

## THE DEVELOPMENT OF A COMMON VISA POLICY UNDER THE TREATY OF AMSTERDAM

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### 1. Introduction

The Treaty of Amsterdam introduced radical changes to the framework for cooperation on visa policy and most of the other “flanking” policies related to the realization of free movement of persons in the Community. The reform followed from dissatisfaction with progress under the Maastricht Treaty. The Treaty of Amsterdam, essentially, brought about a “communitarization” of visa, immigration and asylum policies, i.e. that these matters were brought within the ambit of the EC Treaty (Title IV). It provided, through Article 62(2), that Article 14 (ex 7a) requires the total abolition of internal frontier controls, and it introduced the concept of an “area of freedom, security and justice” (Arts. 61 EC and 2 TEU). It also provided, through a Protocol, for the integration of the Schengen *acquis* into the European Union legal order.<sup>1</sup> These changes were accompanied by arrangements to accommodate the special positions of the United Kingdom, Ireland and Denmark.<sup>2</sup> Moreover, Title IV itself was, and to some extent still is, characterized by complex and *sui generis* provisions with regard to decision-making, jurisdiction of the Court of Justice, and the safeguarding of national competence against pre-emption in some areas.<sup>3</sup>

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1. Protocol integrating the Schengen *acquis* into the framework of the European Union.
2. Protocol on the application of certain aspects of Article 14 of the Treaty establishing the European Community to the United Kingdom and Ireland; Protocol on the position of the United Kingdom and Ireland; Protocol on the position of Denmark. See also Arts. 3 and 4 of the Protocol integrating the Schengen *acquis* into the framework of the European Union.
3. See e.g. O’Keeffe, “Can the leopard change its spots? Visas, immigration and asylum following Amsterdam” in O’Keeffe and Twomey (Eds.), *Legal Issues of the Amsterdam Treaty* (Hart, 1999).

Since the entry into force of the Treaty of Amsterdam, considerable progress has been made on the development of a common visa policy. The common visa policy remains however surrounded by controversy, above all because of its restrictive character. Restrictiveness – in the form of the very long common “black” list of countries whose nationals require visas to enter the Member States – results from the method which was used to harmonize the visa requirements imposed by the Member States; the Council proceeded by cumulating pre-existing national visa restrictions, which for a number of reasons varied widely. The emphasis given to security is also evidenced by the development of the visa sticker into an identity document based on biometric technologies which is to work in connection with a database – the Visa Information System – storing information on third country nationals who have requested, are in possession of, or have been refused visas. These measures have given rise to a number of concerns relating to personal information protection, the adequacy of individual remedies and, more generally, the development of a “control society”.

The sensitive nature of visas – a symbol of the State’s right to control entry of aliens; an instrument of foreign policy; and an instrument which gives expression to internal policy objectives on the preservation of external links and on internal security – is at the heart of another characteristic of the common visa policy, namely its flexibility. Under the current Visa Regulation, the Member States continue to retain discretion in relation to the visa requirements applicable to a number of special categories of persons. Also, under communitarized Schengen rules, the Member States retain a large degree of national control as to who can obtain a visa to enter their individual national territories. The preservation of national control is achieved through recourse to mutual recognition (i.e. cumulation) of national entry conditions for the issuing of “uniform visas”, and the possibility of issuing “limited territorial validity visas”.<sup>4</sup> This flexibility may provide fertile ground for inter-institutional disputes over competence. The Member States’ autonomy in formulating substantive entry conditions was challenged in Case C-257/01, *Commission v. Council*.<sup>5</sup>

With regard to future developments, it is expected that greater harmonization of the conditions and procedures for issuing visas applied by the Member State will be sought, and in particular greater harmonization of local

4. “Uniform visas” are valid for the entire Community territory. “Limited territorial validity visas” can be issued to aliens who do not fulfil the common entry conditions and are valid for the territory of the issuing Member State (and any other Member State willing to grant entry) only.

5. Case C-257/01, judgment of 18 Jan. 2005, nyr.

consular practices through the introduction of common visa offices. A system of common visa offices would address the issues of burden sharing among the Member States and of divergences in the level of expertise and equipment of national consular posts, which may cause visa shopping.

It is also evident that the common visa policy, and particularly visa facilitation agreements, will increasingly be used by the Union as an instrument to extract undertakings from third countries, in particular the conclusion of re-admission agreements. This article reviews progress on the development of a common visa policy under Title IV EC.

## 2. The legal framework

### 2.1. *The legal basis*

The legal basis for visa policy in Title IV EC is split into four distinct parts. Article 62(2)(b)(i) EC prescribes the adoption by the Council, within five years of the entry into force of the Treaty of Amsterdam, of “the list of third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement” (the “black” and “white” lists). In light of the Community objective of internal frontier abolition, which Title IV is meant to serve, such “black” and “white” lists are to be exhaustive (i.e. include all third countries). The Council duly adopted the Regulation “listing the third countries whose nationals must be in possession of a visa when crossing the external borders and those whose nationals are exempt from that requirement” (the Visa Regulation) on 15 March 2001.<sup>6</sup> The Regulation included every non-member country on either the “black” or the “white” list. Since its adoption, it has been amended twice.<sup>7</sup>

Article 62(2)(b)(ii) EC prescribes the adoption by the Council of “the procedures and conditions for issuing visas”. These are the common conditions that aliens must fulfil to be granted entry in the Community territory for stays not exceeding three months, and the rules and procedures to be followed by the Member States when issuing visas. A Community measure has not yet been adopted, and communitarized Schengen provisions apply.<sup>8</sup>

6. Regulation 539/2001, O.J. 2001, L 81/1.

7. Regulations 2414/2001 and 453/2003, O.J. 2001, L 327/1 and O.J. 2003, L 69/10.

8. Arts. 15–16 of the Schengen Convention established the common entry conditions for aliens. They were allocated to Art. 62(2)(b), apart from the Articles on the SIS which were allocated by default to the Third Pillar. Arts. 12–14 of the Convention, establishing rules and

Article 62(2)(b)(iii) EC prescribes the adoption of measures on a uniform format for visas (i.e. the common visa sticker containing security features).

Finally, Article 62(2)(b)(iv) EC prescribes the adoption by the Council of “rules on a uniform visa”. A uniform visa is a visa issued by the Member States according to common procedures and conditions, which is valid for the entire Community territory. It thus implies mutual recognition of visas issued by the Member States in accordance with the common conditions for the purpose of both external frontier crossing and free circulation in the Community. Article 62(2)(b)(iv) EC covers only mutual recognition of visas for the purpose of “the crossing of the external borders of the Member States”. Mutual recognition of visas for the purpose of free circulation is covered by Article 62(3) EC. At present, mutual recognition is applied by virtue of communitarized Schengen rules.<sup>9</sup>

The visas referred to in Article 62(2) EC are visas “for intended stays of no more than three months” which relate to “the crossing of the external borders of the Member States”. Thus, Article 62(2) EC, in the light of the *Airport Transit Visas Case*, excludes airport transit visas.<sup>10</sup>

During the first five years after the entry into force of the Treaty of Amsterdam (i.e. up to May 2004), these different legal bases prescribed different law-making procedures.<sup>11</sup> The “black” and “white” lists and the uniform format for visas were to be adopted by the Council by qualified majority voting on a proposal from the Commission and after consulting the European Parliament. The remaining legal bases prescribed the application of the normal decision-making procedure under Title IV (unanimity, a shared right of initiative for the Commission and Member States, and consultation of the European Parliament). Once the five-year transitional period was over, adoption of the conditions and procedures for issuing visas and of rules on a uniform visa became governed automatically by the procedure prescribed in Article 251 EC (qualified majority voting and co-decision). The extension of qualified majority voting and co-decision to Article 62(3), governing the

procedures for issuing visas, were allocated to Art. 62(2)(b). A number of decisions of the Executive Committee, adopted under Art. 17 of the Convention, were allocated to legal bases in Title IV. The Common Consular Instructions were allocated to Arts. 62 and 63 EC. See Council Decision 1999/436/EC, O.J. 1999, L 176/17.

9. Art. 10 of the Schengen Convention, attributed to Art. 62(2)(b) EC, prescribes mutual recognition of visas for the purpose of external border crossing, while Art. 19 of the Convention, attributed to Art. 62(3) EC, prescribes mutual recognition of visas for the purpose of free circulation.

10. Case C-170/96, *Commission v. Council*, [1998] ECR I-2763. The Regulation on a uniform format for visas, however, covers airport transit visas.

11. See Art. 67 EC.

adoption of measures on mutual recognition of visas for the purpose of free circulation, depended, on the other hand, on a Council decision to that effect.

The fact that different law-making procedures for different visa measures were prescribed during the transitional period made it important to establish a clear distinction between the different legal bases. This has however proved difficult. The borderline between Article 62(2)(b)(iii) on the uniform format for visas and Article 62(2)(b)(ii) on the conditions and procedures for issuing visas seemed, for example, not totally clear-cut.<sup>12</sup> It was also at first uncertain whether Article 62(2)(b)(iii) could cover measures “on a uniform format for forms for affixing visas issued to persons holding travel documents not recognized by the Member State issuing the visa” since old Article 100c EC was never used as a legal basis for such measures and a draft joint action on the matter was almost agreed under the old Third Pillar.<sup>13</sup> This issue was later settled with the adoption of a regulation on the matter under Article 62(2)(b)(iii).<sup>14</sup>

Moreover, the Council and the Commission held different opinions as to whether visa exemption for third country nationals in possession of residence permits issued by the Member States was to be based on Article 62(2)(b)(i) on the visa lists or Article 62(2)(b)(iv) on rules on a uniform visa. In contrast with the Commission’s original proposal, the Visa Regulation does not provide for visa exemption for holders of residence permits (i.e. equivalence between residence permits issued by the Member States and visas for the purpose of crossing the external borders). Since such a provision implies *mutual recognition* of residence permits issued by the Member States for the purpose of external border crossing, the Council believed that it was to be based on Article 62(2)(b)(iv) on rules on a uniform visa.<sup>15</sup>

Following calls from the European Council of 4 and 5 November 2004 in the context of its approval of the Hague Programme, the Council adopted a Decision whereby from 1 January 2005 qualified majority voting and the co-decision procedure are applicable to most of the legal bases of Title IV.<sup>16</sup> The

12. See Commission Staff Working Paper on visa policy consequent upon the Treaty of Amsterdam and the integration of the Schengen *acquis* in the EU, 26 July 1999, SEC(99) 1213, para 6.

13. The European Parliament expressed its opinion that the measure should have been based on Art. 100c(3) EC rather than Art. K.3 EU.

14. Regulation 333/2002, O.J. 2002, L 53/4.

15. Communitarized Schengen rules currently provide for the equivalence.

16. Council Decision of 22 Dec. 2004 changing decision-making on Arts. 62(1), 62(2)(a), 62(3), 63(2)(b) and 63(3)(b) EC, O.J. 2004, L 396/47. The Treaty of Nice had already introduced the co-decision procedure for measures on judicial cooperation (except family law) and certain measures on asylum (with some heavy qualifications).

limitations on the Court of Justice's jurisdiction under Title IV have not been lifted.<sup>17</sup>

## 2.2. *The variable geometry arrangements*

Title IV is characterized by special arrangements regarding the participation of the United Kingdom, Ireland and Denmark. Under the Protocol on the position of the United Kingdom and Ireland attached to the EC Treaty, these countries are not automatically bound by Title IV EC. They have, however, the option of participating in the negotiation and adoption of any measure proposed under the Title within three months from the proposal having been presented to the Council, and of opting-in to measures already adopted, subject to a Commission decision in accordance with Article 11(3) EC. The Protocol integrating the Schengen *acquis* into the framework of the European Union also makes special provision for the United Kingdom and Ireland, which were not parties to the Schengen Convention. The United Kingdom and Ireland are not bound by the Schengen *acquis*, but can at any time request to take part in some or all of its provisions. Adherence is not automatic upon request, but it is subject to a positive decision of the Council taken by unanimity of the Schengen members.<sup>18</sup>

Denmark also obtained, under the Protocol on the position of Denmark, an opt-out from Title IV except with regard to measures “determining the third countries whose nationals must be in possession of a visa when crossing the external borders of the Member States” and measures relating to a uniform format for visas, for both of which Denmark had accepted Community competence with the introduction of old Article 100c EC by the Maastricht Treaty. Under the Protocol integrating the Schengen *acquis* into the framework of the European Union, Denmark continues to be bound by the Schengen *acquis* under international law *vis-à-vis* the Member States which are signatories to the Schengen Convention. As regards Council decisions “building upon the Schengen *acquis*” that find their legal basis in Title IV EC, Denmark can within six months from their adoption decide whether to be bound by them under international law.

17. See Case C-51/03, *Georgescu*, order of 31 March 2004, nyr, where the Court held that it lacked jurisdiction, under Art. 68(1) EC, to interpret the Visa Regulation on a preliminary ruling from a national court which was not a court of last resort.

18. The Council accepted the United Kingdom's application to participate in some of the provisions of the Schengen *acquis* following an agreement between the United Kingdom and Spain on Gibraltar. See Council Decision of 29 May 2000, O.J. 2000, L 131/43. See also Cases C-137/05 and C-77/05, *United Kingdom v. Council*, pending.

The United Kingdom and Ireland are not taking part in the Community visa regime, with the exception of United Kingdom participation in the Regulations on the uniform format for visas and the uniform format for forms for affixing visas. The main reason for the United Kingdom's non-participation in the Visa Regulation was that adherence to the Regulation would have meant the introduction of visa requirements for nationals of approximately 30 countries (26 of which are Commonwealth countries), as well as the removal of visa requirements for nationals of Bulgaria, Romania, Slovakia (now a Member State), Croatia, Ecuador and Macao. A further reason for non-participation appeared to be concerns on the part of the United Kingdom that participation in the arrangement could undermine in the long term the legal security of its controls at the frontiers with other Member States.<sup>19</sup> Differences between the visa requirements applied by the United Kingdom and Ireland and those applied by the Member States may result in the strengthening of border controls between the two groups. The aim is to keep differences to a minimum. Thus, the United Kingdom – which is present at every level of the Council when visa matters are discussed – intervened strongly in the Council against proposals to amend the Visa Regulation to lift visa requirements for nationals of Bulgaria and Romania, notwithstanding its non-participation in the Community regime. Non-participation in the communitarized Schengen visa arrangements has also implied that the principle of equivalence between residence permits issued by the Member States and visas (i.e. exemption from visa requirements for holders of residence permits) does not apply between the United Kingdom and Ireland, on the one hand, and the rest of the Member States, on the other. This causes practical difficulties for third country nationals resident either in the United Kingdom and Ireland or in the rest of the Community who wish to travel to the Community or the United Kingdom and Ireland respectively.

With regard to Denmark, the Commission in its original proposal on the Visa Regulation maintained that on the basis of the exception to the Danish opt-out from Title IV EC, Denmark was to participate in the Regulation. This position was based on the Commission's disputed interpretation of old Article 100c EC – whose exact wording constitutes the subject matter of the exception. The Commission argued that old Article 100c in view of Article 7a (now 14) EC required the adoption of both a "black" and "white" list (i.e. total harmonization) and that accordingly Article 62(2)(b) "makes no innovation over Article 100c but merely confirms and clarifies the objectives to

19. HC Report, *Lists of third countries whose nationals require visas and those whose nationals are visa-exempt*, 14th Report, 31 March 2000.

which it gives form". The Council, however, treated the Regulation as a measure "building upon the Schengen *acquis*". Accordingly, Denmark was not bound by the Regulation under Community law, but could, within six months, decide whether to be bound by it under international law. The direct applicability of the Regulation in Denmark and the possibility of infringement actions before the Court of Justice are thus excluded.

A question that arises is whether following exhaustive harmonization of the visa requirements applied by the Member States through the Visa Regulation, the Community has acquired exclusive competence to conclude visa exemption agreements with the third countries on the white list under the *ERTA* doctrine. This would seem the case.<sup>20</sup> The non-participation of the United Kingdom, Ireland and Denmark in the Community internal regime will find reflection in the Community external regime – the United Kingdom, Ireland and Denmark will not be covered by the Community visa exemption agreements, and the United Kingdom and Ireland will not be able to opt-in into these agreements directly.

The same applies with regard to visa facilitation agreements. Thus, the Approved Destination Status (ADS) Agreement concluded by the Community and China, covering visa issues and related matters concerning visits of tourist groups from China, including readmission, is not binding on Denmark, the United Kingdom and Ireland.<sup>21</sup> It contains Annexes in which the governments of these Member States and of China declare their willingness to conclude bilateral ADS agreements.

Similarly, provisions falling within the scope of Title IV contained in "mixed" agreements, such as the Stabilization and Association Agreements between the Community and its Member States and Croatia and the FYROM, bind the United Kingdom, Ireland and Denmark as separate contracting parties and not as part of the Community. The Agreements state that the United Kingdom and Ireland may become bound as part of the Community in accordance with the Protocol on the United Kingdom and Ireland.<sup>22</sup>

The situation is different with regard to Community readmission agreements. Community competence to conclude readmission agreements with third countries flows directly from Article 63(3)(b) EC on a policy on repatriation of illegal residents under the Opinion 1/76 case law, since a policy on

20. See also Kuijper, "Some legal problems associated with the communitarization of policy on visas, asylum and immigration under the Amsterdam Treaty and incorporation of the Schengen *acquis*", 37 CML Rev. (2000), 345, at 365. The Commission is preparing negotiating briefs for the conclusion of visa exemption agreements between the Community and third countries, COM(2000)728 final, 30 Nov. 2000, p. 32.

21. O.J. 2004, L 83/12.

22. O.J. 2005, L 26, and O.J. 2004 L 84.

repatriation of illegal residents cannot be realized without concluding readmission agreements with third country. The emergence of Community external competence in this field is thus not dependent on prior internal harmonization. In such a situation, the United Kingdom and Ireland may opt-in into Community readmission agreements directly – an internal measure in which they might have opted into would not exist. The United Kingdom has decided to opt-in into these agreements, while Ireland has not sought participation. The agreements are silent with regard to Irish non-participation, perhaps since Ireland may decide at a future date to seek participation.<sup>23</sup>

### 3. Restrictiveness

#### 3.1. *The “black” list of the Visa Regulation*

The Visa Regulation exhaustively harmonizes the visa requirements imposed by the Member States by including every third country on either a “black” list, whereby its nationals are required to have visas in order to enter the Member States, or a “white” list, whereby its nationals are visa exempt.<sup>24</sup> Harmonization is a remarkable achievement, but the resulting common regime is extremely restrictive with approximately 135 countries included on the “black” list. This restrictiveness results from the fact that harmonization was achieved through (almost) cumulating the visa requirements applied by the Member States individually.

The Regulation sets out in a Recital the criteria on which decisions on whether to include a third country in the “white” or “black” lists are based. These are said to relate to “illegal immigration, public policy and security and to the Union’s external relations with third countries, consideration also being given to the implications of regional coherence and reciprocity”.<sup>25</sup> The Commission in the Explanatory Memorandum to its original proposal considered each of these criteria in turn.<sup>26</sup> The assessment of the risk of illegal

23. See Council Decision on the signing of the Agreement between the EC and the Republic of Albania on readmission, Council doc. 5614/05, 15 Feb. 2005; Council Decision concerning the conclusion of the Agreement between the EC and Macao on readmission, Council doc. 10667/03, 24 Sept. 2003. On Community competence see Monar, “The EU as an international actor in the domain of justice and home affairs”, 9 EFA Rev. (2004), 395, at 396–399.

24. Op. cit. *supra* note 6.

25. 5th Recital.

26. For an in-depth consideration of the criteria see Guild, “Moving the Borders of Europe”, Inaugural Lecture, University of Nijmegen, 30 May 2001, at 33–37; Melis, *Negotiating Europe’s Frontiers* (Kluwer, 2001), p. 138.

immigration includes both an internal and an external assessment. The internal assessment is based on information and statistics on illegal residence (resulting from apprehensions of illegal immigrants within the national territory, or applications for regularization within the context of national regularization programmes), refusals of admission, expulsions and clandestine immigration and labour networks. The criteria for collecting and analysing such information, however, continue to vary among the Member States with a European dimension lacking.<sup>27</sup> In this light, a number of proposals have been made, and measures have been introduced, to advance the collection, exchange and analysis of information on the basis of common definitions and methods.<sup>28</sup>

The external assessment of the risk of illegal immigration concerns the reliability of travel documents issued by third countries and the existence and impact of readmission agreements. Following the introduction of Community competence on repatriation of illegal residents, the Community has successfully concluded negotiations on readmission agreements with Sri Lanka, Hong Kong, Macao and Albania, while negotiations are in progress with Morocco, Pakistan, Russia, Ukraine, Algeria, China and Turkey. In return for the conclusion of readmission agreements, Hong Kong and Macao were offered the lifting of visa requirements. The Commission, when discussing Union leverage in persuading third countries to conclude readmission agreements, maintained that offering “visa facilitation or the lifting of visa requirements can be a realistic option in exceptional cases only (e.g. Hong Kong, Macao); in most cases it is not”, but this position does not reflect current Union practice.<sup>29</sup>

27. This is stated in: Commission Communication on a common policy on illegal immigration, COM(2001)672 final, 15 Nov. 2001, para 4.2.2; Commission Communication on the development of a common policy on illegal immigration, COM(2003)323 final, 3 March 2003, para 2.5; Comprehensive Plan to combat illegal immigration and trafficking of human beings, Council doc. 6621/1/02, 28 Feb. 2002, para 44; Commission Green Paper on a common return policy, COM(2002)0175/final, para 3.4.1. See also Guild, *op. cit. supra* note 26, at 35.

28. These include the introduction in May 2001 of a public annual report on asylum and migration, including a section analysing data on illegal immigration; proposals to strengthen the role of Cirefi – which had been assessed as inefficient – particularly with regard to networking among the Member States in the field of analysis; and the development of a European Migration Observatory to carry out comparative analysis of legal and irregular migration flows. See Council doc. 7973/01, and Comprehensive Plan to combat illegal immigration, *op. cit. supra* note 27, paras. 45–46.

29. Commission Green Paper on a Community Return Policy, *op. cit. supra* note 27, para 4.1.1. See, for example, the EU Common Strategy on the Mediterranean, O.J. 2000, L 183/5, which listed as a proposed EU initiative “that the EU will study the simplification and acceleration of visa procedures”; the ADS Agreement between the EU and China, *op. cit. supra* note

In relation to the assessment of “public policy” and “domestic security” risks, again, the existence of common definitions and uniform evaluation mechanisms seems a crucial precondition to reduce divergences between the Member States capable of increasing the restrictiveness of the common visa policy. However, a “common European approach” in this field seems restricted to the objective of combating criminal networks concerned with the smuggling of migrants and trafficking in human beings, and terrorism.<sup>30</sup>

The criterion of the “European Union’s external relations, consideration also being given to the implications of ... reciprocity” is perhaps the most controversial, being one which greatly contributed to the common visa policy’s restrictiveness. According to the Explanatory Memorandum this criterion means that the common visa regime may well “reflect the specific position of a Member State in relation to a third country, to which the other Member States adhere in a spirit of solidarity”. This position is in line with the Declaration on Article 62(2)(b) EC (ex 73j(2)(b)) attached to the Treaty of Amsterdam which stated that the Council could take into account the “foreign policy considerations of the Union *and the Member States*” when adopting rules on short-term visas.<sup>31</sup> However, even in this context the Member States have tended to give priority to restrictive positions rather than visa-free treatment. Thus, reciprocity has meant that even harmonization of divergences stemming purely from different political relations with third countries, as opposed to different security concerns, concentrated greatly on restrictiveness.<sup>32</sup> This approach disadvantaged those Member States with strong external links.

The central role of reciprocity is confirmed by the arrangements introduced by the Regulation to ensure reciprocity between individual Member States and third countries and at the same time uniformity of the visa requirements applied by the Member States. Thus, under the Regulation, if a country on the “white” list imposes visa requirements on nationals of a Member State, all Member States must introduce visa requirements for nationals of such third country after the Member State on whose nationals visa requirements were imposed notifies the Council and the Commission. If the

21; the EU-Russia Summit of 10 May 2005 which identified as a short-term measure of cooperation the conclusion of a visa facilitation agreement between the EU and Russia; Commission Communication “improving access to durable solutions”, COM(2004)410 final; and the Hague Programme, *infra* paragraph 6.

30. See Comprehensive Plan to combat illegal immigration, *op. cit. supra* note 27, paras. 82–85.

31. Emphasis added.

32. See HL Report, *Visas and Control of the External Borders of the Member States*, 14th Report, 1993–94, HL Paper 78, evidence by the Home Office at p. 81.

third country in question repeals the visa requirements, this provisional measure will cease to operate. Otherwise, the Commission is to examine any request by the Council or a Member State that it submit a proposal to the Council for including the third country concerned on the “black” list.<sup>33</sup> This reciprocity mechanism will become superfluous once Community visa exemption agreements replace the Member States’ individual bilateral visa exemption agreements with third countries.

The Commission has undertaken an in-depth review of the meaning and scope of reciprocity.<sup>34</sup> This was prompted by the fact that the United States maintained visa requirements on Greek nationals, but Greece never triggered the “solidarity mechanism”, which would have caused the whole Community to introduce visa requirements for US nationals. This problem was exacerbated after the accession of the new Member States, some of which were also subject to visa requirements by the United States.

In its review the Commission pointed out that the reciprocity mechanism had never been used because of its excessive rigidity – once a Member State triggers the mechanism, the provisional introduction by all Member States of visa requirements for nationals of the third country in question is virtually automatic. Therefore, the Commission has proposed to amend the Regulation to make the mechanism more flexible, but at the same time to render its use compulsory. Under the proposed amendment, the Commission, upon notification by the affected Member State, will engage with the authorities of the third country concerned, and, depending on the outcome of these contacts, will make a proposal to the Council which will act by qualified majority voting within three months.<sup>35</sup>

The criterion of “regional coherence” was not articulated in the Explanatory Memorandum. It clearly applied in relation to the Commission’s proposal to include Bulgaria and Romania in the “white” list, alongside the first wave of acceding central and eastern European countries. The application of “regional coherence” in this context would have softened some of the problems ensuing from “differentiation” among these countries resulting from the Union’s “membership conditionality” approach. In particular, the acceding countries were required to apply the Schengen *acquis* on border controls which resulted in the strengthening of their borders with neighbouring countries and relevant complications, in particular with regard to the treatment of ethnic minorities. Thus, the inclusion of Romania on the “white” list would have avoided, for example, the imposition of visa requirements on Romanian

33. Art. 1(4).

34. Art. 2 Regulation 453/2003, *op. cit. supra* note 7.

35. See Council docs. 13145/04, 7 Oct. 2004, and 12112/1/04, 18 Oct. 2004.

nationals by Hungary, which, because of the large number of ethnic Hungarians living in Romania and the possibility of retorsion on the part of Romania, was described as a “politically and socially intractable problem” capable of giving rise to destabilization.<sup>36</sup> It is also clear that there was discrepancy between the various accession requirements: the application of the Schengen *acquis* on border controls, on the one hand, and protection of ethnic minority rights, on the other hand, for which candidate countries were encouraged by the Union to conclude agreements among themselves which *inter alia* included provisions on the facilitation of cross-border movement.<sup>37</sup>

The application of the Visa Regulation and the Schengen *acquis* on border controls by the new Member States remains a problem.<sup>38</sup> A proposal has been put forward with a view to facilitating the movement between the new Member States and their eastern neighbours of persons residing in their border region, and the movement between the Member States themselves of third country nationals residing in their border region.<sup>39</sup> The proposed regulation would introduce the possibility of issuing “local visas”, namely visas valid exclusively for the border area of the issuing Member State. These visas would be valid from one to five years and would entitle the holder to multiple entries of a maximum duration of a week.<sup>40</sup> The proposal expressly authorizes Member States to negotiate bilaterally with their neighbours the specific arrangements applicable to local border traffic at their common land border.<sup>41</sup> According to the Commission’s Explanatory Memorandum, “while

36. See HL Report, *Enlargement and the EU External Frontier Controls*, 17th Report, 1999–2000, HL Paper 110, paras 44–47.

37. Hillion, “Enlargement of the European Union – The discrepancy between membership obligations and accession conditions as regards the protection of minorities”, (2004) *Fordham International Law Journal*, 715, at 728–730; Borissova, “The adoption of the Schengen and the justice and home affairs *acquis*: The case of Bulgaria and Romania” (2003) *EFA Rev.*, 105, at 119.

38. See Smith, “The evolution and application of EU membership conditionality”, in Cremona (Ed.), *The Enlargement of the European Union* (OUP, 2003), p. 124; On the problems that Poland faced with introducing visa requirements for Ukraine, Belarus and Russia, see Phuong, “Asylum and immigration in the context of enlargement”, in Tridimas and Nebbia (Eds.), *European Law for the Twenty-First Century*, Vol. 1 (Hart, 2004), at p. 390.

39. It will be recalled that under Art. 3 of the Act of Accession the Schengen *acquis* is subject to a two-phase implementation procedure whereby some provisions are binding upon accession while others will be binding following a Council decision. The provisions on the lifting of internal border controls fall within the second category. Thus internal border controls between the new and old Member States and between the new Member States themselves are still applicable, without prejudice to the EC Treaty provisions governing free movement of EC nationals.

40. COM(2005)56 final, 23 Feb. 2005.

41. The Member States may also maintain or conclude agreements between themselves.

this Regulation sets a Community regime on local border traffic, thus conferring on the Community external competence on this matter, it has been considered appropriate – taking into account the specific nature of a local border traffic regime, whose establishment largely depends on local geographical, social, economic and other considerations – to delegate to Member States the actual implementation of such regime via bilateral agreements”.

After a long deadlock, a Regulation has also been adopted providing for a system of multiple-entry transit papers for Russian citizens travelling between Kaliningrad and Russia through EU territory.<sup>42</sup> It is also Union policy to persuade its new eastern neighbours to approximate their visa policy to the visa policy of the Union.<sup>43</sup>

The “black” and “white” lists introduced by the Regulation are the same as those which were agreed at Schengen level with very few changes. Colombia, the only country on which the Schengen States had not reached agreement by the time the Schengen *acquis* was incorporated into the European Union legal order, was included in the “black” list following pressure from the Benelux countries, France, Portugal and Greece.

While the Commission proposed the inclusion of Romania and Bulgaria in the “white” list, agreement could not initially be reached in the Council, notwithstanding that “the Kosovo crisis in the first half of 1999 and the ensuing instability throughout the Balkans led to a consensus within the EU that Bulgaria and Romania should not be further isolated”.<sup>44</sup> The resulting compromise was that the Regulation originally included both countries on the “white” list but in relation to Romanian nationals it provided that visa exemption was to come into force at a later date to be decided by the Council following reports by the Commission setting out the undertakings Romania was prepared to give in relation to illegal immigration and residence, including arrangements for repatriation.<sup>45</sup> The Commission’s report on Romania presented in June 2001 stated that “Romania has made undeniable progress in legislative and organizational matters as regards illegal immigration and repatriation from the Member States of persons illegally resident there who have travelled from Romania, visa policy and border controls”.<sup>46</sup> The Regu-

42. Regulations 693 and 694/2003, O.J. 2003, L 99/8 and 15. This system was part of a deal between the EU and Russia struck at the EU-Russia Summit in November 2002 which also included a EU-Russia joint anti-terrorism strategy.

43. See, for example, the EU Common Strategies on Ukraine and Russia of 23 Dec. 1999 and of 4 June 1999, O.J. 1999, L 331 and 157. A similar policy has been adopted with regard to some of the Union’s Mediterranean neighbours, see for example the Action Plan for Morocco, 30 May 2002, Council doc. 8939/00.

44. Smith, *op. cit. supra* note 38, at p. 128.

45. Ex Art. 8.

46. COM(2001)361 final, 29 June 2001.

lation was accordingly amended on 7 December 2001 to effectively include Romania on the “white” list.<sup>47</sup> However, it appears that some of the undertakings Romania has given in return for visa-free access for its nationals may put it in breach of international human rights instruments, including the undertaking to punish its own nationals found residing and working illegally in Member States by preventing their future departure from their homeland for a specified length of time (arguably contrary to Art. 2 Protocol 4 ECHR on the right to leave one’s country).<sup>48</sup>

A further amendment of the lists took place on 6 March 2003.<sup>49</sup> This was in response to calls from the Seville European Council of 21-22 June 2002 urging the Council and the Commission to attach top priority to reviewing the “black” and “white” lists by the end of 2002 in the context of the Union’s fight against illegal immigration.<sup>50</sup> By virtue of the amendment, Ecuador was moved from the “white” to the “black” list. Only four Member States requested the inclusion of Ecuador on the “black” list on the ground that recent regularization programmes had shown that a large number of Ecuadorian nationals were illegally present on their territories and because of political and public order considerations. The Amending Regulation also prescribed a date by which the Member States had to bring the visa requirements for nationals of Ecuador into effect.<sup>51</sup> This appeared necessary in the light of past experience: Spain implemented the visa requirements for nationals of Colombia six months after Regulation 539/2001 had entered into force. In this context, the Commission underlined that a correct and timely implementation of amendments to the “black” list by all Member States was essential for the common visa policy’s success as an instrument to combat illegal immigration.<sup>52</sup>

### 3.2. *The development of the visa into an identity document*

The uniform format for visas – originally adopted under old Article 100c EC – is an important component of the common visa policy. It introduces a very high level of security for visas against falsification and forgery, thus contrib-

47. Regulation 2414/2001, op. cit. *supra* note 7.

48. COM(2001)61 final, 2 Feb. 2001, Vol. 1, pp. 4 and 7, and Vol. 2, pp. 12–13. See ILPA, *Submissions on the European Commission’s Communication on a Common Policy on Illegal Immigration*, 27 March 2002.

49. Regulation 453/2003, op. cit. *supra* note 7.

50. Presidency Conclusions, 200/02, para 30.

51. Art. 3(2).

52. Commission Communication on the development of a common policy on illegal immigration, op. cit. *supra* note 27, para 2.1.

uting to ensuring the effectiveness of the common visa policy. In light of the nature of visas, it is also a symbol of political unity.

The uniform format for visas has been one of the aspects of the common visa policy whose development has been most influenced by the events of 11 September 2001. Following these events, both the European Council and the Council emphasized the urgency for the European Union to take immediate action to ensure the security of passports and visas, and the fight against false and forged documents.<sup>53</sup> Accordingly, in February 2002 the Council adopted a Regulation amending Regulation 1683/95 on the uniform format for visas and a Regulation laying down a uniform format for forms for affixing visas (in both of which the United Kingdom is participating).<sup>54</sup> Amended Regulation 1683/95 prescribes the future integration of a photograph in the visa sticker (by 2007). It also introduces powers to change the colour of the visa sticker and to lay down technical standards to be used for the filling in of the uniform visa.

Further proposals were put forward in the Council's Comprehensive Plan to combat illegal immigration and trafficking in human beings.<sup>55</sup> The Plan proposed the inclusion of biometric data in visas and the establishment of a Visa Identification System (VIS), a database storing information on visa applicants, including their photo, biometric data and the image of their travel documents.<sup>56</sup>

Following the Plan, the Commission proposed further amendments to the Regulation on the uniform format for visas.<sup>57</sup> Under these, the visa would include biometric data (facial image and fingerprints), and the introduction of the photograph would be brought forward to 2005. These proposals have been widely criticized as a step on the road to widespread use of biometric indicators across the EU, and on the basis of concerns over data protection. Political agreement on them has been reached and only technical problems remain, regarding the storage of biometric identifiers in the visa.<sup>58</sup>

53. JHA Council, 20 Sept. 2001; European Council, 21 Sept. and 19 Oct. 2001.

54. Regulation 333/2002, *op. cit. supra* note 14, and Regulation 334/2002, O.J. 2002, L 53/7.

55. *Op. cit. supra* note 27.

56. See Council Decision of 8 June 2004 establishing the Visa Identification System, O.J. 2004, L 213/5; Commission Proposal for a Regulation concerning the VIS, COM(2004)835 final. The VIS would enable the identification of those travellers found without travel documents, and would facilitate, by virtue of the stored image of their travel documents, the issue of new travel documents for the purpose of repatriation. It would also permit the detection of any travel document manipulation.

57. COM(2003)558 final, 24 Sept. 2003.

58. The issue is whether a chip should be inserted in the visa sticker or whether a separate card should be introduced. See Council doc. 6228/05 (Presse 28), 24 Feb. 2005.

Parallel to these developments are changes in relation to other personal documents. Uniform formats have been introduced at Community level for residence permits issued by the Member States.<sup>59</sup> Following the Thessaloniki European Council's recommendations to establish a "coherent approach in the EU on biometric data", the Commission has proposed to introduce biometric identifiers in these residence permits.<sup>60</sup> Moreover, following a Commission proposal on the introduction of biometric identifiers in passports of EU citizens – urged by the European Council of 12 December 2003 also in the light of recent US legislation requiring biometric identifiers in passports of citizens of countries granted a visa waiver – the Council adopted a Regulation on biometric features in EU citizens' passports.<sup>61</sup> This could be followed by proposals on the establishment of a "EU passport register".<sup>62</sup> However, it can be argued that in the light of the multiple functions of passports, the Community powers on external border controls, on which the Regulation is based, are insufficient.<sup>63</sup>

It is also Union practice to encourage and support third countries in strengthening their efforts to render their travel documents more secure.

#### 4. Flexibility

##### 4.1. *Exceptions to the application of visa requirements under the Visa Regulation*

Under the Visa Regulation, the Member States maintain discretion in relation to the visa requirements applicable to several special categories of persons. According to the Commission, in spite of the objective of attaining a high degree of harmonization in visa matters, it has to be accepted that national considerations specific to a Member State will continue to apply in certain areas.

As regards stateless persons and recognized refugees, the Commission initially proposed that visa requirements could be determined according to a residence criterion. Thus, under the Commission's original proposal, stateless persons and recognized refugees were to be subject to or exempt from

59. Regulation 1030/2002, O.J. 2002, L 157/1. See also Regulations 693 and 694/2003, *op. cit. supra* note 45.

60. *Supra* note 57.

61. Regulation 2252/2004, O.J. 2004, L 385/1.

62. COM(2004)116 final.

63. Peers, "EU biometric passport proposal exceeds the EC's powers", [www.statewatch.org/news](http://www.statewatch.org/news). See also Case C-137/05, *United Kingdom v. Council*, cited *supra* note 18.

visa requirements depending on whether the country where they resided and which issued them with travel documents was included on the “black” or the “white” list respectively. This was said by the Commission to constitute further progress towards harmonization of the Member States’ visa policies. This residence criterion was rejected by the Council. The Member States were concerned on security grounds about exempting from visa requirements refugees resident in countries included on the “white” list. Accordingly, under the Regulation recognized refugees and stateless persons are subject to visa requirements if the country where they reside is included on the “black” list, while the Member States maintain discretion with regard to recognized refugees and stateless persons residing in a country included on the “white” list.

The imposition of visa requirements on certain other categories of persons remains similarly within the discretion of the Member States. Under the Visa Regulation, the Member States can provide for exemptions from the visa requirement or exceptions from the visa exemption with regard to the following categories: (a) holders of diplomatic passports, official-duty passports and other official passports; (b) civilian air and sea crew; (c) the flight crew and attendants on emergency or rescue flights and other helpers in the event of disaster or accident; (d) the civilian crew of ships navigating in international waters; and (e) holders of *laissez-passer* issued by some intergovernmental international organizations to their officials.<sup>64</sup> Rules on visa requirements for such categories are the subject of bilateral agreements between the Member States and third countries, such as diplomatic visa exemption agreements, or are contained in multilateral or bilateral agreements of a wider scope.<sup>65</sup> A question which arises in this context relates to the implications of the flexible nature of the Community internal regime (i.e. the lack of substantive harmonization) for the emergence of Community external competence under the *ERTA* doctrine. Moreover, it is difficult to imagine a Community agreement covering one aspect (e.g. diplomatic visa exemption) of a wider issue which by its nature falls squarely into Member States’ competence (e.g. diplomatic representation by third countries in the Member States). Furthermore, rules on visas are often contained in international agreements of a wider scope which the Community may have no competence to conclude.

Following the adoption by the ILO General Conference on 19 June 2003 of the ILO Convention 185 on seafarers’ identity documents – to which only

64. Art. 4.

65. See for example the General Convention on Privileges and Immunities of the United Nations 1947; Annex 9 to the Chicago Convention on International Civil Aviation 1944; the Seafarers’ National Identity Document Convention 1958.

States can be parties – the Council adopted a decision on a Commission proposal authorizing the Member States to ratify *in the interests of the Community* the seafarers' identity documents Convention.<sup>66</sup> The Commission underlined that “in accordance with the AETR case law of the Court of Justice on external competence, Member States are no longer free to ratify on their own initiative ILO Convention 185 on seafarers' identity documents as its provisions concerning the exemption of seafarers from the visa requirements for purposes of shore leave and the reference to the conditions governing the entry of seafarers into the territory of Member States for purposes of transit, transfer or repatriation affect the exercise of the Community's competence in this area”.<sup>67</sup>

With regard to the area of national discretion envisaged in the Regulation, national policy is not completely unrestricted, but the Member States have entered a number of undertakings in order to ensure security. With regard to visa requirements for holders of diplomatic, official and service passports, for example, provisions included in the Common Consular Instructions (CCI) stipulate that “the Schengen States undertake not to conclude at a future date, without prior agreement with the other Member States, agreements in the area of removing visa requirements for holders of diplomatic, official and service passports with States whose nationals are subject to prior consultation for a visa to be issued by another Schengen State”.<sup>68</sup> Following the attribution of the CCI to Articles 62 and 63 EC such an undertaking has acquired the force of Community law. This has made Italy desist from concluding a diplomatic visa exemption agreement with Russia (a visa facilitation agreement was concluded instead).<sup>69</sup>

Further, building on the old Third Pillar Joint Action concerning travel facilities for school pupils from third countries resident in the Member States, the Regulation stipulates that the Member States retain discretion to exempt from visa requirements a school pupil national of a country on the “black” list but residing in a country on the “white” list travelling in the context of a school excursion. They also retain discretion to impose visa requirements on nationals of countries included on the “white” list if they carry out a paid activity during their stay.<sup>70</sup>

The Member States are under an obligation to communicate the measures governing visa matters within their discretion to the other Member States

66. Council doc. 7721/05 (Presse 74), 14 April 2005.

67. COM(2004)530 final, 30 July 2004.

68. Annex 2, point I.8.2, CCI, O.J. 2002, C 313/1.

69. Council doc. 11035/04, 30 June 2004.

70. Art. 4.

and the Commission, which will publish them in the *Official Journal*.<sup>71</sup> Unlike the Commission's amended proposal the Regulation does not state that the issue of exceptions from the visa exemption is in due course to be covered by Community visa exemption agreements with third countries.

#### 4.2. *Member States' autonomy in formulating entry conditions*

The communitarized Schengen visa arrangements are characterized by flexibility allowing the Member States to maintain individual control as to who can obtain a visa to enter their territories. This flexibility is achieved through recourse to mutual recognition (i.e. cumulation) of national entry requirements for the issuing of "uniform visas", and the possibility of issuing "limited territorial validity visas" to individuals who do not fulfil the cumulative entry requirements. Its justification resides in the sensitive nature of visas – an expression of the sovereign right to control entry and an instrument of security and foreign policy, most notably in the context of denial/granting of entry to particular individuals and recognition of passports. The flexibility of the common visa policy constitutes its vulnerability insofar as it undermines the common visa policy's objective to provide the security conditions necessary for frontier-free movement in the Community. In particular, in the absence of internal frontier controls, the territorial limitation of limited territorial validity visas may only be enforced once a person illegally present in the territory of a Member State is caught there.

This flexible approach also characterizes new Community instruments adopted under Article 62(2)(b) EC. The Regulation governing the issue of visas to participants to the Olympic Games in Athens in 2004, for example, provided that the Member State responsible for issuing visas to members of the Olympic family (generally Greece under communitarized Schengen rules) could issue limited territorial validity visas to participants who did not meet the cumulative conditions governing the issue of uniform visas.<sup>72</sup> Similarly, the Regulation "on the issue of visas at the border, including the issue of such visas to seamen in transit" stipulates that seamen who, because of their nationality, fall into the category of aliens who cannot be granted a visa without prior consultation of one or more Member States' central authorities in accordance with Annex 5B of the CCI, can without such consultation taking place, be issued at the border with a limited territorial validity visa.<sup>73</sup>

71. Art. 5.

72. Regulation 1295/2003, O.J. 2003, L 183/1. Rules established by the International Olympic Committee require the national government of the city hosting the Olympic Games to give the assurance that competitors will not be refused visas.

73. Regulation 415/2002, O.J. 2003, L 64/1. A number of international instruments govern

The independence of the Member States in formulating entry conditions is acknowledged by Regulation 789/2001 “reserving to the Council the implementing powers with regard to certain detailed provisions and practical procedures for examining visa applications”.<sup>74</sup> The Regulation provides, *inter alia*, that the Manual of travel documents to which a visa may be affixed, the Manual concerning the issuance of Schengen visas in third States where all the Schengen States are not represented, and those parts of the CCI which consist of “lists of factual information which must be provided by each Member State” are to be amended or updated unilaterally by the Member States, rather than by an act of the Council. The Regulation provides for a procedure whereby the amendments are to be communicated to the other Members of the Council and to the Commission.<sup>75</sup>

Thus, although the Manual of travel documents to which a visa may be affixed, for example, was attributed to Article 62(2)(b)(ii) EC, under the Regulation each Member State may amend unilaterally the part of the Manual recording its position as to recognition of passports and travel documents, with only an obligation to communicate the amendments to the other Member States and the Commission. This state of affairs illustrates the uncertainty surrounding the significance of attribution of certain Schengen provisions to an EC legal basis. It is unclear why the Manual was attributed to Article 62 EC in the light of the fact that the Member States, as sovereign States, retain competence as to recognition of passports, and that, accordingly, they continue to amend the Manual unilaterally.

In Case C-257/01, *Commission v. Council*, the Commission applied pursuant to Article 230 EC for the annulment of the Regulation on the ground, *inter alia*, that under the Regulation the Member States reserved to themselves implementing powers in breach of Article 202 EC.<sup>76</sup> In particular the Commission maintained that although the Manual of travel documents to which a visa may be affixed, the Manual concerning the issue of visas in third States, and those parts of the CCI containing “lists of factual information which must be provided by each Member State” concern *factual information*, by

the international movement of seamen such as the Seafarers’ National Identity Documents Convention 1958, the Convention on the Facilitation of Maritime Transport 1965, and the recently adopted ILO Convention 185 on Seafarers’ Identity Documents.

74. O.J. 2001, L 116/2.

75. Art. 2. Parts of the CCI consisting of “lists of factual information” include: the airport transit visa “grey” list; diplomatic visa exemption for countries not subject to prior consultation and diplomatic visa exception to the visa exemption; the list of visa applications requiring prior consultation; the list of documents entitling entry without a visa; and the amounts required for crossing borders.

76. Cited. *supra* note 5.

virtue of allocation they have become Community instruments whose amendment must therefore take place under the normal institutional rules.

The Court of Justice upheld the validity of the Regulation. The Court held that although Article 202 EC concerns Council acts, it governs the division of implementing powers between the Council and the Commission and not between the Community and the Member States. Therefore the issue was whether for the purpose of implementing certain provisions of the CCI, the Council was required to use Community procedures or whether power to amend those provisions could be conferred on the Member States without infringing Community law. The Court underlined the intergovernmental origin of the CCI and the fact that their integration into the framework of the European Union did not result in the Member States being immediately stripped of the powers which they were entitled to exercise under them to ensure their implementation. The Court maintained that a complaint against the procedure established under the Regulation for the transmission of amendments which the Member States are authorized to make to certain provisions of the CCI (the content of which depends exclusively on information that they alone possess) could only succeed if it were established that the procedure prejudiced the proper implementation of the CCI. The Commission, however, which had not disputed that the information contained in the relevant instruments was factual or the fact that the information could be provided effectively only by the Member States, had failed to establish the necessity of a “uniform updating procedure”.

With regard to visa facilitation agreements with third countries and other agreements concerned with visa issuance, institutional practice endorses the view that the Community has acquired competence to conclude such agreements under the doctrine of implied powers. On the basis, *inter alia*, of Articles 62(2)(b)(ii) and (iv) EC on the conditions and procedures for issuing visas and on rules on a uniform visa, the Community has concluded a visa facilitation agreement with China. Also, ILO Convention 185 on seafarers’ identity documents is to be ratified by the Member States in the interest of the Community.<sup>77</sup> However, the attitude of some Member States has been that the flexible nature of the common internal regime implies that they continue to have competence to conclude visa facilitation agreements with third countries, until the Community itself concludes agreements with such third countries. Italy, for example, has concluded an agreement with Russia on visa facilitation for official representatives, economic operators, prominent people in the cultural, scientific and academic fields, and exchange students.<sup>78</sup>

77. Cited *supra* notes 21 and 66.

78. Cited *supra* note 69. Indeed, the EU–Russia Summit of 10 May 2005 envisaged, in the

## 5. No progress

### 5.1. Airport Transit Visas

Notwithstanding that the Vienna Action Plan envisaged the abolition of the airport transit visa “grey” list within three years from the entry into force of the Treaty of Amsterdam, and that the Commission in its biannual scoreboard envisaged the adoption of a regulation by April 2001, a Community measure has not yet been adopted or proposed.<sup>79</sup> The Member States, including the United Kingdom and Ireland, remain bound by the Joint Action on Airport Transit Visas adopted under the former Third Pillar.<sup>80</sup> The Member States (excluding the United Kingdom and Ireland) are also bound by the airport transit visa “black” list agreed at Schengen level, which is contained in the CCI. This has not been changed in response to the terrorist attacks of 11 September 2001.<sup>81</sup>

### 5.2. Free movement of visa holders

With regard to free circulation, the Commission proposed a directive “relating to the conditions in which third-country nationals shall have the freedom to travel in the territory of the Member States for periods not exceeding three months, introducing a specific travel authorization and determining the conditions of entry and movement for periods not exceeding six months”.<sup>82</sup> The proposed directive covers free circulation for third country nationals who possess short-stay visas, are exempt from visa requirements, or possess a residence permit or a long stay visa.<sup>83</sup> It does not extend to third country na-

context of creating a Common Space of Freedom, Security and Justice, a “better use of the existing flexibilities under Schengen”, and in particular the “facilitation of visa issuance by the EU Member States for Russia researchers, using the flexibilities within the Schengen *acquis* and on the basis of reciprocity”.

79. Council’s and Commission’s Action Plan on “how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice”, 4 Dec. 1998, O.J. 1999, 200/1/99. The “grey” list is the list of countries whose nationals are required to have airport transit visas by some Member States only.

80. See Hailbronner, *Immigration and Asylum Law and Policy of the European Union* (Kluwer, 2000), p. 1059.

81. Regulation 789/2001, *op. cit. supra* note 74, stipulates the procedure for amending the airport transit visa “black” list contained in the CCI (the Council acts by qualified majority voting, the right of initiative is shared between the Commission and the Member States, and no consultation of the Parliament is prescribed).

82. O.J. 2001, C 270E/244.

83. The proposed directive would repeal Regulation 1091/2001, O.J. 2001, L 150/4, on the equivalence between short-stay and long-stays visa for the purpose of free circulation.

tionals who have a right to enter or stay in a Member State under Community law.

An important innovation in the proposal is the introduction of a travel authorization that would allow third country nationals to move freely for six months instead of three, provided they do not spend more than three months in the same Member State.<sup>84</sup> The proposed directive would also have the effect of extending the possibility of moving freely for six months to all third country nationals, whether exempt from or subject to visa requirements.<sup>85</sup>

## 6. Measures under development

The common visa policy is developing in two directions. First, the visa is developing into an identity document based on new technologies which is to work in connection with the VIS. Second, greater harmonization of the conditions and procedures for issuing visas applied by the Member States will be sought, including harmonization of local consular practices. The Comprehensive Plan to combat illegal immigration, in line with calls from the Tampere and Laeken European Councils, recommended the progressive establishment of joint visa offices, setting up a pilot project in Pristina, which was unsuccessful.<sup>86</sup> The Comprehensive Plan pointed out that joint visa offices would allow burden sharing and a more uniform level of expertise and equipment, which should reduce the risk of visa shopping.

It is also evident that the common visa policy, and particularly visa facilitation, is increasingly becoming an instrument that the Union uses in a strategic way in order to obtain undertakings from third countries, particularly with regard to readmission.<sup>87</sup>

The Hague Programme – a multi-annual programme on the area of freedom, security and justice agreed by the Brussels European Council of 4–5 November 2004 – endorsed these developments.<sup>88</sup> The Programme recommends achieving further harmonization of national legislation governing visa issue and of handling practices at local consular missions. It recommends in

84. Since the authorization covers stays of six months, Art. 63(3) EC is used as legal base instead of Art. 62(3) EC.

85. Cf. the initiative of the Portuguese Republic “with a view to adopting the Council Regulation on the period during which third country nationals exempt from visa requirements are free to travel within the territory of the Member States”, O.J. 2000, C 164/6.

86. Op. cit. *supra* note 27. See also Commission Communication on the development of a common policy on illegal immigration, op. cit. *supra* note 27, para 2.1.

87. See *supra* notes 29, 42 and 78.

88. Annex 1, Presidency Conclusions, 14292/1/04.

particular the establishment in the long term of common visa offices, taking into account discussions on the establishment of a European External Action Service, as provided in the Constitutional Treaty.<sup>89</sup> In the meantime, the Programme calls for the submission in 2005 of a proposal on the establishment of common application centres focusing *inter alia* on possible synergies linked to the development of the VIS. The swift implementation of the VIS is also recommended, with the incorporation of visa applicants' data and photo by 2006 and biometrics by 2007. The Programme also invites the Council and the Commission, with a view to developing a common approach, to consider whether in the context of a EU readmission policy it would be opportune to facilitate, on a case-by-case basis, the issuance of short-term visas to third country nationals, where possible and on the basis of reciprocity, as part of a real partnership in external relations including migration related issues.

89. Under a Declaration attached to the Constitutional Treaty, work on the establishment of the External Action Service was to start before ratification of the Treaty. It is indeed possible to develop the External Action Service under existing powers.