



## Statewatch analysis

### Revising EU border control rules: A missed opportunity?

#### Introduction

The EU's convoluted and hotly disputed rules on the abolition of internal border checks and the imposition of standardised external border controls would be consolidated and amended by a Commission proposal of April 2004. This measure is the first proposal for EC immigration and asylum law to be subject to the joint power of the Council (of Member States' ministers) and the European Parliament (EP), along with the abolition of national vetoes in the Council. As such it is a test case to see whether the change in decision-making rules will lead to more liberal (or more conservative) EC measures in this area.

A detailed analysis of the current state of the negotiations within the Council, and between the Council and EP, shows that the EP has had some success in getting a number of its more modest amendments accepted. But more radical changes have either been rejected by the Council or not tabled at all by the EP. So while, if the most recent version of the text is adopted, there will be some important improvements concerning the position of EU citizens and their family members, the treatment of travellers by border guards and travellers' procedural rights, there will be more limited improvements concerning asylum-seekers, the conditions of entry and the reinstatement of controls at internal borders.

The net result is that there will still be risks in particular of breaches of international human rights law and refugee law concerning asylum-seekers who arrive at the external borders of EU Member States, as well as the human rights of demonstrators and protesters.

#### Detailed Analysis

##### *Overview*

The EU's rules on border controls are complex and controversial. Controversy arises first from the ability of Member States to reimpose internal border

controls (border controls between EU Member States) or police checks even though those border controls are supposed to have been abolished between the EU Member States applying the Schengen rules (all of the 'old' Member States except the UK and Ireland, plus Norway and Iceland; the new Member States and Switzerland are due to apply the rules in several years' time). These internal border checks can in particular be used to stop the movement of protesters and demonstrators. Secondly, controversy arises from the EU's external border checks (on the borders between the Schengen Member States and non-Schengen countries, comprising land, air and sea borders), not only because they are used to stop movement of protestors and demonstrators from outside the EU, but also because they are a chief means of restricting entry into the EU in pursuit of its immigration policy, in particular restricting the movement of asylum-seekers who wish to claim asylum in a Member State.

The rules are complex because they have many overlapping sources. The primary source is the Schengen Convention, Article 2 of which sets out the basic obligation to abolish internal border controls and the possible derogations from that obligation. Articles 3 to 8 of the Convention then contain the basic rules on the conditions for crossing the external borders. A major additional source of external border rules is the Common Manual for Border Guards, drawn up originally by the Schengen Member States in the Schengen Convention's Executive Committee (which consisted of Member States' ministers) and since amended several times since 1999 (when the Schengen acquis was integrated into EU law) by the EU Council (of Member States' ministers), in particular to require use of a standard form where persons are refused entry at the border. There are also several other Schengen Executive Committee decisions and EU Council acts which contain border control rules. The proliferation of acts is confusing and furthermore the legal status and effect of Schengen measures is not yet clear, particularly in the case of the Common Manual, which was largely drawn up for practical use by border guards.

In order to simplify and update the rules, the Commission proposed in May 2004 a Regulation establishing an EU borders code, which would consolidate the text of the various existing measures with amendments. The proposed Regulation would also settle the question of the legal effect of the Borders Manual, since any rules in the Borders Manual taken over into the Regulation would clearly be 'normal' EC law (Regulations are binding and 'directly applicable' in EU Member States' national law, according to Article 249 of the EC Treaty).

When the Commission made its proposal, borders measures still had to be agreed by a unanimous vote of the Council following consultation of the European Parliament (EP). But from January 2005, following agreement on the Hague Programme, borders measures are adopted by a qualified majority vote in the Council and co-decision with the EP, giving the EP equal powers to the Council concerning the adoption of legislation. Since the previous decision-

making system had clearly led to the adoption of immigration and asylum measures which were usually close to the ‘lowest common denominator’ of the most conservative Member States, the key question following the change to the new decision-making rules is whether the abolition of the veto and the co-decision powers for the EP (which tends to have a majority favouring relatively liberal views on immigration and asylum) would lead to more liberal legislation in this area.

The proposed borders code Regulation is the first opportunity to see whether EU policy will change direction, as it was the first measure subjected to the new rules. Other EC legislative proposals subject to a qualified majority vote and co-decision (rules on border traffic, the Visa Information System and the Schengen Information System) are pending, and further proposals are expected in the near future.

It appears that the EP committee in charge of the borders code issue, in particular its rapporteur on this issue (Michael Cashman, a British Labour MEP) has had advanced discussions with the current Council Presidency (Luxembourg) about a deal on this proposal, which would incorporate many, but not all, of the amendments tabled by the rapporteur and others in the course of discussing a draft committee report. While the compromise deal suggested by the Luxembourg Presidency would incorporate many positive features of the EP’s proposals, a number of important proposed amendments would be overlooked. It is not yet clear whether the proposed deal will be accepted by the Council and the EP.

The following looks in detail at several key issues.

### *Asylum-seekers*

The current Schengen Convention states that it is ‘subject to’ the Geneva Convention of 1951 on the status of refugees and the 1967 Protocol to that Convention (Article 135), although this provision of the Convention was not integrated into EU law in 1999. The rules on conditions to cross the external borders specify that they ‘shall not preclude the application of special provisions concerning the right of asylum’ (Article 5(2)), but there is no further detail on what this means in practical terms. Article 3 of the Convention, which requires penalties to be imposed for unauthorised crossing of the external borders, contains no such provision, so it conflicts with the Geneva Convention, Article 31 of which exempts refugees from penalties for unauthorised border crossing under certain conditions. As for the Common Manual, point 1.3 of Part I of the Manual, which sets out exemptions from these penalties, similarly does not provide for any exemption for refugees. There are special rules for refugees in points 6.3 and 6.10 of Part II of the Manual, but these only address the issues of which travel documents are valid when a recognised refugee (ie, not an asylum-seeker claiming to be a refugee) crosses

the border regularly and of which national law applies when asylum is requested at the border. The Manual does not further elaborate upon Articles 5(2) or 135 of the Convention to indicate what special rules apply to asylum-seekers, and indeed the wording of point 6.10 of Part II of the Manual could be understood to mean that the position of asylum-seekers at the border is up to the national law of each Schengen state to determine.

The practical impact of this is that the Schengen rules do not clearly and expressly prevent Member States from simply refusing to admit asylum-seekers entry at their external borders, as Italy has recently done. Such behaviour arguably infringes the Geneva Convention and the European Convention of Human Rights, but it is less clear whether or not it infringes the Schengen rules, which are subject to the jurisdiction of the Court of Justice and accordingly might be more easily enforceable than the human rights and refugee Conventions. While the references to the Geneva Convention and the right to asylum in the Schengen rules, taken with the human rights protection accorded by the general principles of EU law (following integration of the Schengen *acquis* into EU law), could be interpreted to mean that the Schengen rules *do* preclude refusals of asylum-seekers at the border, it would obviously be preferable to specify this (and other issues relating to asylum-seekers) more precisely.

What would the borders code change on this issue? The Commission's proposed Regulation contains a general provision in Article 3(b), specifying that the Regulation does not affect 'the rights of refugees and persons requesting international protection, in particular as regards non-refoulement'. Article 4(3) specifies expressly that the application of penalties to persons who cross the external borders without authorisation is 'without prejudice to [Member States'] international protection obligations', and Article 11(1) carries over the provision from Article 5(2) of the Schengen Convention referring to 'special provisions on the right to asylum' that could trump an obligation to refuse entry at the external borders to an asylum-seeker who does not meet the normal conditions for entry. . All of these provisions have been retained by the Council to date. However, the specific references to asylum-seekers and refugees found in Part II of the Common Manual are not taken over into the Regulation.

The proposed provisions on asylum would be useful in that they would reinstate a general provision on the rights of refugees and asylum-seekers to replace Article 135 of the Schengen Convention, with more general wording, and would also refer expressly to the obligation not to apply penalties to asylum-seekers who cross the border irregularly. But although it could still be argued that the text of the proposed Regulation *could* be interpreted to mean that asylum-seekers could not be refused entry at the border, it would still be preferable to set out this obligation more clearly. Amendment 23 from the EP would do this, as it would specify that asylum-seekers have the right to remain on the

territory until a final decision is taken on their asylum application. Unfortunately, this proposed amendment has not been taken on board by the Council, even in an amended form.

### *EU citizens and their family members*

EU citizens and their family members have the right to move and reside freely in other Member States, as set out in Articles 12, 18, 39, 43 and 49 EC and diverse secondary legislation, which has been brought together in Directive 2004/38 (Member States must apply this Directive by the end of April 2006). The Treaty articles and legislation allow EU citizens and their family members to enter and reside in other Member States if they meet the criteria to live there (essentially if they have a job, self-employment or another source of income, rather than applying for benefits from the host State).

Directives 68/360 and 73/148 currently set out the immigration law rules applicable to EU citizens in another Member State and to their family members. These rules also apply to EU citizens who move for other reasons (along with their family members). As regards exit (Art. 2 of each Directive), this legislation provides that Member States must allow EU citizens and their family the right to leave the territory to enter another Member State, 'on production of a valid identity card or passport', and cannot demand exit visas or any equivalent document from their citizens. Member States must issue such documents to their nationals 'in accordance with their laws'. As for entry (Art. 3 of each Directive), Member States must allow entry merely 'on production of a valid identity card or passport', and cannot demand entry visas or an equivalent document, except for family members who are non-EU nationals. In that case, 'Member States shall afford to such persons every facility for obtaining any necessary visas'. These visas must be free of charge (Art. 9(2), Directive 68/360).

Interpreting these rules, the Court of Justice has ruled that a policy of imposing an entry clearance stamp in an EU citizen's passport upon entry is an equivalent measure to requiring a visa, and is therefore banned (Case 157/79 Pieck [1980] ECR 2171). It is not permissible for border guards to ask EU citizens questions about the intended purpose of their visit, or their financial means (Case C-68/89, Commission v Netherlands [1991] ECR I-2637). On the other hand, the Court has ruled that unsystematic and sporadic checks on EU citizens, on occasion at the border, to see if they are carrying the correct permits, does not violate EC law if similar checks are carried out on that State's own nationals, unless those checks are 'carried out in a systematic, arbitrary or unnecessarily restrictive manner' (Case 321/87 Commission v Belgium [1989] ECR I-997, para. 15). As for third-country national family members of EU citizens, the Court has ruled that they can be turned back at the border if they lack an identity card or passport, or (if necessary) a visa, but not if they are able to prove their identity and conjugal ties and if there is no

evidence that they are a risk to public policy, public security, or public health. Moreover, in order to give the free movement Directives 'their full effect, a visa [where it is required] must be issued without delay and, as far as possible, on the place of entry into national territory' (Case C-459/99 MRAX [2002] ECR I-6591, paras. 53-62). Third-country national family members are covered by the legislation setting out substantive limits to Member States' power to expel or deny entry to citizens of other EU Member States on grounds of public policy, public security, and public health, as well as procedural protection for those affected (Directive 64/221).

As for the new Directive 2004/38, the rules on visas and border controls are the same as the old rules (Arts. 4 and 5 of the Directive), except that the right of entry and exit is 'without prejudice to the provisions on travel documents applicable to national border controls', there is an explicit reference to the EC visa list legislation 'or, where appropriate,...national law' as regards family members' visa requirements, third-country national family members are exempt from the visa requirement where they hold a residence card issued to third-country national family members of an EU citizen who resides in a different Member State, visas must be issued 'as soon as possible and on the basis of an accelerated procedure', passports of third-country national family members cannot be stamped if they present the aforementioned residence card, and EU citizens and family members without the required documents must be given the chance to obtain them or corroborate their identity before being turned back.

Article 134 of the Schengen Convention provides that it only applies so far as it is compatible with EC law. This provision was not taken over into EU law in 1999, but the Protocol to the EC and EU Treaties on the Schengen acquis sets out the same rule.

The current Article 6 of the Schengen Convention, while badly drafted, appears to require that all persons, including EU citizens, should be checked to establish their identities on the basis of their travel documents, while third-country nationals should be subject to 'thorough checks'. This distinction appears more clearly from points 1.3.1 to 1.3.4 of Part I of the Common Manual, which moreover provides that EU citizens should be subject to 'random thorough checks' on entry and exit as well as checks where there are reasons to believe that the persons concerned might compromise public policy, national security or health. But third-country national family members of EU citizens are not exempted from 'thorough checks'. Points 6.1 to 6.1.4 of Part II of the Common Manual also address the issue of EU citizens and their family members, stating that EU citizens can only be denied entry to another Member State if they pose a threat to public policy, national security or public health; if entry is refused, then the EU citizen must receive a written notification with the reason for refusal. Family members can only be refused on the same grounds, with addition of the absence of documents (although as with all third-

country nationals, a residence permit is equivalent to a visa); their procedural rights are set out in point 1.4.1 of Part II, which provides that a ban on entry to one Member State is a ban on entry to all of them, and leaves the extent of appeal rights (if any) open to each Member State to determine. These provisions are clearly wholly in conflict with EC free movement law.

The proposed Regulation would provide simply that it would not affect the rights of persons with EC free movement rights (Article 3(a)), including EU citizens' family members (see definition in Article 2(7)). The distinction between a minimum check applicable to everyone and a thorough check for third-country nationals is set out more clearly in Article 6 of the proposal, although it is not clear what the position of family members of EU citizens is under these provisions. The illegal provisions of Part II of the Manual relating to EU citizens and their family members would be deleted entirely.

This issue has been the subject of divergent views between the EP and the Council during negotiations. The Council has agreed to add a provision to Article 6 of the Regulation which makes it clear that the minimum check applies in principle to both EU citizens and their family members with free movement rights, taking over an EP amendment in part. However, the Council has insisted on adding a provision stating that border guards can consult national or European databases, 'occasionally, when carrying out minimum checks on persons enjoying the Community right of free movement...in order to ensure that a person does not represent a real, present and sufficiently serious danger to the internal security, public order, international relations of the Member States or a threat to the public health', while specifying that this will not affect the right of entry of such persons (Article 6(2), as amended). A further Article 6(6), introduced to respond to another EP amendment, states that Directive 2004/38 applies to checks on EU citizens and their family members, but there appears to be a conflict here, as the Directive does not allow for checks in relation to threats to Member States' *international relations* or in relation to *internal security* (as distinct from public security). Nothing in EC free movement law allows for such exceptions; the international relations exception moreover appears to conflict with the right of freedom of expression and freedom of association if applied to demonstrators. The point of this provision is also unclear: if it does not authorize limits on free movement, what is the purpose of it?

Also the Council has apparently dropped the current exception (retained in the Commission proposal and supported by the EP) which permits Member States to exempt their own citizens from having to cross borders at authorized times and places.

### *Conditions of entry*

A key issue concerning the EU's border rules is of course the conditions for obtaining entry into the Member States' territories across the external borders. Article 5 of the Schengen Convention specifies that entry can only be authorised if the person concerned has the correct travel documents, a visa if required, and a justification for the proposed stay (including possibly a subsistence requirement); is not on the Schengen Information System blacklist; and is not a threat to the public policy, national security or international relations of any (Schengen) Member State. The Commission proposed to add public health and a travel insurance requirement to this list, retaining the current exceptions from the requirements (humanitarian grounds, national interest or international obligations, without prejudice to special asylum rules; entry in order to transit to a Member State where a person holds a residence permit or re-entry visa) and adding another currently found in the Common Manual (exemption from the visa requirement where a person holds a residence permit issued by a Member State).

During discussions, the Council has largely accepted EP amendments to clarify the definition of public health, to drop the travel insurance requirement, and to offer a wider scope for travellers to prove that they have sufficient subsistence and justification for entry. However, the Council has added an express reference to checks in national databases as well as the SIS (although such databases are probably already checked in practice under the current rules); it is not clear if Member States are expected or permitted to check *each other's* databases to this end. The Council has also rejected an EP amendment which would have ensured that a letter of guarantee from a host was conclusive proof that entry was justified. The net result of all this is that the conditions for entry will not change significantly. It would have been preferable to focus more on abolition or further clarification of the criteria for entry, in particular abolishing or severely restricting the 'international relations' exception which could be used against demonstrators or protesters. However, one compromise amendment does suggest that there will be an obligation, not discretion, to admit any persons who meet the criteria for entry.

### *Treatment by border guards*

The Commission's proposal only provided that measures adopted by border guards would be subject to the principle of proportionality. This has been improved by the EP, which tabled amendments accepted by the Council Presidency to add that border guards must fully respect human dignity and cannot discriminate on grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation (Article 5a). This would be the first non-discrimination clause inserted into the main text of an EC immigration or asylum measure (the Council has methodically removed such clauses from a

number of prior legislative proposals). It should be pointed out, however, that the non-discrimination clause does not apply to the entire Regulation, including the conditions for entry, but only to the performance of border checks.

Also, the Council Presidency has tabled amendments based on EP amendments to specify that thorough checks should, where possible, be carried out in a non-public area, and that information should be given to a person subject to such a check, in particular to request the name or service number of the guard carrying out such checks (Articles 6(5) and 6(6)). But this still falls short of suggested EP amendments to ensure the right to have the name and service number and to have fuller information on the purpose of the checks. Nor has the Council accepted an EP amendment to provide for a standard complaint form which aggrieved travellers could file in the event of a dispute.

### *Procedural rights*

The Council Presidency has accepted EP amendments that would considerably enhance the procedural rights of persons at the border (Article 11 of the Regulation). These amendments state that a person is entitled to know the precise reason for a refusal, that there is a 'right to appeal', although the details are left up to national law (at the moment, the Common Manual only states that it is up to national law to determine any appeal rights), that the traveller must be given information on contacts regarding the appeal and that in addition to possible compensation, there must be a remedy of correction of the refusal of entry if the appeal is successful. These provisions still fall short of the EP's amendments, which also called for a decision to be approved by a superior officer, for a clear right to compensation following a well-founded appeal, for a written and oral indication of appeal procedures, and for the appointment of representatives for travellers. The Council Presidency also accepted the basic features of an EP amendment requiring Member States to compile information on persons refused entry.

### *Internal border checks*

Finally, the Commission proposed to amend the rules concerning internal border checks by clarifying the cases in which police checks could take place behind borders and by amending the procedure applicable when a Member State seeks to derogate from the obligation to abolish internal checks, in particular to give the Commission a greater role. A further provision setting out circumstances in which all Member States could reintroduce checks simultaneously in the event of a major terrorist threat will be dropped after objections from both the Council and EP (Article 24 of the Commission proposal). Following discussions in the Council and acceptance of several EP amendments, there will be further clarification of what forms of internal police checks are permissible, public health will no longer be a ground for re-

imposition of border checks, and there are revised provisions on reporting to the public and the European Parliament.

### *Sources*

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