

### 3.5. Internal border controls

The EU rules on the abolition of internal border controls, including a power to reintroduce those controls, were initially set out, as mentioned above, in the Schengen Convention.<sup>275</sup> This provision of the Convention was also implemented by three Decisions adopted by the Schengen Executive Committee, which concerned the issues of: obstacles to traffic flows;<sup>276</sup> bringing the Convention into force;<sup>277</sup> and procedures for reintroducing border checks.<sup>278</sup> The relevant provision of the Schengen Convention and the three Executive Committee Decisions were then integrated into the legal order of the EC (as it then was) with the entry into force of the Treaty of Amsterdam; all were attributed the legal base of Article 62(1) EC (now Article 77(2)(e) TFEU).<sup>279</sup>

Research on the application of the Schengen Convention in two Member States indicated that following the abolition of internal controls, the size and powers of 'internal' border guard forces were increased considerably.<sup>280</sup> Also, the power to reintroduce controls was frequently invoked, in particular in the context of planned large-scale demonstrations at EU summit meetings.<sup>281</sup> The Council even adopted measures on this issue, which in particular provided for the exchange of information on alleged troublemakers, with the aim of lessening the effect of re-imposed internal border controls by means of targeted policing.<sup>282</sup>

As from 13 October 2006, the basic rules regulating the abolition of internal border controls derive from the Regulation establishing the Schengen Borders Code, which also sets out common rules on external border control.<sup>283</sup> The Code replaced the relevant provision of the Schengen Convention and two of the three Executive Committee Decisions.<sup>284</sup>

<sup>275</sup> Art 2 of the Convention ([2000] OJ L 239/1).

<sup>276</sup> SCH/Com-ex (94) 1 rev 2 ([2000] OJ L 239/157).

<sup>277</sup> SCH/Com-ex (94) 29 rev 2 ([2000] OJ L 239/130).

<sup>278</sup> SCH/Com-ex (95) 20 rev 2 ([2000] OJ L 239/133).

<sup>279</sup> Decision 1999/436 ([1999] OJ L 176/17). However, this Council Decision stated that Art 2(2) and (3) of the Convention were without prejudice to Art 64(1) EC (now Art 72 TFEU), which sets out Member States' responsibilities as regards law, order, and security. On the interpretation of this provision, see 3.2.4 above. Furthermore, Art 2(4) of the Convention was not allocated any legal base, because it was believed to be obsolete (see Decision 1999/435, [1999] OJ L 176/1).

<sup>280</sup> See K Groenendijk, 'New Borders Behind Old Ones: Post Schengen Controls Behind the Internal Borders—Inside the Netherlands and Germany' in E Guild, P Minderhoud, and K Groenendijk, eds, *In Search of Europe's Borders* (Kluwer, 2003) 131.

<sup>281</sup> See K Groenendijk, 'Reinstatement of Controls at the Internal Borders of Europe: Why and Against Whom?' (2004) 10 *ELJ* 150, and generally the second edition of this book, at 133.

<sup>282</sup> See: JHA Council conclusions (JHA Council press release, July 2001); a security handbook for police use at such events (Council doc 12637/3/02, 12 Nov 2002); and a Resolution on security at European Councils ([2004] OJ C 116/18). See further 12.7 below.

<sup>283</sup> Reg 562/2006 ([2006] OJ L 105/1), Art 40. On the external borders provisions, see 3.6.1 below. All references in the rest of this section are to the Borders Code Reg, unless otherwise indicated.

<sup>284</sup> Art 39(1) and 2(b) of the Code. The Decision which was not repealed was SCH/Com-ex (94) 29 rev 2 (n 277 above), setting out rules concerning the initial application of the Convention. It

Title III of the Code concerns internal border controls,<sup>285</sup> and Chapter I of this Title concerns the abolition of such controls.<sup>286</sup> The first provision repeats the basic rule at the core of the previous Schengen Convention, that 'internal borders can be crossed at any point without any checks on persons being carried out'.<sup>287</sup> Despite this basic rule, four types of checks are still permitted:<sup>288</sup> the exercise of police powers, where there is no 'effect equivalent to border checks'; security checks at ports and airports (if such checks also apply to movement within a Member State); the possibility to impose an obligation to hold or carry documents; and the registration requirement set out in the freedom to travel provisions of the Schengen Convention.<sup>289</sup>

The 'police powers' exception sets out four cases 'in particular' where the exercise of police powers shall not be considered equivalent to border checks:<sup>290</sup> the checks do not have border control as an objective; they are based on general police information and experience and aim 'in particular' at combating 'cross-border crime'; they are devised and executed differently from systematic checks at the external borders; and they do not entail spot-checks. It is not clear if these provisions are alternative or cumulative, although in any event the list is non-exhaustive (as is the second item on the list). Furthermore, there is no notification or transparency requirement which would assist in an assessment of whether the rules are being applied correctly. It could possibly be argued, however, that the concept of a police check with an 'effect equivalent to border checks' could be interpreted as broadly as a measure having an equivalent effect to a quantitative restriction on the free movement of goods.<sup>291</sup>

One key question is whether police checks would infringe the Code if they are carried out at or near the borders for the purposes of migration control. It is striking that there is no direct reference to this issue in this provision of the Code. In light of this, and since any checks carried out at or near borders for the main purpose or with the main effect of migration control must surely be considered as having the prohibited objective of border control (and perhaps also an effect equivalent to an internal border check), it must follow that such checks would violate the Code.

Finally, it should be noted that these police checks are not covered by the ban on discriminatory conduct set out elsewhere in the Borders Code, which only applies to checks at the external borders;<sup>292</sup> but surely it can be argued that a police check within the scope of this internal borders provision which is mainly aimed

has not subsequently been amended or repealed, although points 3 and 4 of this Decision are now clearly obsolete.

<sup>285</sup> Arts 20–31.

<sup>286</sup> Arts 20–22.

<sup>287</sup> Art 20.

<sup>288</sup> Art 21. Member States must notify the national provisions relating to the third and fourth exceptions to the Commission: Art 37. For these notifications, see: <[http://ec.europa.eu/justice\\_home/doc\\_centre/freetravel/rights/doc\\_freetravel\\_rights\\_en.htm#notifications](http://ec.europa.eu/justice_home/doc_centre/freetravel/rights/doc_freetravel_rights_en.htm#notifications)>.

<sup>289</sup> Art 22 of the Convention, which has not been amended or repealed; see 4.9 below.

<sup>290</sup> Art 21(a).

<sup>291</sup> See Art 28 EC (now Art 34 TFEU).

<sup>292</sup> Art 6(2).

at non-white people falls nonetheless within the scope of the principle of equality, which is protected as a general principle of EU law.

Next, Member States are obliged to remove road-traffic obstacles at the internal borders, including any unjustified special speed limits, but nonetheless they must be 'prepared to provide for facilities' to reintroduce internal border checks if necessary.<sup>293</sup>

Chapter II of Title III of the Borders Code concerns the reintroduction of internal border controls by a Member State.<sup>294</sup> The basic rule is that a Member State can 'exceptionally' reintroduce border controls for up to thirty days, or for a longer period if the duration of the relevant event is foreseeable, in the 'event of a serious threat to public policy or to internal security'; but the 'scope and duration' of the reintroduced checks 'shall not exceed what is strictly necessary to respond to the reintroduced checks'.<sup>295</sup> The reintroduction of controls may be continued for further renewable periods of up to thirty days, 'taking into account any new elements'.<sup>296</sup> Compared to the previous Schengen Convention rules,<sup>297</sup> the threshold for reintroduction of checks is higher, the time period is more precisely specified and the necessity rule is stricter.

The basic rule is supplemented by more specific rules, depending on whether the reintroduction of border checks is foreseeable or urgent. First of all, where the reintroduction of controls is foreseeable,<sup>298</sup> Member States must inform the Commission and other Member States 'as soon as possible' of its plans to reintroduce controls, and provide information 'as soon as available' on the reasons for and the scope of the reintroduction of controls, the authorized crossing points, the date and duration of the introduction, and (if relevant) the measures to be taken by other Member States. The Commission may issue an opinion on the planned reintroduction, and there shall be consultation on the planned controls between the Member States and the Commission in order to discuss the proportionality of the controls and possibly also 'mutual cooperation between the Member States'. These rules were a change from the previous procedures as regards the role of the Commission (which had no role at all previously), the date of the consultations (at least fifteen days before the reintroduction of controls), and the requirement to discuss the proportionality of the planned controls.<sup>299</sup>

Secondly, in the event that 'urgent action' is required, Member States may reintroduce controls without prior notification, provided that the relevant information is sent to the Commission and other Member States later.<sup>300</sup> As for

<sup>293</sup> Art 22. This clause took over the gist of Schengen Executive Committee Decision 94(1) (n 276 above), which was repealed.

<sup>295</sup> Art 23(1). <sup>296</sup> Art 23(2).

<sup>297</sup> Art 2(2) of the Convention, repealed by the Borders Code. <sup>298</sup> Art 24.

<sup>299</sup> Compare to point 1 of SCH/Com-ex (95) 20 (n 278 above), which has been repealed by the Code.

<sup>300</sup> Art 25. There is no change from the previous rules (point 2 of SCH/Com-ex (95) 20, *ibid*).

the procedure for prolonging controls, it simply requires the application of the procedure for reintroducing controls.<sup>301</sup>

Finally, Title III of the Code contains provisions on: informing the EP of decisions on reintroduced controls (and reporting to the EP following the third consecutive extension of reintroduced controls); clarifying that the external borders rules will apply when internal border checks are reintroduced; requiring a report when internal border controls are lifted, outlining the operation of the internal checks and their effectiveness; requiring information to the public about reintroduced controls unless there are overriding security reasons to the contrary; and requiring the EU institutions and other Member States to respect the confidentiality of information submitted by a Member State at its request.<sup>302</sup> Also, the Commission was obliged to report on the application of Title III of the Code by October 2009;<sup>303</sup> the report was to 'pay particular attention to any difficulties arising from the reintroduction of border control at internal borders' and '[where appropriate] . . . present proposals aimed at resolving such difficulties'. The Commission has not yet issued this report.

Of course, it should be recalled when considering the issue of internal border controls that until the entry into force of the Treaty of Lisbon, according to the prior Article 68(2) EC, the Court of Justice did not have 'jurisdiction to rule on any measure or decision taken pursuant to Article 62(1) [which conferred powers to adopt measures concerning internal borders] relating to the maintenance of law and order and the safeguarding of internal security'. This in effect prevented the Court of Justice from ruling on the validity of the reintroduction of internal border controls by any Member State. After this limit on its jurisdiction has been lifted, it was not long before the Court of Justice was asked to interpret the rules on internal border controls.<sup>304</sup> In the *Melki and Abdeli* judgment, it criticized the French practice for police controls behind the internal borders, in particular because the national law in question 'contains neither further details nor limitations on the power thus conferred—in particular in relation to the intensity and frequency of the controls which may be carried out on that legal basis—for the purposes of preventing the practical application of that power, by the competent authorities, from leading to controls with an effect equivalent to border checks'. To comply with the limitations in the Borders Code, national law 'granting a power to police authorities to carry out identity checks—a power which, first, is restricted to the border area of the Member State with other Member States and, second, does not depend upon the behaviour of the person checked or on specific circumstances giving rise to a risk of breach of public order—must provide the

<sup>301</sup> Art 26. Again, there is no change from the previous rules (point 3 of SCH/Com-ex (95) 20).

<sup>302</sup> Arts 27–31. Most of these provisions are new as compared to the previous rules.

<sup>303</sup> Art 38.

<sup>304</sup> Joined Cases C-188/10 and C-189/10 *Melki and Abdeli*, judgment of 22 June 2010, not yet reported.

necessary framework for the power granted to those authorities in order, inter alia, to guide the discretion which those authorities enjoy in the practical application of that power. That framework must guarantee that the practical exercise of that power, consisting in carrying out identity controls, cannot have an effect equivalent to border checks’.

In practice, it appears that border controls were reintroduced about seventeen times from the application date of the Borders Code until June 2010.<sup>305</sup> The large majority of cases concerned some form of political meeting (for instance, NATO and G8 summits, and the Copenhagen conference on climate change). Many of the reports on these reintroductions of controls are not available, but there are some available reports.<sup>306</sup>

Since many of the required reports on the reintroduction of border controls in individual cases are not available, and since the Commission has not produced its report on the internal borders rules, it is difficult to ascertain whether the Borders Code has had any impact on this issue. It is striking, however, that controls were apparently reintroduced more frequently in 2009 and 2010 than in previous years. One might surmise that the older Member States feel less secure since the enlargement of the Schengen zone.

### 3.6. External border controls: basic rules

Like the rules on the abolition of internal border controls, the basic rules on harmonized external border controls were initially set out in the Schengen Convention,<sup>307</sup> along with measures adopted by the Schengen Executive Committee, particularly a Common Manual for use by border control authorities,<sup>308</sup> along with two other Decisions of the Schengen Executive Committee.<sup>309</sup>

<sup>305</sup> Council docs: 13837/06, 11 Oct 2006; 15332/06, 15 Nov 2006; 6084/07, 7 Feb 2007; 10172/08, 30 May 2008; 13603/08, 1 Oct 2008; 7725/09, 18 Mar 2009; 7501/09, 20 Mar 2009; 11380/09, 25 June 2009; 13613/09, 24 Oct 2009; 13913/09, 1 Oct 2009; 13979/09, 2 Oct 2009; 16280/09, 20 Nov 2009; 16911/09, 1 Dec 2009; 7899/10, 23 Mar 2010; 8580/10, 15 Apr 2010; 9190/10, 21 Apr 2010; and 8584/10, add 1, 27 May 2010.

<sup>306</sup> For instance, see the report by Austria regarding reintroduction of controls during the 2008 European football championships (Council doc 15185/08, 5 Nov 2008).

<sup>307</sup> Arts 3–8 of the Convention ([2000] OJ L 239/1). On the provisions of the Schengen *acquis* regarding internal borders, see 3.5 above. For more detail on the measures concerning external border controls in force before the adoption of the Schengen Borders Code, see the second edition of this book, at 135–139.

<sup>308</sup> The Manual (as consolidated in Schengen Executive Committee Decision Sch/Com-ex (99) 13) was initially classified, but was subsequently mostly declassified (see Decisions in [2000] OJ L 303/29 and [2002] OJ L 123/49). It was published in [2002] OJ C 313/97.

<sup>309</sup> These were Sch/Com-ex (94) 17 on introducing the Schengen system and Sch/Com-ex (98) 1 on the activities of a task force ([2000] OJ L 239/168 and 191).

Following the integration of the Schengen *acquis* into the EC and EU legal order, in accordance with the Treaty of Amsterdam,<sup>310</sup> these measures were supplemented by EC acts, in particular a Decision concerning border signs and a Regulation on the stamping of documents.<sup>311</sup> Furthermore, the Council adopted in 2001 a Regulation which conferred upon itself (and Member States) the power to amend the Common Manual.<sup>312</sup> A challenge to this measure by the Commission before the Court of Justice (on the grounds that the Council had not adequately explained why it conferred those implementing powers upon itself, whereas the normal rule is to confer them on the Commission) was unsuccessful.<sup>313</sup> This Regulation was used to amend the Common Manual on several occasions, in particular to add a standard form for refusing entry and the border.<sup>314</sup> The Manual was also amended on several other occasions: by the EU's borders legislation,<sup>315</sup> by legislative acts concerning visas,<sup>316</sup> as well as incidentally when the Council amended the basic rules governing the procedure for visa applications (the Common Consular Instructions).<sup>317</sup>

In 2006, the various measures setting out the basic rules governing external border controls were all integrated and amended in the form of the Regulation establishing the Schengen Borders Code. The next major development in this area will be the development of an entry-exit system, ie a system which stores precise information on the movements of each third-country national across the external borders. These two issues will be considered in turn. Of course, these measures should be seen in the broader context of the other measures discussed

<sup>310</sup> Arts 2–8 of the Convention and Schengen Executive Committee Decisions Sch/Com-ex (94) 17 and Sch/Com-ex (98) 1 were allocated to Art 62(2)(a) EC (now Art 77(2)(b) TFEU), except for Art 7 of the Convention, which was allocated to Art 66 EC (now Art 74 TFEU), and Art 4 of the Convention, which was not allocated at all due to obsolescence. The Common Manual was allocated to Art 62 and 63 EC (now Arts 77–79 TFEU). See the Council Decisions on the definition and allocation of the *acquis* (1999/435 and 1999/436, [1999] OJ L 176/1 and 17).

<sup>311</sup> See respectively [2004] OJ L 261/119 and Reg 2133/2004, [2004] OJ L 369/5. The Regulation *inter alia* inserted two new provisions into the Schengen Convention (Arts 6a and 6b) and amended Art 6(2)(e) of the Convention, while the Decision *inter alia* amended Sch/Com-ex (94) 17 (n 309 above).  
<sup>312</sup> Reg 790/2001, [2001] OJ L 116/5.

<sup>313</sup> Case C-257/01 *Commission v Council* [2005] ECR I-345.

<sup>314</sup> The first two amendments ([2002] OJ L 123/47 and [2002] OJ L 187/50) made 'housekeeping' changes; the third amendment increased checks on minors ([2004] OJ L 157/36); and the fourth amendment introduced a common form to be used when refusing entry at the border ([2004] OJ L 261/36).  
<sup>315</sup> Art 3 of Reg 2133/2004 (n 311 above).

<sup>316</sup> Art 7(2) of Reg 539/2001 ([2001] OJ L 81/3); Art 2 of Reg 334/2002 ([2002] OJ L 53/7); Art 5(2) and (3) of Reg 415/2003 ([2003] OJ L 64/1); and Art 11(2) of Reg 693/2003 ([2003] OJ L 99/8). On the substance of these measures, see 4.5–4.7 below.

<sup>317</sup> Art 1(2), (4), and (5) of Decision 2001/329 ([2001] OJ L 116/32); Art 3 of Decision 2001/420 ([2001] OJ L 150/47); Art 2 of Decision 2002/44 ([2002] OJ L 20/5); the Decision on fees for considering visa applications ([2003] OJ L 152/82); Decisions 2003/585 and 2003/586 on transit visa requirements ([2003] OJ L 198/13 and 15); Art 2 of Decision 2004/17 on travel medical insurance requirements ([2004] OJ L 5/79); and the June 2006 Decision on visa fees ([2006] OJ L 175/77). On the substance of these measures, see 4.7.1 below.

in this chapter, concerning passport security, the Schengen Information System, and the EU's border agency, Frontex.

### 3.6.1. Schengen Borders Code

The Schengen Borders Code,<sup>318</sup> which applied from 13 October 2006,<sup>319</sup> also integrated and amended all the previous rules concerning internal borders.<sup>320</sup> As regards external borders, the Code repealed the relevant provisions of the Schengen Convention; one Schengen Executive Committee Decision; the Common Manual (as amended by EC measures); and the legislation on border signs; the stamping of documents; and the power to amend the Common Manual.<sup>321</sup> Subsequently, the Code has been amended on four occasions.<sup>322</sup> The Commission plans further amendments, pursuant inter alia to planned legislation on an entry-exit system.<sup>323</sup>

The Code confers powers upon the Commission to adopt implementing measures as regards three of its eight attached Annexes; the Commission can also adopt implementing measures as regards border surveillance.<sup>324</sup> All these measures are subject to the 'regulatory procedure with scrutiny', which entails greater scrutiny power for the EP; this process will likely be replaced by the 'delegated acts' procedure introduced by the Treaty of Lisbon at some point.<sup>325</sup> To date, one implementing measure has been adopted, regarding maritime surveillance (see the discussion below).<sup>326</sup>

Certain decisions relating to external border crossing (such as the penalties for crossing at unauthorized points or times) have been left to the Member States'

<sup>318</sup> Reg 562/2006 ([2006] OJ L 105/1). All further references in this section are to the Borders Code Reg, unless otherwise indicated. <sup>319</sup> Art 40.

<sup>320</sup> Arts 23–31 of the Code; see 3.5 above.

<sup>321</sup> Art 39. More precisely, Sch/Com-ex (94) 17 was repealed, but Sch/Com-ex (98) 1 remained in force (for both, see n 310 above). The latter Decision has not been amended or repealed. Some provisions relating to the abolition of internal border controls were also deleted: see 3.5 above. Also, the Code deleted Annex 7 to the Common Consular Instructions (on which, see 4.7.1 below).

<sup>322</sup> Firstly, Reg 296/2008 ([2008] OJ L 97/60) regarding 'comitology', amended Arts 12, 32, and 33. Secondly, Reg 81/2009, regarding the use of the Visa Information System at borders ([2009] OJ L 35/56), amended Art 7(3). Thirdly, Art 55 of the visa code (Reg 810/2009, [2009] OJ L 234/1), amended Annex V. Finally, Reg 265/2010 ([2010] OJ L 85/1) amended Arts 5(1)(b) and 5(4)(a). The Code has not been consolidated.

<sup>323</sup> See the Commission's 2010 work programme COM (2010) 135, 31 Mar 2010. On the entry-exit plans, see further 3.6.2 below.

<sup>324</sup> Arts 12(5), 32, and 33, as amended by Reg 296/2008 (n 322 above). The implementing powers concern Annexes III, IV, and VIII, which concern signs for separate lanes at border crossings, stamping of travel documents, and proof that the border has been crossed without travel documents being stamped. <sup>325</sup> See 2.2.2.1 and 2.2.3.1 above.

<sup>326</sup> [2010] OJ L 111/20. The legality of this measure has been challenged, on the grounds that the Council exceeded its powers to implement the Regulation when adopting it: Case C-355/10 *EP v Council*, pending.

discretion, but there is nevertheless an obligation for Member States to inform the Commission of these decisions; the Commission must then inform the public.<sup>327</sup> The Commission has also drawn up a Recommendation containing practical information for border guards.<sup>328</sup>

Moving on to the content of the Schengen Borders Code, it comprises forty Articles in four Titles, with (as noted already) eight attached Annexes.<sup>329</sup> Title I sets out the purpose of the Regulation, along with rules on definitions and the scope of the Code.<sup>330</sup> It is specified that while the Regulation applies 'to any person crossing the internal or external borders of Member States', it is 'without prejudice to' the rights of persons enjoying EU free movement rights or to 'the rights of refugees and persons requesting international protection, in particular as regards non-refoulement'.<sup>331</sup> The first of these categories follows from the priority of EU free movement law over Schengen rules,<sup>332</sup> while the latter arguably follows from the general principles of EU law.<sup>333</sup> Moreover, the Code does not address the issue of rules on local border traffic, which was the subject of separate legislation adopted some months later.<sup>334</sup>

Title II of the Code, which contains three Chapters,<sup>335</sup> sets out the main rules concerning external borders. Chapter I comprises two Articles, which set out in turn the rules concerning crossing external borders and the conditions for entry at the external borders.<sup>336</sup> Borders must be crossed at official points during official hours,<sup>337</sup> and notice of opening hours must be provided. Derogations may be permitted for pleasure shipping or coastal fishing;<sup>338</sup> seamen under certain conditions; individuals or groups where there is a 'requirement of a special nature' (subject to certain conditions); or individuals or groups in an unforeseen emergency.<sup>339</sup> Penalties must be imposed by Member States for breach of the obligation to cross at official points; these penalties shall be 'effective, proportionate and dissuasive', and this obligation is 'without prejudice to... [Member States'] international protection obligations'.<sup>340</sup> These two express provisions respectively

<sup>327</sup> Arts 34 and 37; this information is also available online at: <[http://ec.europa.eu/justice\\_home/doc\\_centre/freetravel/rights/doc\\_freetravel\\_rights\\_en.htm#notifications](http://ec.europa.eu/justice_home/doc_centre/freetravel/rights/doc_freetravel_rights_en.htm#notifications)>.

<sup>328</sup> C(2006) 5186, reproduced in Council doc 15010/06, 9 Nov 2006, amended by C(2008) 2976, reproduced in Council doc 11253/08, 30 June 2008.

<sup>329</sup> Title III of the Code solely concerns the abolition of internal border controls, and was considered in 3.5 above. Title IV solely sets out final provisions, and is not considered separately.

<sup>330</sup> Arts 1–3. <sup>331</sup> Art 3. The former group is defined in Art 2(5).

<sup>332</sup> See the former Art 134 of the Schengen Convention, which was not integrated within the EC legal framework (Decision 1999/435, n 310 above); the Schengen Protocol; and Case C-503/03 [2006] ECR I-1097. See also 3.4.1 above.

<sup>333</sup> Compare to the former Art 135 of the Schengen Convention, which was not integrated within the EC legal framework (see Decision 1999/435, *ibid*).

<sup>334</sup> Art 35; see Reg 1931/2006 ([2006] OJ L 405/1), discussed in 3.8 below.

<sup>335</sup> Arts 4–19. <sup>336</sup> Arts 4 and 5.

<sup>337</sup> Member States must notify their border crossing points to the Commission (Art 34(1)(b)).

<sup>338</sup> For definitions of these concepts, see Art 2(17) and (18). <sup>339</sup> Art 4(2).

<sup>340</sup> Art 4(3). Member States must notify these penalties to the Commission (Art 37).



reflect the underlying effective sanctions principles of EU law and the exemption of refugees from penalties for irregular entry as set out in Article 31 of the Geneva Convention on refugee status.<sup>341</sup> It should be noted that these provisions do not require Member States to criminalize irregular border crossing; more generally, EU law is silent on the criminal law aspects of irregular migration except for specific obligations to criminalize the smuggling, trafficking, and employment of irregular migrants, which do not require criminalization of the irregular migrants themselves.<sup>342</sup>

The key provision of the Schengen Borders Code sets out the conditions for entry for short-term stays (three months within a six-month period).<sup>343</sup> These conditions 'shall be the following':

- (a) possession of valid documents necessary to cross the border;<sup>344</sup>
- (b) possession of a visa if required by the EU visa list legislation,<sup>345</sup> although a residence permit or a long-stay visa is equivalent to a visa for this purpose;<sup>346</sup>
- (c) justification of the purpose and conditions of the stay, and possession of sufficient means of subsistence;
- (d) absence from the list of persons banned from entry set up within the Schengen Information System (SIS);<sup>347</sup> and
- (e) absence of a 'threat to public policy, national security or the international relations' of any of the Member States, 'in particular' where there is no alert in Member States' national databases refusing entry on such grounds.

The final provision could be interpreted as a requirement to check *all* Member States' national databases, but surely this is not practical on grounds of technical difficulties and cost. A 'non-exhaustive' list of documents providing justification of the stay is set out in Annex I to the Code, which is a straightforward list of documents which can serve as evidence of travel for business, studies, tourism or private reasons, or for political, scientific, cultural, sports, religious, or other reasons.<sup>348</sup> The subsistence requirement 'shall be assessed in accordance with the duration and the purpose of the stay and by reference to average prices for board

<sup>341</sup> On the first point, see Case 68/88 *Commission v Greece (Greek maize)* [1989] ECR 2685. On the second point, see 7.3.2 below. <sup>342</sup> See 7.5 below.

<sup>343</sup> Art 5.

<sup>344</sup> The relevant documents are listed in a Manual of travel documents, established by Schengen Executive Committee Decisions Sch/com-ex (98) 56 and (99) 14 ([2000] OJ L 239/207 and 298), since updated pursuant to Reg 789/2001 ([2001] OJ L 116/2).

<sup>345</sup> On the content of the visa list, see 4.5 below.

<sup>346</sup> Art 2(15) defines 'residence permit'. The exception for long-stay visas was added by Reg 265/2010 (n 322 above).

<sup>347</sup> See further the definition in Art 2(7), which refers to Art 96 of the Schengen Convention, which concerns the grounds for issuing 'alerts' in the SIS for persons to be refused entry (see 3.7.1 below). There is also an express requirement to check the SIS upon entry (Art 7 of the Code, discussed below).

<sup>348</sup> Art 5(2).

and lodging',<sup>349</sup> and Member States' reference amounts for subsistence are to be notified to the Commission.<sup>350</sup> The possession of sufficient subsistence 'may' be verified, 'for example', by 'the cash, travellers' cheques and credit cards in the third-country national's possession' as well as sponsorship declarations, where a Member State's law recognizes such declarations, and guarantees from hosts, as defined by national law.<sup>351</sup> Arguably, the words 'shall be the following' create an obligation to admit the person concerned if the relevant conditions are satisfied.

There are three exceptions to the rules concerning entry conditions:<sup>352</sup>

- (a) persons with a residence permit, a long-stay visa, or a re-entry visa from a Member State who wish to cross the external borders in transit back to the State which issued the permit shall be admitted across the border, unless they are listed on the watch-list of the Member State they wish to cross, along with instructions to refuse entry or transit;
- (b) persons who do not meet the visa requirement, but who satisfy the criteria for obtaining a visa at the border set out in EU visa legislation, may be authorized to enter if a visa is issued at the border pursuant to those rules;<sup>353</sup> and
- (c) a person may be permitted to enter if a Member State 'considers it necessary' to derogate from the criteria for entry on humanitarian grounds, national interest, or international obligations; but in such a case the permission to enter should be limited to the territory of that Member State, and other Member States must be informed of such decisions, if the person concerned is listed on the SIS.<sup>354</sup>

The first exception is mandatory ('shall be authorized to enter'); the residence permits concerned must be notified to the Commission.<sup>355</sup> The inevitable consequence of these rules is that persons who do not meet the criteria for entry must be denied entry, unless they fall into one of the three special categories listed above. However, the obligation to refuse entry is 'without prejudice to the application of special provisions concerning the right of asylum and to international protection or the issue of long-stay visas'.<sup>356</sup> The special provisions on the right to asylum and international protection are not further defined, and it could be argued that this is

<sup>349</sup> Art 5(3), first sub-paragraph. <sup>350</sup> Art 34(1)(c).

<sup>351</sup> Art 5(3), second sub-paragraph.

<sup>352</sup> Art 5(4), amended by Reg 265/2010 (n 322 above), which added a reference to long-stay visas. See previously Art 18 of the Schengen Convention (n 307 above), as amended by Regulation 1091/2001 ([2001] OJ L 150/4). See also the transit decisions discussed in 4.2.5 below.

<sup>353</sup> This initially referred to Reg 415/2003 (n 316 above), but this Regulation has now been replaced by Arts 35 and 36 of the visa code (n 322 above).

<sup>354</sup> cf the provisions for visas with 'limited territorial validity', set out in Art 25 of the visa code (ibid).

<sup>355</sup> Art 34(1)(a).

<sup>356</sup> Art 13(1).

a reference to national law; to a uniform EU concept which could be defined by the Court of Justice; to a minimum EU standard which could again be defined by the Court; or to the asylum procedures Directive.<sup>357</sup> As for the special provisions on long-stay visas, this should now be understood as a reference to the provisions of the Borders Code itself.<sup>358</sup>

Next, Chapter II of Title II of the Code concerns border checks and refusal of entry.<sup>359</sup> As regards the conduct of border checks, border guards must respect human dignity, act proportionately and not discriminate on any listed grounds while carrying out border checks.<sup>360</sup>

The Code then addresses the crucial issue of the checks that must be carried out at external borders on entry and on exit. In particular, the 'minimum checks' to be carried out on all persons at external borders must entail a 'rapid and straightforward verification' of the validity of the documents carried, including an examination for signs of counterfeiting or falsification, using technical devices and consulting databases on lost or stolen documents 'where appropriate'.<sup>361</sup> Presumably it cannot seriously be intended that the documentation of every single traveller will be fully checked in all possible databases.

The Code specifies that while such checks are the 'rule' for persons exercising EU free movement rights, it is possible for border guards to check databases on a 'nonsystematic basis' in order to determine 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'.<sup>362</sup> There is no cross-reference as regards these grounds to EU free movement law, and this proviso differs from EU free movement law because it refers to 'internal security' rather than 'public security' and also to 'international relations'.<sup>363</sup> However, it is specified that such checks 'shall not jeopardise' the right of entry set out in free movement legislation,<sup>364</sup> and further that checks on persons with free movement rights must be carried out 'in accordance with' EU free movement law.<sup>365</sup> Although these safeguards (and the general safeguard for free movement law set out in the Code),<sup>366</sup> in conjunction with the Treaty free movement rights, should be interpreted to prevent any restriction on free movement rights as a result of checking databases, it is possible in practice that a border guard might apply these conflicting provisions more restrictively. In particular, it

<sup>357</sup> However, it should be recalled that the Schengen associates and Denmark do not apply the procedures Directive. On the substance of the Directive, see 5.7 below.

<sup>358</sup> Art 5(4)(a), as amended by Reg 265/2010 (see n 352 above). <sup>359</sup> Arts 6–13.

<sup>360</sup> Art 6. <sup>361</sup> Art 7(2), first sub-paragraph. <sup>362</sup> Art 7(2), second sub-paragraph.

<sup>363</sup> Moreover, compared to Art 28(2) of Dir 2004/38 on EU citizens' free movement rights ([2004] OJ L 229/35), there is no reference to 'personal conduct' or to threatening the 'fundamental interests of society'. But at least the definition of 'public health' is identical (Art 29(1) of the Directive and Art 2(19) of the Code). For more on the free movement rules, see 3.4.1 above.

<sup>364</sup> Art 7(2), third sub-paragraph. <sup>365</sup> Art 7(6). <sup>366</sup> Art 3(a).

is objectionable that the border checks provision of the Code does not fully reflect free movement rules and refers to more extensive grounds than free movement law provides for.

The Code then specifies the 'thorough checks' to be carried out on third-country nationals (other than those with EU free movement rights). On entry, such persons shall be checked as regards their documents, the purpose and period of stay including subsistence requirements, along with checks in national databases and the SIS.<sup>367</sup>

Furthermore, once the Visa Information System (VIS) becomes operational, third-country nationals shall also (if they hold a visa) be checked in the VIS on entry for the purposes of verification (a 'one-to-one' search), using fingerprints and the visa sticker number.<sup>368</sup> Due to doubts about the practicality of this obligation, particularly as regards land borders,<sup>369</sup> it will be subject to a derogation, concerning the checking of fingerprints, for a transitional period of three years, beginning three years after the VIS has started operations.<sup>370</sup> The Commission must evaluate the application of the derogation and report on its implementation to the EP and the Council within two years of the start of the derogation. Either the EP or the Council may then suggest that the Commission table a proposal to amend the legislation.<sup>371</sup>

As for the substance of the derogation, it will apply where intense traffic results in excessive delay at border crossing points, all resources have been exhausted as regards staff, facilities, and organization, and 'on the basis of an assessment there is no risk related to internal security and illegal immigration'.<sup>372</sup> The first two criteria match the criteria applicable to the decision to relax border controls in the Borders Code,<sup>373</sup> but the third criterion (risk assessment) does not. Also, as compared to the rules on the relaxation of border controls, a Member State will not have to show (as regards the derogation from the obligation to check fingerprints in the VIS) that there were 'exceptional and unforeseeable

<sup>367</sup> Art 7(3)(a).

<sup>368</sup> Art 7(3)(aa), as inserted by Reg 81/2009 (n 322 above). For the details of the VIS, see 4.8 below. It should be noted that the VIS Reg (Reg 767/2008, [2008] OJ L 218/60) does not lay down a requirement for border guards to use the VIS; only an amendment to the Schengen Borders Code could do that.

<sup>369</sup> The practical difficulties at land borders have been ameliorated, however, by the extension of visa waivers to Western Balkan states, and will be further ameliorated if there are in future visa waivers for ex-Soviet countries (see 4.5 below).

<sup>370</sup> Art 7(3)(ae), as inserted by Reg 81/2009 (n 322 above). Presumably the transitional period does not begin for three years because of the three-year delay, after the VIS begins operations, before the VIS Reg permits the use of fingerprints to search the VIS at all borders (Art 18(2) of the VIS Reg, n 368 above). Art 18(2) of the VIS Reg permits that date to be brought forward as regards air borders; the Borders Code does not make any special provision for this situation.

<sup>371</sup> *Ibid.* See also Art 50(5) of the VIS Reg (*ibid.*), which provides for evaluation of the provisions regarding fingerprint searches in the VIS by external border guards, one year and three years after the VIS starts operations.

<sup>372</sup> Art 7(3)(ab), as inserted by Reg 81/2009 (n 322 above).

<sup>373</sup> Art 8(1), discussed further below.

circumstances', which 'shall be deemed to be those where unforeseeable events' lead to the intense traffic in question.<sup>374</sup> It follows that in principle, the decision to relax border controls and the derogation from full use of the VIS on entry will not always apply simultaneously, although in practice it is likely that this will often be the case.

If the derogation applies, the VIS must still be searched in all cases using the visa sticker, and in random cases using fingerprints as well.<sup>375</sup> The VIS will also have to be searched using visa sticker and fingerprints in 'all cases where there is doubt as to the identity of the holder of the visa and/or the authenticity of the visa'. Decisions to apply the derogation will have to be taken by the border guard in command at the border post or at a higher level, and notified immediately to the other Member States and to the Commission.<sup>376</sup> Member States must report annually on the use of the derogation to the Commission, including providing information on 'the number of third-country nationals who were checked in the VIS using the number of the visa sticker only and the length of the waiting time' which justified the derogation.<sup>377</sup>

A statement was adopted by the Council and Commission when the relevant Regulation amending the Borders Code was adopted, asserting that 'the Council and the Commission stress that the derogation... should not be applied for a total period of more than 5 days or 120 hours per year at any border crossing point'. Also, the statement provides that the 'evaluation carried out by the Commission... will consider the infrastructure of the border crossing points, including recent and planned developments, as well as any factor that may have an influence on passenger flows, and may contain suggestions for improvements accordingly'.<sup>378</sup> It should be recalled that according to the Court of Justice, 'such a declaration cannot be used for the purpose of interpreting a provision of secondary legislation where... no reference is made to the content of the declaration in the wording of the provision in question. The declaration therefore has no legal significance'.<sup>379</sup>

Neither the obligation nor the option to check the VIS at external borders will apply to third-country national family members of EU citizens, since they are not subject to the relevant provisions of the Borders Code.<sup>380</sup> The point is

<sup>374</sup> Art 8(1).

<sup>375</sup> It should also be noted that passports also still have to be stamped, even where border controls are relaxed: see Art 8(3), discussed below.

<sup>376</sup> Art 7(3)(ac) of the Borders Code, inserted by Reg 81/2009. Note that the border guard on command at the border post also decides on whether to relax border controls in the first place: Art 8(2), discussed below. However, as compared to the VIS derogation, the Borders Code does not require the notification of each decision to relax border controls.

<sup>377</sup> Art 7(3)(ad), inserted by Reg 81/2009. Note that Member States must also report annually on the relaxation of border checks generally (Art 8(4), discussed below).

<sup>378</sup> Council doc 15501/08 add 1, 20 Nov 2008.

<sup>379</sup> Case C-292/89 *Antonissen* [1991] ECR I-745, para 18.

<sup>380</sup> Art 7(2) and (3), along with the definitions in Art 2(5) and (6). See 3.4.1 above.

important, because information on the persons concerned will nevertheless be stored in the VIS.<sup>381</sup>

These amendments to the Code will be relevant to the future establishment of an entry-exit system.<sup>382</sup> But it must be noted that an entry-exit system cannot function as long as a derogation applies at entry, and in the absence of an obligation to enter information on visa holders at exit points as well (on which, see below). The potential difficulties in applying such a system would obviously be multiplied if it applies to non-visa nationals as well, as the Commission intends, although the Commission has suggested the parallel development of a 'trusted traveller' system in order to avoid bottlenecks.<sup>383</sup>

If the VIS begins operations in 2010 as planned, the derogations in the VIS Regulation and the Borders Code concerning the use of biometrics in the VIS upon entry will expire in 2016—which is after the time frame in which the Commission estimates that an entry-exit system could begin operations.<sup>384</sup> It should also be recalled that the initial three-year derogation from the use of fingerprint checks at external borders in the VIS Regulation will overlap with the rolling out of the VIS—so the impact of the use of the VIS at external borders will be limited for some time.<sup>385</sup>

Moving on to controls on exit, checks must include a check on the validity and genuineness of travel documents and 'whenever possible' a verification that the person is not a threat to 'public policy, internal security, or the international relations of any of the Member States'.<sup>386</sup> Exit checks *may* also involve verification of a visa, checks as to whether a person overstayed, and checks in the SIS or national databases<sup>387</sup>—although of course the *required* check 'wherever possible' on whether the person is a threat to for example, public policy would seem to entail a mandatory SIS check. Member States will also have an option, once the VIS becomes operational, to check persons on exit in the VIS for the purposes of verification.<sup>388</sup> Again, these provisions are linked to the future development of an entry-exit system.<sup>389</sup>

Furthermore, once the VIS becomes operational, Member States will have an option to search the VIS, presumably either on entry or exit, to check persons in the VIS for the purposes of *identification* (a 'one-to-many' search).<sup>390</sup>

<sup>381</sup> See 4.4.1 below.

<sup>382</sup> See 3.6.2 below.

<sup>383</sup> See *ibid.*

<sup>384</sup> COM (2008) 69, 13 Feb 2008.

<sup>385</sup> On the timeframe to roll-out the VIS, see 4.8 below. This point is also relevant to the practicalities of imposing VIS checks at land borders. It remains to be seen which non-Member States bordering the EU, if any, are still subject to a visa obligation by the time that the VIS is rolled out to these neighbouring regions.

<sup>386</sup> Art 7(3)(b).

<sup>387</sup> Art 7(3)(c).

<sup>388</sup> Art 7(3)(c)(i), as amended by Reg 81/2009 (n 322 above). There is no derogation permitted.

<sup>389</sup> See 3.6.2 below.

<sup>390</sup> Art 7(3)(d), inserted by Reg 81/2009 (*ibid.*). There is no derogation permitted.

Thorough checks will take place, if possible, in a non-public area, at the request of the person concerned.<sup>391</sup> Persons must be given information about the purpose of the check and the procedures applicable, and may request the name or service number of the border guard(s) carrying out the check and the location and the date of crossing.<sup>392</sup> Both these provisions should contribute to the objective of ensuring fair treatment during border checks. Finally, the information which must be registered at the borders is listed in Annex II to the Code:<sup>393</sup> the names of the border guards; any relaxation of checks; the issuing of documents at the borders; persons apprehended and complaints; persons refused entry (grounds for refusal and nationalities); information on the security stamps used and the guards using them; complaints from persons subject to checks; police or judicial action; and particular occurrences. These amendments should make a useful contribution respectively to ensuring reasonable behaviour by border guards and to combating corruption or other criminal activity regarding falsified documents. It would be even more useful if this data were published.

Member States are obliged to provide for separate lanes at airports for EU and EEA citizens and their family members, on the one hand, and for all (other) third-country nationals, on the other hand. They have an option as to whether to provide for separate lanes at sea and land borders.<sup>394</sup>

As noted already, the Code provides for the possible relaxation of checks in limited circumstances, 'as a result of exceptional and unforeseen circumstances', which are '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'.<sup>395</sup> In that case, entry checks must take priority over exit checks, and there is anyway an obligation to stamp each travel document on entry and exit.<sup>396</sup> Member States must submit an annual report on the relaxation of border checks to the EP and Commission,<sup>397</sup> but there is no information available on these reports.

Next, travel documents (usually passports) must be stamped when all third-country nationals cross the border, both on entry and exit, regardless of whether the travellers are subject to a visa obligation or not.<sup>398</sup> There is an exemption for third-country national family members of EU citizens if they hold residence cards, in accordance with EU free movement law.<sup>399</sup> There are also express exemptions for heads of state and dignitaries, certain transport workers, and to nationals of Andorra, San Marino, and Monaco. The obligation might also '[e]xceptionally'

<sup>391</sup> Art 7(4).      <sup>392</sup> Art 7(5).      <sup>393</sup> See Art 7(7).

<sup>394</sup> Art 9, which took over the provisions of a 2004 Decision on this issue (n 311 above).

<sup>395</sup> Art 8(1). Arts 8, 10, and 11 took over the provisions of Reg 2133/2004 (*ibid*).

<sup>396</sup> Art 8(2) and (3) respectively; on stamping of documents, see below.      <sup>397</sup> Art 8(4).

<sup>398</sup> Art 10(1). The detailed arrangements for stamping are set out in Annex IV (Art 10(4)).

<sup>399</sup> Art 10(2), interpreted *a contrario*; see 3.4.1 above.

be waived where stamping a travel document 'might cause serious difficulties' for an individual; in such cases, a separate sheet has to be stamped to record entry and exit.<sup>400</sup>

If a travel document is not stamped on entry, Member States may presume that the person concerned does not fulfil the conditions for the duration of stay in the Member State concerned.<sup>401</sup> This presumption can be rebutted by the traveller,<sup>402</sup> but if he or she cannot rebut it, they may be expelled.<sup>403</sup> The Court of Justice has confirmed that there is only an option, rather than an obligation, to expel the person concerned in this case,<sup>404</sup> although arguably the position will be affected in future by the application of the Returns Directive.<sup>405</sup>

The Commission reported on the application of the provisions on stamping of documents and presumptions of irregular stay in 2009.<sup>406</sup> According to this report, there have been no problems applying the stamping obligations fully; in particular the obligations have not caused long waiting times at borders. Difficulties have arisen where a passport was full, where the stamping was confusing or illegible (due to stamping on top of a previous stamp), where children did not have a separate passport, and as regards whether the passport of a third-country national with a residence permit from a Schengen State should be stamped. In the latter case, the Commission takes the view that the passport need not be stamped, because a risk of exceeding the authorized period of short stay does not arise. While this is a sensible argument, nevertheless there is no express exception to this end in the Code.<sup>407</sup> Equally the

<sup>400</sup> Art 10(3).

<sup>401</sup> Art 11(1).

<sup>402</sup> Art 11(2) and Annex VIII.

<sup>403</sup> Art 11(3).

<sup>404</sup> Joined Cases C-261/08 *Zurita Garcia* and C-348/08 *Choque Cabrera*, judgment of 22 Oct 2009, not yet reported. Although the Spanish text of the Code states that the person 'must' be expelled, the Court gave priority to the wording in all of the other language versions, which indicate that there is an option to expel. With respect, it is not clear from the facts of these cases whether or not there was a failure to stamp the documents of the persons concerned; the Court (and Advocate General) simply assumed that Art 11 of the Code was applicable. The judgment also interpreted Art 23 of the Convention, which will be replaced by the Returns Directive (Dir 2008/115 ([2008] OJ L 348/98) as from 24 Dec 2010 (Arts 20 and 21 of the Directive). On this Art, see 7.7 below.

<sup>405</sup> Dir 2008/115 (*ibid*); see 7.7.1 below. The Directive did not amend the Borders Code and there is no express provision in the Directive indicating how the *prima facie* mandatory expulsion set out in Art 6 of the Directive relates to the optional expulsion referred to in Art 11(3) of the Code. However, the Directive does specify that it is 'without prejudice' to 'more favourable provisions' in the 'the Community *acquis* relating to immigration and asylum' (Art 4(2) of the Directive). This must surely mean that the optional expulsion in the Code must take precedence over the mandatory expulsion in the Directive, where the two rules overlap. It should also be noted that Art 11(1) of the Code only provides for an option, not an obligation, to presume in the first place that the conditions for stay have been breached in the event that the documents in questions are not stamped. On the relationship between the Code and the Directive on this point, see also the opinion in *Zurita Garcia* (*ibid*), note 23, which, with respect, fails to take Art 4(2) of the Directive into account.

<sup>406</sup> COM (2009) 489, 21 Sep 2009, pursuant to Art 10(6).

<sup>407</sup> The same point could be made where the person concerned holds a long-stay visa, but the Commission does not mention this. The Commission's argument raises the question whether the list of exceptions from the stamping obligation set out in Art 10(2) and (3) is exhaustive or non-exhaustive. The text of the Code does not make this clear, although the exclusion of third-country



Commission does not see the need to create an exception to the stamping obligation for lorry drivers, who are the main group affected by stamps filling up a passport early, due to the risk of illegal immigration; it argues that an entry-exit system will eventually address their position.<sup>408</sup> The Commission does intend, on the other hand, to propose an express exception from the stamping obligation for railway workers who regularly travel in and out of the EU. Also, the Commission takes the view that a stamping obligation cannot be applied at internal borders, even where border checks are reinstated pursuant to the applicable provisions of the Code,<sup>409</sup> given that the re-introduction of those checks cannot alter the total length of authorized stay. This is again undoubtedly a sound argument, but not expressly set out in the wording of the Code.<sup>410</sup>

As for the presumption of illegality, most Member States do not collect statistics on the numbers of persons who are found on the territory or detected while exiting without an entry stamp, or who are able or not able to rebut any presumption of irregular stay, although in fact the Code does not require them to do so.<sup>411</sup> The Commission rightly points out that this information would obviously be useful in order to assess the effect of the provisions on stamping, but the fault here lies with the legislation, which failed to set out an obligation in this respect. Equally, most Member States have not informed the Commission about their practices on the presumption of illegal stay, although on this point the Code does set out an obligation.<sup>412</sup> It is not clear from the information supplied to the Commission whether or not Member States always presume that the absence of an entry stamp indicates an irregular stay. Ultimately, the Commission draws no conclusions about the rules in the Code on the presumption of an illegal stay, and does not mention the issue of the link between these rules and the Returns Directive (see the discussion above).

national family members of EU citizens with residence cards from the stamping obligation is not expressly set out—it follows from an *a contrario* reading of Art 10(2) along with Art 3(a). It might be possible to argue (although the Commission does not) that the stamping obligation does not apply to such persons because the Code only applies to persons admitted for a short stay in the first place (see Art 5(1)). But if that were the case, why does the Code contain references to persons with long-stay visas and residence permits in other provisions (Art 5(1)(b) and (4)(a), for instance)?

<sup>408</sup> See 3.6.2 below. Note, however, that an entry-exit system is not forecast to be operational until 2015, so this would not alleviate the position of the lorry drivers in the meantime. The Commission seems unwilling to consider any special solution for this category of persons (the creation of a special permit, a system of employers' liability, reciprocal agreements with states of origin on special travel documents, or the development of a *sui generis* entry-exit system for the meantime).

<sup>409</sup> See 3.5 above.

<sup>410</sup> Art 28 provides that '[w]here border control at internal borders is reintroduced, the relevant provisions of Title II shall apply *mutatis mutandis*'. It might be deduced that Art 10(1) is not a 'relevant provision' for this purpose, but it might be better to specify exactly what these 'relevant provisions' are in the interests of legal certainty.

<sup>411</sup> This is a distinct issue from the obligation to provide statistics on *refusal of entry* decisions (Art 13(5)).

<sup>412</sup> Art 11(2), final sub-paragraph.

Next, the Code contains basic rules on border surveillance; addressing the purposes of surveillance; the types of units to be used; the numbers of border guards to be used and their methods; and the requirement to survey sensitive areas in particular.<sup>413</sup> Further measures concerning surveillance may be adopted in accordance with a comitology procedure, involving participation of the EP.<sup>414</sup> An implementing measure relating to maritime border surveillance was adopted in 2010.<sup>415</sup> This Decision only concerns surveillance operations coordinated by Frontex, so is discussed further below.<sup>416</sup>

The Code then sets out rules concerning refusal of entry, which are obviously among its most important provisions. As noted above, the general rule is that persons who do not meet the criteria for admission must be denied entry, subject to certain exceptions;<sup>417</sup> more detailed rules on the procedure for refusing entry are set out in an Annex to the Code.<sup>418</sup> There are also procedural rights for persons denied entry. Entry may only be refused 'by a substantiated decision stating the precise reasons for the refusal', which is given by means of a standard form annexed to the Code. The decision must be taken by a legally empowered authority, must take effect immediately, and the decision form must be given to the person concerned, who 'shall acknowledge receipt'.<sup>419</sup>

Persons refused entry have 'the right to appeal'; the appeal 'shall be conducted in accordance with national law'. Member States must give the person concerned a written list of contact points who could provide information on persons who could represent him or her. But appeals 'shall not have suspensive effect'. If successful, an appeal must entail that the cancelled entry stamp is corrected; this is '[w]ithout prejudice to any compensation granted in accordance with national law'.<sup>420</sup> Unsurprisingly, the Code specifies that border guards must ensure that persons refused entry shall not enter the territory of the Member States.<sup>421</sup> Member States must collect statistics on the numbers refused entry; their nationality; the grounds for refusal of entry; and the type of border where entry was refused. This information must be transmitted annually to the Commission; which must publish it every two years.<sup>422</sup>

It is possible that these provisions will overlap with the scope of the Returns Directive, which gives Member States an option (but not an obligation) to exclude persons refused entry in accordance with the Borders Code from the scope of that Directive, which contains its own specific rules on procedural rights and related issues such as detention. Member States may also exclude from the scope of that Directive those persons 'who are apprehended

<sup>413</sup> Art 12(1)–(4). <sup>414</sup> Art 12(5), as amended by Reg 296/2008 (n 322 above).

<sup>415</sup> See n 326 above. <sup>416</sup> See 3.10.1. <sup>417</sup> Art 13(1); see the discussion of Art 5 above.

<sup>418</sup> Art 13(6), referring to Annex V, Part A, since amended by Art 55 of the visa code (n 322 above). Point 3 of this Annex refers to the Schengen and EU rules on carrier sanctions (see 7.5.1 below).

<sup>419</sup> Art 13(2) and Annex V, Part B. <sup>420</sup> Art 13(3). <sup>421</sup> Art 13(4)

<sup>422</sup> Art 13(5). For more on this, see 3.11 below.

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'.<sup>423</sup> If Member States take up these options, the former category of persons will at least benefit from the procedural rights set out in the Borders Code.<sup>424</sup> But more problematically, the latter category of persons will not benefit from any procedural rights whatsoever as a matter of EU law; this position is impossible to defend. Arguably this category of persons falls sufficiently within the scope of EU law to be covered by the general principles of EU law, and can therefore derive procedural rights in that connection. In any event, the Returns Directive requires that for both categories of persons, Member States must 'ensure that their treatment and level of protection are no less favourable than' the rules in that Directive regarding limitations on use of coercive measures; postponement of removal; emergency health care; the needs of vulnerable persons, and detention conditions; and must also 'respect the principle of non-refoulement'.<sup>425</sup>

Next, Chapter III of Title II concerns cooperation between national authorities, as well as staff and resources for border controls.<sup>426</sup> Member States must deploy 'appropriate staff and resources' in order to carry out border checks as provided for in Chapter II, 'to ensure an efficient, high and uniform level of control at their external borders'.<sup>427</sup> Checks must be carried out by border guards in conformity with national law; the guards must be sufficiently specialized and trained, and encouraged to learn relevant languages. Member States must ensure effective coordination of all relevant national services, and notify the Commission of the services responsible for border guard duties.<sup>428</sup>

As for cooperation between Member States, there is a general requirement of assistance and cooperation in accordance with other provisions of Code. They must also exchange relevant information. The code refers to the role of Frontex in coordinating border operations, as well as Member States' role as regards operational coordination, including the exchange of liaison officers, as long as this does not interfere with the work of the Agency. Member States must provide for training of border guards on border control and fundamental rights, taking account of the standards developed by the Agency.<sup>429</sup> Furthermore, there

<sup>423</sup> Art 2(2)(a) of Dir 2008/115 (n 404 above).

<sup>424</sup> Conversely, of course, if a Member State does not invoke the exclusion, persons refused entry at the border will benefit from the provisions in both the Returns Directive and the Borders Code. Presumably, in the event of overlap, the rule setting the highest standards will apply, pursuant to Art 4(2) of the Returns Directive.

<sup>425</sup> Art 4(4), Dir 2008/115 (n 404 above). The obligation to respect the principle of non-refoulement is not further defined (cf also Art 5 of the Directive), although note that in any event the Directive is subject to more favourable provisions in other EU immigration and asylum measures (Art 4(2)). See further 7.7.1 below.

<sup>427</sup> Art 14.

<sup>428</sup> Art 15; see Art 34(1)(d) on notification.

<sup>429</sup> Art 16.

<sup>426</sup> Arts 14–17.

is a special rule concerning joint control of the common land borders of those Member States not yet fully applying the Schengen rules. Until the Schengen *acquis* is fully applicable to them, those States can jointly control their borders, without prejudice to Member States' individual responsibility. To this end, Member States may conclude bilateral agreements, which they must inform the Commission of.<sup>430</sup>

Finally, Chapter IV of Title II of the Code sets out specific rules for border checks in certain cases, concerning respectively different types of borders and different categories of persons.<sup>431</sup> For instance, the rules on crossing by road in particular permit drivers usually to stay in their vehicles during checks; the rules for checking trains en route to or from third countries have been amended to allow for 'juxtaposed control' in third States; the rules on air travel contain entirely new provisions on private flights; and the rules on sea borders were amended in particular to strengthen the rules on control of cruise ships and pleasure boats and to tighten the definition of fishing vessels which will not generally be checked.

As for checks on particular categories of persons, there are six categories of persons subject to special treatment: heads of state; pilots and other aircraft crew; seamen; holders of diplomatic, official, or service passports and of documents issued by international organization; cross-border workers; and minors. For example, the special rules for Heads of State and their delegation exempt them entirely from border checks; holders of diplomatic, official, or service passports and documents issued by international organizations are exempt from subsistence requirements, must be given priority when crossing, and cannot be refused entry by border guards unless the guards first check with foreign ministries; cross-border workers need not be subject to a check every time they cross the border, if they are 'well known' to the border guards due to their 'frequent crossing' and they were not listed in the SIS when an initial check was carried out; and minors must be the subject of 'particular attention' from border guards, to ensure that accompanied minors are with persons entitled to exercise parental care and that unaccompanied minors are not leaving the territory against the wishes of the person with parental care of them.<sup>432</sup>

### 3.6.2. Entry-exit system

The next major step in the development of EU external border controls could be the creation of an 'entry-exit' system, which, as noted above, would keep

<sup>430</sup> Art 17; see Art 37 on notification.

<sup>431</sup> Arts 18–19. The detailed rules appear in Annexes VI and VII.

<sup>432</sup> See subsequently the action plan on unaccompanied minors (COM (2010) 213, 6 May 2010) and the Council conclusions on this issue (JHA Council press release, 3 June 2010), which refer to regular collection of data and risk assessments by Frontex on this issue.

track of the entry into and out of the Schengen zone of most categories of third-country nationals. Such a system was suggested by the Commission in a detailed communication in February 2008, which also addressed the related issues of a 'trusted traveller' programme and a system of electronic travel authorization.<sup>433</sup> The Commission is planning to propose legislation on an entry-exit and trusted traveller systems, and a communication on electronic travel authorization, in 2011.<sup>434</sup>

According to the 2008 Commission communication, the main purpose of the entry-exit system would be to identify third-country nationals who had 'overstayed' their period of permitted stay in the Union, whether or not they were subject to a visa obligation. Such persons are the biggest category of irregular migrants in the EU.<sup>435</sup> The system would record data on 'the time and place of entry, the length of stay authorised, and the transmission of automated alerts' to the authorities on overstayers, once they violate the rules in question and also when they leave the EU. In case of change of status (justified overstay, or a grant of residence), the information concerned would be updated. It would be necessary for the VIS to be fully operational before the entry-exit system was applied to visa nationals.<sup>436</sup> As for non-visa nationals, they would have to give their biometric data when they first entered the EU once the new system was applicable; the Commission admits that this 'could potentially complicate the management of passenger flows, especially at certain land border crossing points'.

These problems, according to the Commission, could be addressed by introducing, in conjunction with the new entry-exit system, a new category of 'trusted traveller' for certain third-country nationals (again available to both visa nationals and non-visa nationals), based on a pre-screening process offered on a voluntary basis. These persons would be exempt from some of the conditions of entry at the border (regarding the purpose of stay, means of subsistence, and absence of threat to public order), and would also be admitted through automated border gates, which would register their identity and travel history as well as check their biometrics (fingerprints and photographs) against their travel document or database. The automated gates could also be used by EU citizens, nationals of EEA States, Swiss nationals, and family members of such persons, provided that they held biometric passports, with the proviso that in accordance with free movement law, their movement would not be recorded.

The 'common vetting criteria' for this status for third-country nationals could be, 'as a minimum . . . a reliable travel history (the person should not have exceeded

<sup>433</sup> Communication on the next steps in border management (COM (2008) 69, 13 Feb 2008).

<sup>434</sup> See the Commission's action plan for implementation of the Stockholm programme (COM (2010) 171, 20 Apr 2010).

<sup>435</sup> See the impact assessment attached to the Commission communication (SEC (2008) 153, 13 Feb 2008).

<sup>436</sup> On the VIS, see 4.8 below.

the authorised stay at previous visits to the EU), proof of sufficient means of subsistence, and holding a biometric passport', but '[f]urther criteria could be considered', and visa nationals could get registered traveller status on the basis of the criteria for obtaining multiple entry visas.<sup>437</sup> Applicants for this status would have to apply at consulates or common application centres. In the Commission's view, the entry-exit system and the accompanying trusted traveller programme could be applicable by 2015.

Finally, the possible electronic system of travel authorization would apply to non-visa nationals, 'who would be requested to make an electronic application supplying, in advance of travelling, data identifying the traveller and specifying the passport and travel details'. This data would be used to verify that the person concerned fulfilled the entry conditions 'before travelling to the EU, while using a lighter and simpler procedure compared to a visa'.

While waiting for the Commission's legislative proposal regarding an entry-exit system, the Council conducted a questionnaire to determine Member States' positions on the planned system,<sup>438</sup> and conducted a pilot project to register the number and categorization of all persons crossing the Schengen external borders during one week in September 2009.<sup>439</sup> There were 12.9 million entries or exits in a single week, comprising 9.3 million EU citizens and other persons with free movement rights, 2.1 million non-visa nationals, and 1.5 million visa nationals; 1.1 million people crossed at sea borders, 5.0 million at land borders, and 6.8 million at air borders.

### 3.6.3. Assessment

Taken as a whole, the Borders Code is clearly vastly better drafted than the texts it replaced, although it has several flaws. There are significant improvements as regards procedural rights, fair treatment, accountability, and transparency, but several provisions are unclear (as regards the use of databases on EU citizens, exit checks and the exercise of police powers) or ill-considered (the rules on exit controls, which are arguably impractical). The Code could more clearly have addressed the issue of whether there is a right to entry if the relevant conditions are satisfied, although it is arguable, as noted above, that a right to entry can be inferred from the wording of the entry conditions rules set out in the Code. While the additional provisions concerning asylum are welcome, the opportunity was missed to rethink the conditions for entry and to provide for detailed provisions ensuring that the right to asylum is respected at external borders; the latter

<sup>437</sup> On those criteria, see 4.7.2 below.

<sup>438</sup> Council docs 14334/08, 16 Oct 2008 and 15630/08, 1 Dec 2008. The questionnaire did not examine the parallel issue of developing a 'trusted traveller' system.

<sup>439</sup> Council doc 13267/09, 26 Sep 2009.

issue is complicated by the controversial and highly questionable provisions of the EU's asylum procedures Directive.<sup>440</sup>

The amendment to the Borders Code relating to the VIS may in particular prove to be impractical. It is striking that there was no impact assessment either of the proposal to amend the Code as regards VIS use or of the practical implications of this particular issue when the Commission assessed the impact of the original proposal for the VIS Regulation.<sup>441</sup> The derogation from use of the VIS upon entry set out in the Borders Code is drafted quite narrowly, and it may not prove feasible to spend time assessing the impact of granting a derogation when a quick decision has to be made to address traffic flows.<sup>442</sup> When the relevant derogations expire at the end of 2015, the rules on the full use of the VIS at borders may be more realistic, at least as regards land borders, if visa requirements are by then abolished for all Western Balkan states and perhaps at least some other neighbouring states. It is also possible that visa facilitation treaties might be amended to address this issue in future. Of course if an entry-exit system is by then operational and applies to all non-visa-nationals at the Commission intends, then the issue will present itself again—all the more so given that an entry-exit system would require non-EU citizens to be checked upon exit as well as entry.

As for the stamping of documents, the rules in the Code have proved practical according to the Commission's assertions, although it does not follow that the use of VIS at the borders, especially the extra time taken to obtain fingerprints, would still be feasible. It would be useful to know more about how presumption regarding irregular stay is actually applied.

This brings us to the planned entry-exit system. It should first of all be noted that in light of EU free movement law, it would not be legal to apply such a system to EU citizens and their family members, including citizens of non-Schengen States or Schengen associates. Also, there is little point in applying this system to non-visa nationals, given the relatively limited risk of overstay which they pose in practice as compared to the extra costs and complications that would result from applying the system to them. If nationals of a particular country not subject to visa obligations in fact have a high rate of overstaying, the obvious solution is simply to impose a visa obligation on nationals of that country, rather than impose an entry-exit system on all non-visa nationals. While an entry-exit system, if it

<sup>440</sup> See 5.7 below.

<sup>441</sup> See SEC (2004) 1628, 28 Dec 2004. This impact assessment simply states (at p 17) that 'time will be lost at entry and exit points by providing and checking biometric data', without assessing the feasibility of checking such data in all cases of entry. On the same page, the Commission estimates the 'very significant' financial costs of the VIS at EU level and for national visa authorities, but this does 'not include the costs for the border crossing points as these costs cannot be estimated at the present time'.

<sup>442</sup> The absolute obligation in the Borders Code to stamp the passports of third-country nationals, even when border controls are relaxed, will already slow down any attempt to clear a backlog at the border crossing.

works as planned, will identify overstayers effectively, it will not assist authorities to find them if they have disappeared. It is assumed that an entry-exit system will either be integrated into the VIS or applied seamlessly in parallel with it. The costs and complications of the development of a completely separate system do not bear thinking about. In any event, any system will have to be subject to robust data protection rules to avoid the effect of erroneous identification, and the penalties for overstay will have to be proportionate and take account of legitimate grounds for overstay such as *force majeure*, applications for international protection, and humanitarian reasons.

As for the other plans for future developments, an authorized traveller system would probably be essential if an entry-exit system is introduced, in order to ensure that delays at border crossings do not become intolerable. Again, such a system could not be used to store information on the movements of EU citizens, citizens of Schengen associates, and their family members. It will be essential to ensure that the rules for registration in this system are fair and transparent, and that data protection rights apply fully to the vetting process. On the other hand, the Commission has not yet made a very convincing case for the idea of developing a system of electronic travel authorization.

### 3.7. Schengen Information System<sup>443</sup>

The Schengen Information System (SIS) is a well-known and long-established element of the Schengen border control system, with the main purpose (in the immigration context) of making available to the relevant national officials a common list of names of persons who should not be allowed to enter the Schengen area. The current system has been amended and the EU also intends to establish a second-generation System (SIS II), which has been bedevilled by operational problems. The current SIS and future SIS II will be considered in turn.

#### 3.7.1. Current Schengen Information System

The current SIS was initially established by Articles 92–119 (Title IV) of the 1990 Schengen Convention,<sup>444</sup> as applied from March 1995. Further rules are set out in various decisions of the Schengen Executive Committee,<sup>445</sup> including the Decision establishing the Sirene Manual, which governs subsequent exchanges of information following a ‘hit’ in the SIS.<sup>446</sup> Despite its dual application for immigration purposes on the one hand and criminal law and policing purposes on the

<sup>443</sup> On the general legal framework governing SIS and SIS II, see 12.6.1.1 below.

<sup>444</sup> [2000] OJ L 239.

<sup>445</sup> *Ibid.* For a list of these measures, see 12.6.1.1 below.

<sup>446</sup> [2003] OJ L 38.