lord Wilson agrees) (dissenting)

Luxembourg has spoken...

120. In the light of the CJEU judgment, I would have regarded the appeal as bound to succeed. With respect to my colleagues, I find it difficult to see how their contrary view can be compatible with our responsibilities under the European Communities Act 1972.

121. Criticism is made in the majority judgments of the form of the questions referred to the court, and even of the fact that a reference was made at all. I find this very surprising. The decision to refer was made by a panel of the House of Lords (Lords Hoffmann, Walker, and Mance, one of whom is a member of the present panel), following an oral hearing on 3 April 2008. Although there is no formal record of the reasons, they can be inferred from the Commissioners' request, which pointed to an apparent conflict between the decision of the House in *Redrow* and the CJEU judgment in *Auto Lease*.

122. The questions were then agreed by the parties in the normal way, submitted to the House on 30 June 2008, and adopted for the purpose of the reference. They were substantially in the form of the draft appended to in the Commissioners' petition of appeal. LMUK's notice of objection, dated 16 November 2007, and signed by the counsel for LMUK (who had appeared successfully in the Court of Appeal), challenged the need for a reference; but LMUK did not take material issue with the form of questions proposed, then or later. We must assume that they were thought by all, including the members of the House and LMUK, to be the questions which needed answers in order to determine the appeal.

123. I do not see how we can, properly or responsibly, go behind either the decision of the House to make the reference, or the questions which were then approved with LMUK's consent. Nor, still less (with respect to Lord Reed), do I believe that it is appropriate or fair for us now to decide that there were other relevant facts, necessary for the determination, but which, through oversight of ourselves and the parties, were not drawn to the attention of the court; and, further, that the true issues were not questions of law at all, so that we are free to redetermine them for ourselves as questions of fact, without regard to the CJEU's conclusions on them. Those are to me entirely novel and controversial

propositions, on which at the very least I would have wished to hear submissions from the parties.

124. As it happened, there was a significant delay between the agreement of the questions in June 2008 and the formal order making the reference on 15 December 2008, which was registered by the CJEU on 6 February 2009. This delay, as I understand it, was caused principally by the decision to link this case with the *Baxi* case. The history is summarised in a letter to the judicial office dated 19 February 2009 from LMUK’s solicitors. In that letter, they complained of the delay and of the handling of the case by the office, but they made no criticism of the form of the questions. At some point, certainly before May 2009, new counsel (Mr Milne QC) was instructed. The hearing in the CJEU took place in January 2010. If at any time during that period LMUK’s representatives had formed the view that the questions were defective in some way, they had plenty of time to seek to amend or supplement them.

The “real issue” - two supplies or one

125. Lord Hope (para 89 above) defines what he calls “the real issue” by reference to a paragraph in LMUK’s written observations to the CJEU:

“LMUK’s analysis is that the redeemers made supplies to *both* LMUK (redemption services) and the collectors (rewards) and that the recipient in *either* case can deduct VAT which it pays, subject to the normal rules. Only LMUK’s analysis results in the VAT being deductible (subject to the normal rules) by the person who has actually paid the VAT and ensures that the UK Government collects VAT on the amount of the consideration actually paid by the final consumer.” (para 29, Lord Hope’s emphasis)

Lord Hope attaches importance to the words “both” and “in either case”, as showing the nature of LMUK’s case. It was not that the consideration was to be apportioned between the two forms of supply; rather that, following *Redrow*, and looking at the matter solely from LMUK’s own point of view (regardless of the collectors’ position), the whole consideration was paid for services supplied to LMUK, which was accordingly entitled to deduct input tax on the whole amount.

126. If this was seen by LMUK as “the real issue”, it is strange that they took no steps to ensure that it was adequately reflected in the submitted questions. In LMUK’s notice of objection to HMRC’s petition, the “sole issue” was said to be whether the supplies were made to LMUK “notwithstanding that third parties,

namely the Collectors, also benefited *de facto* from the making of such supplies”. The Commissioners’ suggested alternative of apportionment was said to “have no merit in it”. Against that background, I can only infer that the omission of a question directed specifically to Chadwick LJ’s formulation was a matter of deliberate choice, presumably because it was thought unlikely to succeed in Europe. As Lord Hope recognises, it is hard to criticise the CJEU for failing to answer an issue which had not been raised in the questions referred to it, even if mentioned in some of the subsequent observations.

127. I note in passing Mr Milne’s separate complaint about the lack of any specific reference, either in the questions, or in the Court’s response, to the issue of deduction of input tax as such. I found this difficult to understand. Since deduction of input tax was what the case had been about from the outset, it is fanciful to suggest that there was any doubt in anyone’s mind of the context in which the questions were asked. It was referred to in terms in the European Commission’s observations (see below), and the Court began its judgment by accurately summarising the course of proceedings below, beginning with LMUK’s claim to “deduct... input VAT” on its payments of service charges to the redeemers (para 13).

Absence of an Advocate-General’s Opinion

128. In agreement with Lord Hope, I think it was unfortunate that there was no Advocate-General’s Opinion in this case. This is by no means unusual. Published figures show that it happens in more than 40% of the cases decided by the court. But those figures say nothing about the relative importance of the various cases, or the level of the court from which they have been referred.

129. Article 20, paragraph 5, of the CJEU Statute provides:

“Where it considers that the case raises no new point of law, the Court may decide, after hearing the Advocate-General, that the case shall be determined without a submission from the Advocate-General.”

I can understand that this case was thought to raise no “new” point of law, as such. The underlying principles had been discussed in many previous judgments. However, it was a reference by the highest court in this country. It should have been clear from the judgments below, and the submissions, that it had raised serious differences as to the correct application of those principles, including

questions as to the authority of the leading House of Lords decision in the light of subsequent European authority.

130. The court itself does not as a matter of practice comment directly on domestic cases, but the Advocate-General may have more flexibility in that respect, and more opportunity to look at the issues in a wider context. Experience shows that the Advocate-General's Opinion can often provide a fuller discussion of the principles and their practical application, against which the sometimes sparse reasoning of the judgment can be easier to understand and apply. In this case, at least in retrospect, as the present controversy demonstrates, it was an unfortunate omission.

131. On the other hand, it is important to note that United Kingdom interpretation was supported by the European Commission in written observations. They provide some useful background information, and to that extent did something to fill the gap left by the absence of an Advocate General's opinion. In particular they addressed the possibility of a more comprehensive view, not dissimilar to that adopted by the Lord Reed:

“21. One possible approach to such schemes would be to say that there is no such thing as a ‘free gift’. Loyal customers pay for those ‘gifts’ as part of the price of goods they buy; customers who are not loyal, moreover, pay for the ‘gifts’ enjoyed by those who are loyal. The cost of operating a loyalty scheme is a cost of business for the trader, and at any given level of profit there is no difference between lowering the price for all customers and selectively lowering the price for loyal customers by giving them more products for the same price. Nor is there any difference between giving loyal customers additional quantities of the products normally supplied by the trader and giving them other goods or services. Again, this is a form of price discrimination in favour of loyal customers: it is no different from granting them a quantity discount or for that matter a cash rebate. Over time, the customer has paid a certain amount for the whole of goods received by him, including those presented as being ‘free’. Accordingly, he should bear the VAT on that amount, which is the total of his consumption. There is no reason to charge additional VAT in respect of the ‘free’ goods, because in reality he (together with the customers who are not loyal) has already paid for them.”

132. They rejected this approach as inconsistent with *Kuwait Petroleum*. They then considered whether the inclusion of the “services” made any difference to the analysis:

“26. The circumstances of the present cases appear at first sight to fall within that analysis. However, in an apparent attempt to evade its consequences, the creators of the loyalty schemes concerned have introduced a nuance: the payments made to the ‘redeemers’, that is to say the persons supplying the goods to the customers, are described as payments for services. Those services are said to be ‘redemption services’ (compendiously described in point 8 of the order for reference in Case C-53/09) or ‘marketing services’ (in Case C-55/09).”

133. In the Commission’s view the inclusion of the services did not make a material difference. The “economic reality” of the situation was that the redeemer was being paid -

“... to provide goods to the customers, and nothing more. Even if there can be said to be a service element, it is purely ancillary, and the core of the transaction is the supply of goods.” (para 27)

Accordingly, the payments were to be regarded as third-party consideration for the supply of the goods, and “no input VAT is deductible in respect of those payments”. Such payments could be considered as including payment for services to promoters “only in so far as it is possible to identify a service separate from the provision of the goods and to determine the price of that service”.

The court’s reasoning

134. In spite of the criticisms which can be made of some aspects of the judgment, I do not myself find any serious uncertainty about what the court has decided and why. In substance the court adopted the Commission’s reasoning. It is important to read the judgment in the light of the words of the directive, and the previous European case-law, and without any preconceptions derived from domestic case-law, or from an independent view as to how the tax should operate.

135. There are as I see it three crucial points underlying the court’s decision. First, the supply of loyalty rewards by the redeemers to the collectors was to be treated as a distinct transaction, separate from the other elements of the rewards scheme (para 55). As the court noted (para 32), this approach accorded with the form of the questions and the submissions of the parties, and also with previous case-law (*Kuwait Petroleum* [1999] ECR I-2323, para 28). That being so, it is unsurprising (as Lord Reed acknowledges – paras 36-38 above) that the court did not undertake a broader analysis of the relationships between LMUK and the other

parties involved. While I acknowledge the apparent attractions of Lord Reed’s analysis and the elegance with which it is presented, the decision of the court is to my mind clear on this point and binding on us. Nor did I understand LMUK to argue otherwise.

136. Secondly, the taxable event under the directive (article 2.1) is a *supply* of goods or services for consideration. In relation to any transaction, it is therefore necessary to start by identifying the relevant supply in respect of which tax is said to be chargeable or deductible.

137. Thirdly, the amount of the charge to tax on the one hand, and the right to deduct on the other, are governed by two provisions of the Directive respectively:

i) Article 11, which defines the “taxable amount” as –

“... everything which constitutes the consideration which has been or is to be obtained by the supplier from the purchaser, the customer or a third party for such supplies....”

ii) Article 17(2), which allows a taxable person the right, in so far goods and services are used for the purpose of his taxable transactions, to deduct –

“... value added tax due or paid in respect of goods or services supplied or to be supplied to him by another taxable person.”

138. It is noteworthy that these two provisions are not directly matched. From the point of view of the person making the supply, and accounting for the tax, the taxable amount is not limited to consideration from the recipient of the goods, but includes consideration from third parties. Conversely, the person seeking to deduct tax has to show, not merely that he gave consideration and paid tax in connection with his own taxable transactions. He must show also that the tax was paid in respect of goods or services supplied *to him*. Consideration given by a third party is taken into account in assessing the taxable amount, but there is no corresponding provision giving the person paying third-party consideration the right to deduct.

139. Applied to the facts of this case, if one ignores for the moment the incidental information and other support services given to LMUK by the redeemers, the CJEU’s interpretation of those provisions is readily understandable. As is now common ground, the goods were supplied by the redeemers to the collectors, not to LMUK, who merely paid third-party consideration for them.

Article 17(2) gives LMUK no right to deduct, even though the consideration was paid in respect of their taxable transactions, because it was not paid in respect of supplies received by them. It is true that the redeemers had a contractual obligation to LMUK to make the supplies to the collectors. But there is nothing in the words of the directive to suggest that the mere fulfilment of a contractual obligation of this kind is to be equated with the supply of a service.

140. This approach can be seen as a natural extension of the court’s reasoning in *Auto Lease Holland BV v Bundesamt für Finanzen* (Case C-185/01) [2003] ECR I-1317. Under the “fuel management agreement” between Auto Lease and its lessees, the cost of petrol supplied to lessees was paid for by Auto Lease (through a credit card arrangement) and reimbursed by lessees by monthly payments and an annual balancing charge. It was held that there was no relevant supply to Auto Lease. The fuel management agreement was “not a contract for the supply of fuel, but rather a contract to finance its purchase”. The fuel was purchased not by Auto Lease, but by the lessee “having a free choice as to its quality and quantity, as well as the time of purchase.” (para 36). So here, the agreement between LMUK and the redeemers, so far as relates to the supply of goods, is no more than a contract to finance their purchase, the choice of goods and the time of purchase being left entirely to the collectors.

141. Does the addition of the information and other services make any difference? The court’s answer (para 58-64) was “no”, unless the services can be separately identified, and part of the consideration properly apportioned to them. That was possible in respect of *Baxi* but not LMUK. There is nothing surprising about that conclusion. Once it is accepted that the contractual obligation to supply the goods does not in itself amount to the taxable supply of a service to LMUK, there is no reason why the provision of such incidental services should fundamentally alter the position in relation to the goods element of the transaction, as opposed to any value properly attributable to the services as such. Other interpretations might have been possible. Arguably, a broader, more purposive interpretation might have led the court to an approach similar to that proposed by Lord Reed, and in line with that of the Court of Appeal in this case. That might also have had the attraction of avoiding what appears to be an element of double taxation if the scheme is looked at as a whole (as Lord Reed suggests - para 84 above). However, that is (or should be) water under the bridge. Interpretation of the directive is ultimately a matter for the CJEU, not the domestic courts. We are bound to follow their lead.

LMUK’s submissions

142. Mr Milne QC, for LMUK, submitted that, properly understood, the judgment is not inconsistent with the reasoning of the Court of Appeal. The

finding that the payments were third party consideration for supply of rewards to customers did not exclude the possibility of their being at the same time consideration for redemption services supplied to LMUK. On the contrary, the judgment acknowledged that possibility in paragraph 64, by leaving it to the referring court to determine “whether those payments also include the consideration for the supply of services corresponding to a separate supply”. Accordingly there is nothing in the judgment to undermine the reasoning of Chadwick LJ, or the decisions in *Redrow* and *Plantiflor* on which it was based.

143. In his oral submissions, Mr Milne relied strongly on the decision of the CJEU in Case C-165/86 *Leesportefeuille “Intiem” CV v Staatssecretaris van Financiën* [1989] 2 CMLR 856 (“*Intiem*”), and the comments of the Advocate-General in Case C-338/98 *EC Commission v Netherlands* [2004] 1 WLR 35; [2003] STC 1506. They showed that there could be a taxable supply of goods to one person, notwithstanding that delivery was to a third party. He also relied on a table, showing hypothetical payments and their tax consequences, as indicating that LMUK’s argument alone was consistent with the underlying principle of “fiscal neutrality”.

144. As a fall-back position, Mr Milne argued for an apportionment on the basis that the service charge should be split between the cost incurred by the redeemer in providing the rewards, and the difference between such cost and the total service charge; alternatively on the basis of the market value of the services provided to LMUK less the cost of the rewards. He suggested that the issue might be remitted to a new tribunal for determination.

Discussion

145. Fairly read, it is impossible in my view to read the judgment as leaving open the possibility that the whole consideration might be taken as in respect of supplies both to LMUK and to the collectors. Even if that possibility was not addressed in terms, the judgment as a whole, particularly the reasoning in the *Baxi* case, leaves no serious doubt what the answer would have been. The court considered the argument that the payments should be treated, not as payment for supply of goods, but rather for “a complex advertising service under which the supply of loyalty rewards to customers is one of a number of services” (para 59). That argument was clearly rejected. The element of the payments, representing the price of the rewards and the cost of packaging and delivery, was treated solely as consideration for the supply of goods to collectors, only the profit margin being allocated to the services to Baxi (paras 61-63). That reasoning is inconsistent with the proposition that, other than by apportionment, the consideration could be treated at the same time as being in respect of supplies to both parties.

146. Paragraph 64 of the judgment must be seen in that context. It cannot be read as leaving open the issue of whether the whole consideration could be treated as in respect of two different supplies. Although the issue of apportionment had not previously been raised in the LMUK case, and had been rejected by LMUK itself as without merit, it was included in the questions before the court, and therefore required an answer. Paragraph 64 follows the treatment of the same issue in the *Baxi* case, where it did arise. As I read paragraph 64, it is simply covering the same issue for the sake of completion in the *LMUK* case, indicating that, in the absence of any relevant findings before the court, it must be left to the domestic courts to determine.

Intiem

147. I turn to the argument based on *Intiem*. The company operated a business involving the distribution by its employees of a catalogue to customers at their homes. The employees used their own cars for deliveries. At the end of each working day, they were able to refuel at the company's expense at a filling station near the company's office, under a contractual arrangement between the company and the station. The filling station then invoiced Intiem for the petrol so supplied to employees. The issue referred to the CJEU was whether the company could deduct the full amount of tax on the petrol so supplied, notwithstanding that it was supplied in fact to the employees. That question was answered in the affirmative. Having noted that the right to deduct applied to goods and services connected with the pursuit of the taxable person's business, the Court said:

“14 It must accordingly be concluded that this deduction system must be applied in such a way that its scope corresponds as far as possible to the sphere of the taxable person's business activity. Where, in such circumstances, article 17 (2) of the Sixth Directive restricts the taxable person's right of deduction, as regards the value-added tax on supplied goods, to the tax due or paid ‘in respect of goods ... supplied to him’, the purpose of that provision cannot be to exclude from the right of deduction the value-added tax paid on goods which, although sold to the taxable person in order to be used exclusively in his business, were physically delivered to his employees.”

As the Advocate-General had said:

“The fact that the petrol is pumped directly into the tank of the employee's car and is used on account of the undertaking in no way affects the legal and economic reality of the transaction... In

economic terms, the petrol with which Intiem is invoiced and for which it has to pay constitutes one of its production cost components which bears the value added tax charged on it at the previous stage... ” ([1989] 2 CMLR at p 861)

148. That judgment was distinguished in Case C-338/98 *EC Commission v Netherlands* [2004] 1 WLR 35; [2003] STC 1506, where, under Dutch legislation, an employer was able to pay employees allowances for use of their cars in the employer’s business and a standard 12% deduction was allowed by way of input VAT. That arrangement was held to be incompatible with the relevant EU legislation for a number of reasons. The Court noted (para 37), and implicitly accepted, the Commission’s identification of three significant differences from the facts of *Intiem*: first, there was no agreement between the employer and the supplier; secondly, the goods were not used exclusively for the employer’s business; and thirdly, the taxable employer was not invoiced by the taxable supplier. The Court arrived at its conclusion on the true interpretation of the Sixth Directive, while accepting that it might not appear fully consistent with certain objectives pursued by that Directive “such as fiscal neutrality and the avoidance of double taxation” (para 55).

149. Mr Milne submits that this case is analogous to *Intiem*, rather than the *Netherlands* case, in that, while the goods are physically supplied to the customers, that is in pursuance of contracts between LMUK and the Redeemers, and invoiced accordingly, and it is done wholly for the purposes of LMUK’s business.

150. Attractively though the argument was put, the short answer is that it is irreconcilable with the CJEU’s decision in this case. The Court has clearly decided that, on the facts of this case, and notwithstanding the contractual position, economic reality lies in treating the rewards as goods supplied to the collectors and not, directly or indirectly, as part of services supplied to LMUK.

Previous House of Lords authorities

151. It remains to consider how the judgment in this case affects the reasoning and conclusions of the House of Lords in the *Redrow* and *Plantifor*. The relevant facts and the essential reasoning of the House of Lords in each case have been described by Lord Reed. Like him, I see no reason to doubt the correctness of the decision in either case, but hesitate to regard either as laying down a universal rule.

152. The Commissioners’ position on the correctness of the decision in *Redrow* has fluctuated. Lindsay J recorded, and in effect adopted, their submission

(presented at that time by Mr Vajda QC) that *Redrow* was distinguishable on the facts:

“Mr Vajda draws attention to the very different facts of *Redrow*. There it was *Redrow* not the prospective house purchaser who chose the estate agents and gave instructions to them. *Redrow* obtained a contractual right as against the estate agents and could even prevent or override changes in the agents' instruction which the house purchasers might otherwise have been minded to make...

By contrast, says Mr Vajda, it was not LMUK that selected the particular goods or services enjoyed by way of reward by Collectors, nor, (in the sense that no Collector was bound to use points in all his acquisitions but could deal with retailers who were not Suppliers) was it LMUK that selected who it was that was to supply them. LMUK had no role in determining whether goods or services should be acquired by Collectors only by the use of points or wholly by cash or partly for one and partly for the other or in what proportions between the two forms of satisfaction. Nor is it the case that such provision as is made to Collectors is exclusively at LMUK's expense; in all cases where points alone did not suffice the Collectors, too, would bear some expense. In *Redrow* it was easy enough to see the legal and financial characteristics that were there being examined as pointing to a supply to *Redrow* but the overriding characteristics of the Programme suggest a provision to Collectors, says Mr Vajda, with third party consideration for that provision coming from LMUK...” (para 72-73)

Similar submissions were made in the Commissioners' written observations to the CJEU, when it was asserted that the House of Lords “reached the correct result in the *Redrow* case, but for the wrong reasons”.

153. By contrast, before us Mrs Whipple for the Commissioners submitted that neither the reasoning nor the conclusion in *Redrow* was compatible with the CJEU decision in the present case. The House of Lords had been wrong to focus on the position from the point of view of the taxpayer, rather than determining the “economic reality” of the transaction. On that view, the estate agency services were supplied to the householders, albeit subject to a measure of control by *Redrow*. Lord Hope was right to acknowledge that reality (“clearly the estate agents were supplying services to prospective purchasers...”), but wrong to think that it could stand with a finding that tax was deductible by “the person who instructed the service and who has had to pay for it of the benefit of the deduction” ([1999] 1 WLR 408, 412).

154. I prefer the Commissioners' earlier view. The facts of *Redrow* differed markedly from those of the present case, for the reasons Mr Vajda gave. Although the prospective purchasers benefited, Redrow did not merely pay for the services, but exercised a high degree of control and received benefits for purposes directly related to its own business objectives. By contrast, in the present case LMUK had no direct or indirect interest in the reward goods themselves; their interest was only in the fulfilment of obligations previously undertaken as part of the rewards scheme as a whole.

155. As Lord Reed has noted, *Redrow* was followed and applied in *Plantiflor*, though the outcome in the latter case was victory for the Commissioners. It is unnecessary to repeat his description of the case.

156. Mrs Whipple submitted that the decision in *Plantiflor* is compatible with the reasoning of the CJEU in the present case. As she put it in her printed submissions, in terms with which I readily agree:

“There plainly are cases which fall properly within the ‘delivery model’ referred to by Lord Millett as being cases where the arrangements ‘consist of the right to have goods delivered or services rendered to a third party’. A typical example is where A contracts with B to have flowers delivered to C. The economic reality of those arrangements is that A and B contract, on terms that A’s payment is to B, for services provided to A, those services consisting of delivery to C. In *CEC v Plantiflor*, Plantiflor contracted with Parcelforce to have flowers delivered to its customers. The supply was by Parcelforce to P of the service of delivering P’s goods (plants and garden products) to P’s customers pursuant to a contract for delivery made between Parcelforce and P, and for a consideration payable by P. The House of Lords correctly identified the VAT supply as being, on these facts, by Parcelforce to P, and not to P’s customer.”

157. I do not find it necessary or useful to consider in detail the other cases to which we have been referred. They merely serve to illustrate, as Lord Reed has said, how difficult and fact-sensitive the issues may be in individual cases.

Other issues

158. I have noted that the CJEU left open the possibility of an apportionment of the service charge, and LMUK has proposed that the issue should be referred back to the Tribunal. I agree with Mrs Whipple that this point is not open to them at this

stage, having clearly and repeatedly declined hitherto to make it a part of their case. It would be contrary to well-established principles to remit the case to the Tribunal for findings on factual issues which could have been but were not raised when the matter was originally before them.

159. Both parties have claimed that the principles of “fiscal neutrality” support their respective cases. I have found this a somewhat elusive concept on the facts of this case. It must be assumed that so far as appropriate this aspect has been taken into account by the CJEU in their decision. We were told by Mr Milne that they were shown the tables which are before us, and which appear to show an element of double taxation looking at the scheme as a whole. However, as I have indicated, where third-party consideration is involved, a potential for imbalance is inherent in the definitions respectively of the taxable amount and of the right to deduct. It is clear from the CJEU case-law that the “principle of neutrality” is not to be treated as an overriding principle of interpretation such as to justify a departure from the words of the directive (see for example *EC Commission v Netherlands* cited above).

Conclusion

160. For these reasons, I would have allowed the appeal, and restored the order of Lindsay J.