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OPINION OF THE LEGAL SERVICE

No. Cion prop. : 6406/04 VISA 31 COMIX 107 + 6406/1/04 JAI 49 VISA 31 COMIX 107
REV 1 (en)

Subject : Proposal for a Council Regulation on standards for security features and
biometrics in EU citizens' passports;

- Legal base

INTRODUCTION

1. At the meeting of the Council (JHA) of 19 February 2004, the Commission presented its proposal for a Council Regulation on standards for security features and biometrics in EU citizens' passports¹. In the course of the debate the President of the Council invited the Council Legal Service to prepare an opinion as to the appropriateness of the legal base proposed by the Commission for this Regulation. The Commission has founded its proposal on Article 62, point 2 (a) of the EC Treaty.

This opinion responds to that invitation.

¹ Doc 6406/04 JAI 49 VISA 31 COMIX 107

THE AIM AND CONTENT OF THE PROPOSAL

2. According to the case-law of the Court of Justice, the choice of the legal basis for a measure must rest on objective factors which are amenable to judicial review; those factors include in particular the aim and the content of the measure².

3. The aim of the proposal is to render passports held by European citizens more secure by imposing an obligation on Member States to introduce minimum standards for harmonised security features for passports issued by them and to determine the biometric identifiers to be used in order to establish a reliable link between the document and its genuine holder.

In the explanatory memorandum, the Commission points out that security standards of passports held by European citizens should not lag behind those already achieved for the uniform format of visas and for residence permits for third country nationals, and that for those documents the biometric identifiers have already been decided by the Council.

In particular, the introduction of common security features in passports are to serve the aim of facilitating the exercise of checks at external borders, since the authorities concerned will be able to check certain visible security features present on all passports issued by Member States and would have to resort to more in-depth scrutiny only in cases of doubt.

4. As far as the content of the proposed measure is concerned, it sets out, in general terms, that passports issued by Member States to their nationals will have to comply with minimum security standards as set out in the Annex to the Regulation. These security standards concern, on the one hand, prescriptions with respect to the passports as a whole (material, printing techniques, numbering, issuing procedures) and, on the other hand, prescriptions with respect to the data to be entered in the personal data page of passports. In particular, it is foreseen that the page containing personal data should include an electronically readable storage medium capable of containing biometric information in the form of a facial image and fingerprints. However, the Commission proposes that the storage of fingerprints should be optional for the Member States for the time being. But if they do register fingerprints they should do so in interoperable formats, so as to allow for their possible use by all Member States.

² ECJ, Case C-491/01, BAT and Imperial Tobacco, judgment of 10.12.2002, at point 93, ECR 2002 p. I-11453

In its explanatory memorandum the Commission also points out that verification systems will have to be installed at border posts. Such equipment should be common to the Member States and be capable of verifying biometric data not only of passports issued to EU citizens but also of such data in visas issued to third country nationals (in the context of the introduction of biometric data in visas under the Visa Information System), as well as in residence permits to be issued by Member States to third country nationals. However, in the proposed Regulation itself no provision has been included imposing an obligation on Member States to install such verification equipment at their external border posts.

In order to adopt the detailed technical specifications with respect to the security features of the passports, including the storage medium of biometric identifiers, its "securisation", and to ensure the necessary quality of the facial image and fingerprints, a comitology procedure is envisaged (using the same Committee as the one set up pursuant to Council Regulation 1683/95 laying down the uniform format for visas).

Finally, the proposal contains a provision granting persons to whom passports with electronically readable biometric identifiers have been issued the right to have the personal data verified and, if necessary, corrected or deleted. It goes on to state that no information in machine-readable form should be included in the passport other than that provided for in the Regulation.

THE LEGAL INSTRUMENTS PRESENTLY DEALING WITH EU PASSPORTS.

5. At present no act of the Community deals with the establishment or security aspects of EU passports.

The question whether the Community should introduce a uniform passport for its citizens was raised already at the European Summit of 9/10 December 1974 in Paris, where it was concluded that a working party should examine the possibility of establishing a passport Union, and, in anticipation thereof, the introduction of a uniform passport. At the European Council of 3/4 December 1975 in Rome, the Heads of State and Government agreed that a uniform model for passports should be set up, to be issued in 1978. The matter was examined by a Working Party of the Council between 1975 and 1980 and its deliberations led to the adoption, on 23 June 1981, of a Resolution of the Representatives of the Governments of the Member States, meeting within the Council, setting out the uniform model for passports and stating that Member States shall endeavour to issue passports on the basis of that model as from 1 January 1985³. This Resolution has been

³ OJ C 241 of 19.09.1981, p.1

supplemented by Resolutions of the Representatives of the Governments of the Member States of 23 June 1982⁴, 14 July 1986⁵, 10 July 1995⁶ and 28 October 2000⁷.

The Resolution of 1981, as supplemented by the Resolutions of 1982 and 2000, sets out the characteristics of the uniform format of the passport, including provisions on security features of the passport.

Given the legal nature of the Resolutions, none of these provisions are legally binding on the Member States.

However, the Resolution of 1981 envisages the existence of a group of experts of the Member States, who would determine the format of the passport, while taking technical questions into account.

6. In 1995, prior to the adoption of the Resolution of the Representatives of the Governments of the Member States of 10 July 1995, the choice of the legal form for the updating of the European passport was discussed. The Legal Service addressed that question in its opinion of 19 April 1995⁸ and concluded that, under the Treaties as they stood at that point in time, three possibilities existed to that end, from which the Council was free to choose: an act of the Community based on Article 8A(1) TEC (now 14), if the Commission were to submit a proposal to that effect (which the Commission at that time declined to do), an act of the Union based on Title VI TEU (ex- Articles K.1.2 and K.3) or a further Resolution of the Representatives of the Governments of the Member States.

It was decided to follow the last option⁹.

7. Since 1995, the following amendments to the Treaties are relevant for the examination of the present Commission proposal.

⁴ OJ C 179 of 16.07.1982, p.1

⁵ OJ C 185 of 24.07.1985, p.1

⁶ OJ C 200 of 04.08.1995, p.1

⁷ OJ C 310 of 28.10.2000, p.1

⁸ Doc. 6626/95 JUR 88 INST 20

⁹ The same option was followed for the Resolution of 17 October 2000, i.e. after the entry into force of the Treaty of Amsterdam

Pursuant to the Treaty of Amsterdam, the provisions of the TEU on rules governing the crossing by persons of the external borders of the Member States and the exercise of controls thereon were transferred to the TEC and are now found in Article 62. As a result of the integration of the Schengen acquis within the framework of the European Union, a large body of law, originally adopted within the framework of intergovernmental Schengen co-operation, has become part of the Community acquis. This includes the provisions of the Schengen acquis with regard to the exercise of controls on persons when crossing the external borders of the Member States participating in that part of the acquis, in particular the provisions of Articles 3-8 of the 1990 Schengen Convention implementing the Schengen Agreement of 1985 on the gradual abolition of checks at internal borders and the Common Manual for border control practitioners¹⁰.

8. Moreover, pursuant to the Treaty of Nice, the provisions of the TEC on citizenship of the Union have been modified. In particular, a new third paragraph has been added to Article 18, concerning the right of every citizen of the Union to move and reside freely within the territory of the Member States.

In addition to paragraph 2 of Article 18, reading:

"[i]f action by the Community should be necessary to attain this objective and this Treaty has not provided the necessary powers, the Council may adopt provisions with a view to facilitating the exercise of the rights referred to in paragraph 1. The Council shall act in accordance with the procedure referred to in Article 251."

the newly introduced paragraph 3 states:

"3. Paragraph 2 shall not apply to provisions on passports, identity cards, residence permits or any such document or to provisions on social security or social protection."

¹⁰ last version in Doc. 12081/03 FRONT 112 COMIX 506

THE RELEVANCE OF ARTICLE 18(3)

9. Since Article 18(3) explicitly addresses the powers of the Community in relation to the adoption of provisions on passports to be issued to citizens of the Union the following questions must be examined when considering the measures proposed by the Commission:

- a) Whether the scope of Article 18(1) TEC is limited to free movement within the territory of the Member States or also covers the power to regulate the right of citizens of the Union to enter and leave the territories of the Member States;
- b) If that is the case, whether the fact that paragraph 2 does not apply to provisions on passports constitutes an absolute obstacle for the Community to adopt any rules with respect to passports; and
- c) If no such absolute obstacle exists, which rules can be adopted by the Community and on which basis.

10. Ad a). Article 18 constitutes, among other provisions of the Treaty, the legal base for the proposed Directive of the European Parliament and of the Council on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC. The Council adopted a Common Position on that proposal on 5 December 2003¹¹. Chapter II of that Directive deals with the right of exit (Article 4) and entry (Article 5). Article 4 grants the right to all Union citizens with a valid identity card or passport to leave the territory of a Member State to travel to another Member State. To that end Member States must issue to their nationals identity cards or passports stating their nationality, and valid for third countries which the holder must pass through when travelling between Member States. Article 5 obliges Member States to grant Union citizens leave to enter their territory with a valid identity card or passport. Even if Articles 4 and 5 explicitly state that they are "without prejudice to the provisions on travel documents applicable to national border controls", it is not contested that the Community has the power to prescribe, on the basis of Article 18 TEC, that with a view to the exercise of the right of free movement of Union citizens within the territory of the Member States, they should have a right under Community law to leave and enter that territory.

¹¹ Doc. 13263/3/03 Rev 3, MI 235 JAI 285 SOC 385 CODEC 1308 OC 616

Therefore, provisions with a view to facilitating the right of exit and entry to and from the territory of the Member States may be adopted pursuant to paragraph 2 of Article 18.

11. Ad b). Paragraph 3 of Article 18 states that the entire paragraph 2 shall not apply to provisions on passports. It cannot be interpreted so as to apply to the second sentence of paragraph 2 only, such as to imply that the Council could act otherwise than through the codecision procedure. Quite apart from the fact that it may not be apparent what other procedure the Council should apply in the absence of any other Treaty provision providing the necessary powers, such an interpretation would deprive the whole of paragraph 3 of its intended effect, i.e. to reserve in principle the powers for the establishment of rules on passports of Union citizens to the Member States.

However, the Legal Service is of the view that the fact that paragraph 2 does not apply to provisions on passports cannot be interpreted so as to exclude the exercise of Community competence which is explicitly provided for in other parts of the Treaty. In other words, if other provisions of the Treaty create specific competences for the Community that require regulating at the same time certain matters concerning passports of citizens of the Union, such other provisions can continue to be relied on.

12. Ad c). The Legal Service wishes to exclude at the outset the recourse to Article 308 for that end. That Article cannot be used to assume that a power can be attributed to the Community for taking action in areas where specific provisions of the Treaty explicitly preclude the type of action in question. It is only in cases where the Treaty has not excluded certain action for the purposes of obtaining one of its objectives in the course of the operation of the internal market, that the possibility of invoking Article 308 presents itself. Using Article 308 to counter the effects of a specific provision like Article 18(3) would amount to circumventing the latter and would therefore be illegal.

The Commission has chosen Article 62, point 2(a) as the legal basis for its proposal.

In its explanatory memorandum the Commission justifies this choice by stating that it is necessary to render the passport more secure, as the Community has done for visas and residence permits for third country nationals, and that the aim is to fight against the use of false documents. It goes on to state that since passports are primarily controlled when crossing external borders, the harmonisation of security features of the EU passports is a matter of setting "standards and procedures of border controls at the external borders". In particular the introduction of a biometric identifier, the facial image, will make border controls more efficient.

THE RELEVANCE OF ARTICLE 62, POINT 2(a)

13. Article 62, point 2(a) reads as follows:

"The Council, acting in accordance with the procedure referred to in Article 67, shall [...] adopt [...] measures on the crossing of the external borders of the Member States which shall establish [...] standards and procedures to be followed by Member States in carrying out checks on persons at such borders;"

For the purposes of assessing the appropriateness of the legal basis chosen by the Commission the following questions have to be examined:

- a) To what extent is the fact that the Community has adopted security standards for visas and residence permits for third country nationals relevant for this choice?
- b) Do the checks on persons referred to in Article 62, point 2(a), comprise checks on citizens of the Union?
- c) If so, what is to be understood by "standards" and "procedures" to be followed by Member States "in carrying out" checks on persons?

14. Ad a) The relevant acts concerning security requirements for visas are Council Regulation 1683/95 (which was based on Article 100 C (3) TEC as established by the Treaty of Maastricht), and Regulation 334/2002 modifying Regulation 1683/95. Regulation 334/2002 is based on Article 62, point 2 (b)(iii) TEC.

Both ex-Article 100 C (3) and Article 62, point (b)(iii) provide legal bases for adopting rules on visas, including rules on security features. Both provisions, however, refer exclusively to visas and therefore exclude any competence in relation to passports for EU citizens.

The relevant act concerning security features for residence permits for third country nationals is Regulation 1030/2002, which is based on Article 63, point 3 TEC. That provision deals with measures on immigration policy, which, by definition, only concerns measures in relation to third country nationals. As distinct from residence permits in the sense of Article 18(3) to be issued to EU citizens living in a Member State other than that of their nationality, Article 63, point 3 gives full competence to the Community to regulate standards and procedures for the issue by Member

States of residence permits for third country nationals. But again, this provision does not confer any competence in relation to passports for EU citizens.

The fact that it may be desirable to adopt similar provisions on security features for passports of EU citizens as those adopted in respect of visas and residence permits for third country nationals, does not in itself create the power for the Community to do so.

15. Ad b). If Article 62, point 2 (a) applies to standards and procedures to be followed by Member States in carrying out checks on third country nationals at such borders only, it would not be possible to rely on this provision for the purposes of adopting rules in respect of passports of EU citizens. It is true that most of the existing provisions of Community law concerning controls on persons at external borders deal specifically with the exercise of such controls on third country nationals. Thus, the provisions of Article 5 of the 1990 Schengen Convention, as well as most of the provisions of the Common Manual are concerned with that category of persons. However, the provisions of Article 6 of the 1990 Schengen Convention make a clear distinction between checks to be carried out on all persons and checks to be undergone by third country nationals. Moreover, the Common Manual, in part II, points 1.3.4, 1.4.7 (which refers to points 1.4.2, 1.4.5 and 1.4.6), 6.1.1 and 6.1.3, contains specific provisions concerning the carrying out of checks on citizens of the EU. For the provisions of Article 6 of the 1990 Schengen Convention the Council has, in its decision of 20 May 1999 (1999/436/EC)¹², determined that Article 62, point 2 (a) TEC is the corresponding legal basis. Therefore, it is possible for the Community to rely on that provision for the purposes of adopting measures establishing standards and procedures to be followed by Member States in carrying out checks on EU citizens at external borders.

16. Ad c). The measures to be adopted pursuant to Article 62, point 2(a) relate to the setting of common standards and procedures to be followed by the Member States in carrying out checks on persons at external borders. Therefore, these are standards and procedures to be applied by the border control authorities. The provisions of Article 8 of the 1990 Schengen Convention may also be relevant here, stating that the Executive Committee (to be read as: the Council¹³) shall take the necessary measures on the "practical procedures for carrying out border checks and surveillance". It appears from these provisions that the Community is to set the rules to be applied

¹² OJ L 176 of 10.07.1999, p. 17

¹³ Cf. Article 2(1), first subparagraph, last sentence of the Protocol integrating the Schengen acquis into the framework of the European Union

by the border control authorities when checking whether persons wishing to leave or enter the territory of the Member States are authorised to do so and that the Community has the power to provide for commonly agreed standards to be observed or available to that end, be it in terms of conditions, facilities or even equipment.

Article 62, point 2(a) TEC and Article 8 of the 1990 Schengen Convention do not, however, provide a basis for adopting standards and procedures to be applied by authorities other than those responsible for carrying out checks at external borders.

17. In the light of these considerations the Council Legal Service is of the view that an important justification for using Article 62, point 2(a) as the legal base for the measures proposed by the Commission is to be found in the recognised need to have verification equipment installed at all external border posts, capable of reading electronically stored data in visas and passports. Since holders of uniform visas may enter the territory of the Member States participating in the rules on uniform Schengen visas at any of their external border crossing points and since EU citizens may, on the basis of their (valid) passports, enter the Community at any given external border crossing point, it makes sense for the Community to require that all Member States concerned have the necessary commonly agreed equipment in place at those border crossing points capable of reading the machine readable features of those documents. In that context it makes also sense for the Community to define the biometric data to be stored in EU passports and other features to be machine readable and to prescribe the technical conditions and specifications of such storage and features.

18. However, the Legal Service is not convinced that Article 62, point (a) can be used as the legal basis for imposing on Member States obligations with respect to the introduction of security measures which are not of direct relevance to the exercise of controls on their authenticity by the border control authorities. This concerns for instance the provisions in the proposed Regulation requiring the designation of one body per Member State having responsibility for the production of passports or provisions in the Annex addressing the logistics, administration and techniques relating to issuing procedures.

19. The Legal Service is of the view that those provisions go beyond the scope of Article 62, point 2(a) and, in the absence of any other specific legal base in the Treaty, therefore fall under the terms of Article 18(3), precluding the Community from adopting such measures. It is not in a position to assess whether there are any other matters referred to in the Annex which would not be of direct relevance to the exercise of controls at the external borders and therefore exceed the scope of Article 62, point 2(a) TEC. It would have to rely on technical expertise to that end.

20. If, under the current state of the Treaty¹⁴, it is not legally possible for the Community to adopt provisions on common minimum standards for EU citizens' passports to the full extent proposed by the Commission, the Representatives of the Governments of the Member States may wish to continue their existing co-operation pursuant to the Resolutions adopted in the past for the purposes of dealing with matters not covered by the Regulation.

SCHENGEN RELEVANCE

21. The Commission has presented the proposed Regulation as an act developing the Schengen acquis. Consequently, the United Kingdom and Ireland would not participate in its adoption, since it develops a part of the Schengen acquis in which those Member States do not participate pursuant to the relevant Council Decisions¹⁵. Denmark would also not participate in its adoption but would have to declare whether it will implement it in its national law and become bound by it as a matter of public international law. Its content would furthermore become binding on Iceland and Norway pursuant to the Agreement on the association of these two States with the application, implementation and development of the Schengen acquis.

As far as the position of the United Kingdom and Ireland is concerned, it should be observed that the United Kingdom has participated in the adoption of Council Regulation 334/2002 modifying Regulation 1683/95 laying down the uniform format for visas and Council Regulation 1030/2002 laying down a uniform format for residence permits for third country nationals. Ireland has not, but has accepted these measures pursuant to Article 4 of the Protocol on the position of the United Kingdom and Ireland. The justification for the UK's and Ireland's participation in those Regulations,

¹⁴ It is to be noted that in the draft for the Treaty establishing a Constitution for Europe, the Article corresponding to the current Article 18 TEC (Article III-9) does not contain the exceptions included in paragraph 3 of Article 18 TEC.

¹⁵ Decision 2000/365/EC OJ L 131 of 1.6.2000, p. 43 and Decision 2002/192/EC OJ L 64 of 7.3.2002, p. 20

which constitute a development of the Schengen acquis for the purposes of the position of Denmark, Iceland and Norway, is twofold. In the first place Regulation 334/2002 builds upon Regulation 1683/95 which in its turn was adopted on the basis of former Article 100 C TEC, i.e. prior to the integration of the Schengen acquis into the framework of the EU and prior to the existence of the Protocol on the position of the United Kingdom and Ireland. In the second place, both Regulation 334/2002 and Regulation 1030/2002 have been conceived primarily as instruments facilitating the prevention of illegal immigration and illegal residence in general, rather than as specific measures establishing standards and procedures to be followed by Member States in carrying out checks on persons at external borders.

22. Assuming that the scope of the proposed Regulation were confined to those aspects which fully justify its adoption on the basis of Article 62, point 2(a), as suggested in this opinion in points 18 and 19 above, there can be no doubt that it will also constitute, for the purposes of the position of the United Kingdom and Ireland, a development of the Schengen acquis and in particular of its provisions concerning the exercise of checks on persons when crossing the external borders. The United Kingdom and Ireland do not participate in those provisions. And as long as no decision has been taken by the Council pursuant to Article 4 of the Protocol integrating the Schengen acquis into the framework of the Union, extending their participation to those provisions, it is not possible for the United Kingdom and Ireland to participate in their development¹⁶.

¹⁶ See also, in this connection, the opinion of the Council Legal Service on the draft Agreement on visa and related issues concerning visits of tourist groups from the People's Republic of China (ADS Agreement), Doc. 13770/03 JUR 406 VISA 174 COASI 34, point 15

CONCLUSIONS

23. In conclusion, the Legal Service is of the view that:

- a) Article 62, point 2(a) TEC constitutes the appropriate legal basis for the adoption of those provisions of the proposed Regulation which concern the introduction of machine readable biometric data and other security features in passports issued by Member States to their citizens;
 - b) The Community is not competent to establish minimum security standards with respect to passports which are not of direct relevance to the exercise of controls on their authenticity by the border control authorities;
 - c) At present Ireland and the United Kingdom cannot participate in the adoption by the Council of the provisions referred to under a) above.
-