



COMMISSION OF THE EUROPEAN COMMUNITIES

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Proposal for a

### **COUNCIL REGULATION**

**laying down 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 convention implementing the Schengen agreement and the common manual to this end**

(presented by the Commission)

## **EXPLANATORY MEMORANDUM**

### **1. INTRODUCTION**

The Schengen *acquis* incorporated into the framework of the European Union contains rules on the entry, short stay and movement of third-country nationals, notably in Articles 5, 20 and 23 of the Convention implementing the Schengen Agreement. These provisions state that third-country nationals who have legally entered the territory of the Member States have the right, as long as they satisfy the relevant conditions, to remain within the Schengen area for a maximum of three months during the six months following the date of first entry. It is also stipulated that third-country nationals who no longer satisfy the relevant conditions must leave the territory of the Member States immediately. It transpires from all these provisions that the dates on which the third-country national crossed the external borders of the Member States need to be checked in order to work out the total duration of the stay and to ascertain whether that person's situation is legal in respect of this condition.

The Common Manual provides in point 2.1 of Part II that stamps showing, among other things, the date and the name of the border post concerned are to be affixed to the travel documents of third-country nationals, enabling them to cross the external borders. These provisions state that the travel documents of all third-country nationals, apart from a few exceptional cases which are explicitly mentioned, must be stamped at the moment of entry into the Schengen area, regardless of whether these persons are subject to or exempt from the visa requirement. However, these same provisions are less binding as regards the obligation to stamp the travel documents when the person leaves the Schengen area. Only point 2.1.2 refers to the affixation of an exit stamp, and only in the case of documents which contain a multiple-entry visa with a restriction on the total length of stay.

Furthermore, point 1.3.5 of Part II of the Common Manual, adopted on the basis of Article 6(2)(e) of the Convention, provides for the possibility of relaxing checks at land borders as a result of special circumstances, notably relating to the intensity of traffic. It is stated that, under these circumstances, the officials responsible are to give priority to checks on entry movements over checks on exit movements.

### **2. WHY IS A NEW LEGISLATIVE PROPOSAL NECESSARY AND WHAT DOES IT CONTAIN?**

The ambiguity of the Schengen *acquis* provisions in this area has led to divergent procedures in the Member States. It has been found during Schengen evaluation visits and debates in the relevant Council groups and bodies that, in many cases, third-country nationals enter the Schengen area legally without their travel document having an entry stamp affixed when they cross the external border. This is the case, for example:

- when, in certain airports, specific nationalities are exempted from having their travel documents stamped because of the low risk of illegal immigration represented by those nationalities;
- when, at certain external land borders, the rules are regularly relaxed in order to avoid long queues;
- when checks are carried out on trains by mobile teams which do not have the capacity to check the documents of all passengers.

Since the situation described here has created difficulties in checking compliance with the condition regarding the duration of short stays of third-country nationals on the territory of the Member States, it is necessary both to clarify the existing rules on stamping travel documents and to lay down the conditions in which the absence of an entry stamp on the travel documents of third-country nationals may be taken as a presumption of the illegality of their stay.

In the context of the harmonisation and strengthening of checks at external borders and the fight against illegal immigration, the Justice and Home Affairs Council of 19 December 2002 adopted conclusions aiming at the systematic implementation of the rule that aliens' travel documents should be stamped during checks carried out at external border crossing points. To this end, it called on the Commission to consider proposals which would be likely to harmonise practices relating to the affixation of stamps on travel documents, also with a view to enlargement, and to examine the consequences of the absence of entry stamps on travel documents, including the question of the presumption of illegal residence.

In response to this invitation, the Commission proposed to the Justice and Home Affairs Council of 27 and 28 February 2003 a set of practical measures that would be adopted gradually so as to take account of any practical difficulties in adapting them encountered by Member State authorities. It indicated that these measures, all of which the Member States have undertaken to respect, should include, in the form of a Community Regulation, the Member States' obligations with regard to the stamping of the travel documents of third-country nationals when they cross external borders as from 1 May 2004 and that the consequences of the absence of an entry stamp on such documents should be determined.

In addition, the special security characteristics of the uniform entry and exit stamps used by the Member States at external border crossing points that stem from the conclusions of the Justice and Home Affairs Council of 5 and 6 June 2003 constitute a measure guaranteeing that the authenticity of the stamps affixed to the travel documents of third-country nationals can be checked and making them the basis for the presumption of legal entry into the territory.

This initiative is intended to translate into reality the Member States' obligation to stamp travel documents now that the conditions are in place to lessen the practical difficulties mentioned above since various measures for managing external borders that are likely to allow greater fluidity in checks on travellers have either already been or will shortly be adopted. For example, the provisions requiring the Member States to provide separate lanes, duly differentiated by signs and adapted to the type of check to which travellers are, in principle, subject by reason of their nationality, and the rules on local border traffic will make the obligation to stamp travel documents easier. Furthermore, from 1 May 2004, the proportion of third-country nationals crossing land borders in particular will diminish considerably following the accession of the new Member States, whose nationals will become full citizens of the European Union. The number of travel documents to be stamped at these borders will thus be reduced.

This initiative follows up the guidelines adopted by the Council and is being presented before the recasting of the Common Manual because of its own intrinsic importance and in view of the timetable for the accession of new members. The recasting of the Common Manual is a necessarily complex exercise which requires preparatory work and negotiations; it is difficult to predict how long this will take. The fact that these questions are being addressed separately is without prejudice to their close complementarity or to the need to take account of them when any new text is adopted.

The priority given to this Regulation can also be justified by the fact that some Member States are already responding to the absence of an entry stamp on third-country nationals' travel documents by taking these people back to the border.

The obligation under this Regulation to stamp travel documents systematically does not in any event constitute a new condition for entry, short stay or movement by third-country nationals in the territory of the Member States. It is though intended to strengthen the instruments that the Member States have at their disposal to monitor checks on the sole condition for short-term stays. Its implementation will require considerable logistical efforts on the part of the Member States, which is why systematic stamping is currently required only for entry checks. Subsequently, however, it will have to be considered, in the light of the impact assessment for the Regulation, whether it is appropriate to impose the same requirement for exit checks.

If this obligation to stamp documents is to be met and if the implications for the decision on the legality of their stay of the absence of a stamp on third-country nationals' travel documents are to be taken on board, the conditions in which a relaxation of checks on persons at external borders can be adopted must be reviewed. It will no longer be possible to take these measures except in exceptional, unforeseen circumstances requiring immediate action by the competent authorities. The Member State concerned will have to inform the Council and Commission of these as quickly as possible. The notification will serve to verify the accuracy of any declaration by persons whom, when questioned because their travel document does not carry a stamp, states that they crossed the border at a time when a measure relaxing the rules was in force.. In any case, third-country nationals must be warned that they may have to subsequently prove the legality of the length of their stay on the territory of the Member States if their travel document does not bear an entry stamp specifying their date of arrival on the territory of the Member States. They will also be able to request expressly that their travel document be stamped even if a measure relaxing checks on external borders is in force.

### 3. LEGAL BASIS

In its Decision (1999/436/EC) of 20 May 1999 determining, in conformity with the relevant provisions of the Treaty establishing the European Community and the Treaty on European Union, the legal basis for each of the provisions or decisions which constitute the Schengen *acquis*, the Council identified Article 62(2)(a) of the EC Treaty as the appropriate legal basis in the Treaties for the provisions laid down in the Chapter on "Crossing External Borders".

This Regulation develops the Schengen *acquis* as regards the conditions of entry, short stay and movement of third-country nationals provided for in that Chapter.

Accordingly, Article 62(2)(a) of the EC Treaty should be taken over as the legal basis for this Regulation.

### 4. SUBSIDIARITY AND PROPORTIONALITY

Article 5 of the EC Treaty stipulates that "Any action by the Community shall not go beyond what is necessary to achieve the objectives of the Treaty." The form taken by Community action must be the simplest possible that will allow the proposal to attain its objective and to be implemented as efficiently as possible.

This proposal for a Regulation develops the Schengen *acquis*. It is intended to clarify the existing obligations on the Member States as regards the stamping of the travel documents of third-country nationals.

Because of its very nature, only Community action can achieve this objective. National action alone could not produce rules that would apply to all the Member States.

## 5. CONSEQUENCES OF THE VARIOUS PROTOCOLS ANNEXED TO THE TREATY

The legal basis for this Regulation is found in Title IV of the Treaty and constitutes a development of the Schengen *acquis*. It must therefore be proposed and adopted in compliance with the Protocols annexed to the Amsterdam Treaty on the position of the United Kingdom, Ireland and Denmark.

Consequences of these various protocols:

### *United Kingdom and Ireland*

In accordance with Articles 4 and 5 of the Protocol integrating the Schengen *acquis* into the framework of the European Union, "Ireland and the United Kingdom of Great Britain and Northern Ireland, which are not bound by the Schengen *acquis*, may at any time request to take part in some or all of the provisions of this *acquis*."

The proposed Regulation develops the provisions of the Schengen *acquis*, in which the United Kingdom and Ireland do not take part, in accordance with Council Decision 2000/365/EC 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* and 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*. The United Kingdom and Ireland are therefore not taking part in the adoption of the Regulation, which is not binding on them and does not apply to them.

### *Denmark*

In accordance with the Protocol on the position of Denmark annexed to the EC Treaty, Denmark does not take part in the adoption by the Council of measures pursuant to Title IV of the EC Treaty, with the exception of "measures determining the third countries whose nationals must be in possession of visas when crossing the external borders", or "measures relating to a uniform format for visas" (former Article 100).

However, when, as is the case here, these proposals develop the Schengen *acquis*, then in accordance with Article 5 of the Protocol "Denmark shall decide within a period of 6 months after the Council has decided on a proposal or initiative to develop the Schengen *acquis* under the provisions of Title IV of the Treaty establishing the European Community, whether it will implement this decision in its national law."

### *Norway and Iceland*

In accordance with the first paragraph of Article 6 of the Protocol integrating the Schengen *acquis*, an agreement was signed on 18 May 1999 between the Council, Norway and Iceland in order to associate those two countries with the implementation, application and development of the Schengen *acquis*.

Article 1 of the Agreement provides that Norway and Iceland are to be associated with the activities of the EC and the EU in the fields covered by the provisions referred to in Annexes A (provisions of the Schengen *acquis*) and B (provisions of European Community acts which have replaced corresponding provisions of - or were adopted pursuant to - the Schengen Convention) to the Agreement and their further development.

Pursuant to Article 2, the acts and measures adopted by the European Union to amend or supplement the Schengen *acquis* which has been integrated (Annexes A and B) are implemented and applied by Norway and Ireland.

The proposal presented develops the Schengen *acquis* as defined in Annex A to the Agreement.

The matter should therefore be examined in the "Mixed Committee", as provided for in Article 4 of the Agreement, in order to give Norway and Ireland the opportunity "to explain the problems they encounter in respect of [this] measure" and "to express themselves on any questions concerning the development of provisions of concern to them or the implementation thereof".

## 6. COMMENTARY ON THE ARTICLES

### Article 1

Article 1 defines the objectives of the regulation, namely:

- to establish the obligation for the Member States to stamp **systematically** third-country nationals' travel documents on entry at the external borders of the Member States;
- to specify the conditions in which the absence of an entry stamp on third-country nationals' travel documents may constitute a basis for the presumption of illegal residence on the territory of the Member States.

### Article 2

This Article amends the Convention implementing the Schengen Agreement.

Paragraph 1 amends Article 6(2)(e), limiting situations where a relaxation of checks can be justified to exceptional, unforeseen circumstances requiring immediate steps to be taken. It also stipulates that the Member State concerned is to inform the Council and Commission accordingly as quickly as possible.

Paragraph 2 inserts an Article 6a, setting out the obligation to stamp systematically third-country nationals' travel documents on entry at external border crossings.

Paragraph 3 inserts an Article 23a, paragraph 1 of which stipulates that, in the absence of an entry stamp on the travel document of a third-country national, it may be presumed that such person has exceeded the duration of the authorised short stay. Paragraph 2 of this new Article states that the person concerned may overturn the presumption established in the preceding paragraph by providing proof of and information on the actual length of the stay; a number of examples of such proof or information are given. A bona fide third-country national will thus have numerous opportunities to demonstrate the legality of his stay. Lastly, in the event of the presumption not being overturned, paragraph 3 of Article 23a gives the competent national authorities the possibility of applying the provisions of paragraphs 3 to 5 of Article 23.

### Article 3

This Article makes the necessary changes to the Common Manual in points 1.3.5, 1.3.5.4, 2.1.1, 2.1.5, and 3.4.2.3 of Part II.

In point 1.3.5 it is stated that checks on the land borders may be relaxed as a consequence of exceptional, unforeseen circumstances. This may be the case, for example, if a major accident blocks the normal traffic routes or if sudden international transport strikes lead to such an inflow of people that it is impossible to carry out checks even if all the available resources are deployed.

The inclusion of new point 1.3.5.4 is designed to enable third-country nationals who expressly request it to have their travel document stamped even if checks are relaxed.

The amendments to point 2.1.1 set out the principle of systematic affixation of entry stamps and specify the cases where this does not apply (EU citizens and other persons who enjoy the same right to freedom of movement).

Point 2.1.5 is amended by deleting the reference to Swiss nationals in the second indent and by adding a fifth indent exempting from the stamping requirement persons covered by local border traffic arrangements.

The third paragraph added to point 3.4.2.3 extends the obligation for the locally responsible control authorities to stamp the travel documents of third-country nationals who so request, including at external maritime sea borders.

### Article 4

This article takes account of the need to provide correct, appropriate information to those concerned by this Regulation with a view to equitable application of the measures set out in it.

### Article 5

Paragraphs 1 and 3 are standard final provisions.

Paragraph 2 provides that the Regulation is to apply from 1 May 2004, the scheduled date for the accession of the new Member States.

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THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 62(2)(a) thereof,

Having regard to the proposal from the Commission,<sup>1</sup>

Having regard to the opinion of the European Parliament,<sup>2</sup>

Whereas:

- (1) The European Council held in Seville on 21 and 22 June 2002 called for closer co-operation in combating illegal immigration and called on the Commission and the Member States to take operational steps to ensure an equivalent level of control and surveillance of external borders.
- (2) The provisions of the convention implementing the Schengen Agreement of 14 June 1985<sup>3</sup>, and of the common manual<sup>4</sup> concerning the crossing of external borders lack clarity and precision as regards the obligation to affix stamps to the travel documents of third-country nationals when they cross external borders. Consequently, they lead to divergent practices in the Member States and make it difficult to check whether the duration of short stays for such third-country nationals on the territory of the Member States is adhered to, namely a maximum of three months in any six-month period.
- (3) The Justice and Home Affairs Council of 27 and 28 February 2003 approved the Commission's intention to clarify the existing rules in this area, notably by specifying, by way of a Community regulation the obligation for the Member States to stamp systematically third-country nationals' travel documents on entry at external border crossings. The Commission is therefore called on to take the appropriate initiatives and to provide for action in response to the absence of an entry stamp on such documents.

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<sup>1</sup> OJ C [... ], [... ], p. [... ].

<sup>2</sup> OJ C [... ], [... ], p. [... ].

<sup>3</sup> OJ L 239, 22.9.2000, p. 19. Convention modified by decision 2003/170/JAI (OJ L 67, 12.3.2003, p. 27).

<sup>4</sup> OJ C 313, 16.12.2002, p. 97.



- (4) The conclusions adopted by the Justice and Home Affairs Council of 8 May 2003 concerning the installation of separate lanes at external borders, duly differentiated by signs depending on the nationality of travellers, and the presentation of a proposal intended to lay down specific rules on local border traffic will improve the management of external borders by the services responsible, making it easier to overcome any practical difficulties arising from the requirement to stamp third-country nationals' travel documents systematically. These measures will also help to ensure that any measures relaxing checks on persons at external borders are exceptional.
- (5) The obligation on the Member States to stamp third-country nationals' travel documents systematically when they enter the territory of the Member States and the limitation regarding the circumstances in which measures relaxing checks on persons at external borders may be adopted provide the possibility of presuming, in the absence of a stamp on such travel documents, that their holder is in an illegal situation as regards the condition of the duration of a short stay. However, it must be possible to overturn this presumption by any form of proof that can demonstrate the legality of the duration of the stay.
- (6) The obligation to stamp third-country nationals' travel documents must be applied uniformly by the Member States. To this end, it is necessary to fix a date after which all the Member States are to implement this obligation systematically.
- (7) The convention implementing the Schengen Agreement and the common manual must be amended accordingly.
- (8) 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 therefore not bound by it or subject to its application. Given that this Regulation is intended to build on the Schengen *acquis* by applying the provisions of title IV of Part Three of the Treaty establishing the European Community, Denmark, acting in accordance with Article 5 of the Protocol mentioned above, is to decide within six months after the Council has adopted this Regulation whether it will implement it in its national law.
- (9) As far as Iceland and Norway are concerned, this Regulation constitutes a development of the provisions of the Schengen *acquis*, as provided for in 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*<sup>5</sup> falling within the area referred to in Article 1(B) of Council Decision 1999/437/EC of 17 May 1999 on certain arrangements for the application of that Agreement<sup>6</sup>.
- (10) This Regulation constitutes a development of the provisions of the Schengen *acquis* in which the United Kingdom is not participating, in accordance with Council Decision 2000/365/EC of 29 May 2000 on the request by the United Kingdom of Great Britain and Northern Ireland to take part in some of the provisions of the Schengen *acquis*<sup>7</sup>.

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<sup>5</sup> OJ L 176, 10.7.1999, p. 36.

<sup>6</sup> OJ L 176, 10.7.1999, p. 31.

<sup>7</sup> OJ L 131, 1.6.2000, p.43.

Consequently, the United Kingdom is not taking part in its adoption and is not bound by it or subject to its application.

- (11) This Regulation constitutes a development of the provisions of the Schengen *acquis* in which Ireland is not taking part, in accordance with Council Decision 2002/192/EC of 28 February 2002 on the request by Ireland to take part in some of the provisions of the Schengen *acquis*<sup>8</sup>. Consequently, Ireland is not taking part in its adoption and is not bound by it or subject to its application.
- (12) This Regulation constitutes an act building upon or related to the Schengen *acquis* within the meaning of Article 3(1) of the Act of Accession,

HAS ADOPTED THIS REGULATION:

#### *Article 1*

The purpose of this Regulation is:

- to lay down the obligation for the competent authorities of the Member States to stamp systematically third-country nationals' travel documents when they cross the external borders of the Member States;
- to specify the conditions in which the absence of an entry stamp on third-country nationals' travel documents may constitute a presumption that the authorised duration of a short stay by such nationals on the territory of the Member States has been exceeded.

#### *Article 2*

The convention implementing the Schengen Agreement is hereby amended as follows:

- 1) Article 6(2)(e) is replaced by the following text:

"e) if in exceptional and unforeseen circumstances requiring immediate measures such checks cannot be carried out, priorities must be set. In that case, entry checks shall as a rule take priority over exit checks. The Member State concerned must inform the Council and Commission accordingly as quickly as possible."

- 2) The following Article 6a is inserted:

"The travel documents of third-country nationals referred to in Article 6(2)(a), shall be systematically stamped on entry."

- 3) The following Article 23a is inserted:

1. If the travel document of a third-country national does not bear an entry stamp, the competent national authorities may presume that it does not respect the condition relating to the applicable duration of a short stay.

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<sup>8</sup> OJ L 64, 7.3.2002, p. 20.

2. This presumption may be overturned by the third-country national by demonstrating by any means that he has respected the condition relating to the duration of a short stay. To this end, he may provide evidence such as transport tickets, proof of his presence abroad or declarations pursuant to Articles 22 and 45.
3. In the event of the presumption aimed at paragraph 1 not being overturned, the competent authorities may apply the provisions of Article 23(3)(4) and (5)."

### *Article 3*

Part II of the common manual is amended as follows:

1. Point 1.3.5 is replaced by the following:

"Checks at land borders may be relaxed as a result of exceptional and unforeseen circumstances. This will be the case where unforeseen events lead to such intensity of traffic that the delay in the time taken to reach checking posts becomes excessive, and all resources have been exhausted as regards staff, facilities and organisation."
2. Point 1.3.5.4 which follows is added:

"Even in the event of checks being relaxed, the officials locally responsible for border checks must stamp the travel documents of third-country nationals who so request."
3. Point 2.1.1 is amended as follows:
  - (a) The first sentence of subparagraph 1 is replaced by the following:

"When the territory of a Member State is entered, a stamp shall be affixed to: [...]".
  - (b) Subparagraph 2 is replaced by the following:

"No entry stamp shall be affixed to the documents of citizens of the European Union, nationals of the countries of the European Economic Area, nationals of the Swiss Confederation, nationals of third countries, family members of citizens of the European Union exercising their right to freedom of movement.
4. Point 2.1.5 is amended as follows:
  - (a) the second indent is replaced by the following:

"- on documents enabling nationals of Andorra, Malta, Monaco and San Marino to cross the border,"
  - (b) the following fifth indent is added:

"- in the case of persons benefiting from local border traffic arrangements."

5. In point 3.4.2.3, the following third subparagraph is added:

"Even in the event of a relaxation of the checks, the officials responsible must proceed in accordance with point 1.3.5.4."

#### *Article 4*

The Member States shall take all appropriate measures to inform third-country nationals of the implementation of this Regulation.

#### *Article 5*

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

It shall apply from 1 May 2004.

This Regulation shall be binding in its entirety and directly applicable in all Member States in accordance with the Treaty establishing the European Community.

Done at Brussels, [...]

*For the Council*  
*The President*