



EUROPEAN PARLIAMENT

Directorate-General Internal Policies
Policy Department C
Citizens Rights and Constitutional Affairs

An Analysis of the Current Common Consular Instructions

BRIEFING PAPER

Résumé:

This policy brief presents and critically discusses the content of the Common Consular Instructions (CCI). In this context, the aim of the paper is therefore to offer an analysis of CCI which covers a broad range of aspects, including their operability, their coherence, as well as the technical, legal and political problems they raise. The policy brief then proceeds to address three main sets of questions: What are the technical issues related to the CCI? What are the legal problems related to CCI? What are the political problems related to CCI? Throughout, a particular emphasis is put on the proposed amendments of CCI and their potential impact on individual rights.

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1. Introduction - What are the Common Consular Instructions?

The Common Consular Instructions (CCI) are part of the Schengen *acquis* which was inserted into the EC and EU Treaties by virtue of a protocol to the Treaty of Amsterdam (now a protocol to the EU Treaty). They set out the nuts and bolts of EU visa practice regarding third-country nationals who seek a short-stay visa to come to the EU. The 1985 Schengen Agreement, adopted by five Member States outside the framework of the EU, provided for flanking measures to support the abolition of intra-Member State border controls. The 1990 Schengen Implementing Agreement (CISA) contained the detailed framework for those states to proceed with the abolition of intra-Member State border controls on the basis of a common external border control system. A central element of the system was that third countries would be identified (inter alia) on the basis of the perceived risk of irregular migration that their nationals present to the participating states and on those grounds the country would be included on a common list of countries whose nationals are required in all cases to obtain a visa before leaving their state of residence to come to a participating state. In this sense, the control of visas replaced, in importance, border control at the frontier in the Schengen system as the key mechanism for identifying and combating irregular migration.

In view of the importance of border controls and the issuing of visas, the Executive Committee of CISA was charged with preparing two handbooks: one on the procedures to be used at the external borders of the Schengen states and a second on how consular authorities should issue short-stay visas to third-country nationals. The manual on the issuing of visas is entitled the Common Consular Instructions. The CCI were issued to all participating states' consular authorities for the purpose of determining visa applications. The CCI were confidential and remained confidential until they became part of EU law.

Three Member States do not participate in the CCI as part of EU law – Denmark, Ireland and the UK. Ten other Member States (those which joined on 1 May 2004) do not yet participate fully in the CCI.

The CCI are divided into eight sections: general provisions, including the scope and definition of visas (there are at least 8 different types of the so-called 'Schengen visa'); the diplomatic mission or consular post responsible for determining any visa application; the initiation of an application procedure, which includes the rules on documents, guarantees of means and return and personal interviews; the legal basis; the examination of applications and decisions taken, including detailed instructions on how visa officers should consider applications; instructions on how to fill in stickers (a very practical section); administrative management and organisation and consular cooperation at a local level.

When the Schengen *acquis* was inserted into EU law, the CCI were given a legal base in the first pillar but, as stated on the Commission's website, "this consolidated version does not represent a legal instrument". Thus the legal status of the CCI is uncertain. The Commission has undertaken to propose a regulation to replace the CCI (as has been done in respect of the Schengen Border Manual). The CCI are amended regularly as they include practical rules. A simple search on CCI in the Council registry reveals 344 documents (many confidential) most of which relate to amendments of the CCI. In this regard, the Commission initiated proceedings against the Council on the mechanism for amending the CCI (C-257/01). While the European Court of Justice found in favour of the Council, it noted that the mechanism of amendment only applied during the first five years of the CCI's existence in EU law (i.e. until 1 May 2004).

2. Consequences of the Proposal for a Regulation amending the CCI COM (2006) 269

The proposal COM (2006) 269 proposes a regulation amending the CCI to include biometric identifiers as part of the visa process. The first problem with the proposal is that it rightly states that as the taking of biometric identifiers will now be part of the visa application procedure, the CCI have to be amended in order to create the legal basis for this measure. But

it is by no means sure that the CCI which lacks any clear legal status can, by itself provide an adequate legal basis for a regulation. Normally one would expect a regulation to be based on a provision of the EC Treaty.

On content, the proposal claims that all visa applicants must provide a facial image and submit to having ten flat fingerprints taken on their first application for an EU visa. This information will be stored in the Visa Information System (VIS), which is also under construction at the moment (see European Parliament report COD/2004/0287). On any subsequent visa applications, they will not be required to provide these biometric data again. Any matter of data collection, retention, manipulation, sharing and deletion touches on fundamental rights of the individual. Article 8 ECHR protects the right of the individual to privacy which includes personal data. Thus in order for any EU measure on data collection to be lawful, it not only must fulfil the requirements of EU law, including the Data Protection Directive 95/46, but also the requirements of Article 8 ECHR. The aim for which the data is collected must be legitimate and proportionate and the use to which it is put must be justifiable. Simple administrative convenience is rarely sufficient. The case for the collection and use of biometric data from visa applicants has not yet been clearly made out.

3. What are the technical issues related to the CCI?

3.1. How does the CCI operate?

Pursuant to the CCI, a visa shall be issued by a diplomatic or consular representation of the country in whose territory the sole or main destination of the visit indicated by the applicant is situated, or in cases where this destination cannot be determined, the country whose border the foreigner is to cross first. The procedure for issuing a visa shall be carried out before a Consul, in all cases on the basis of the uniform visa application form filled in by the applicant. The application must be accompanied by a valid travel document to which a visa may be affixed, and where necessary, by the documents justifying the purpose and conditions of the intended stay. Pursuant to the CCI, as a general rule, the applicant must be called on to appear before the Consul, in person. During the interview, the Consul shall ascertain, in particular, whether: (1) the visa issued will not be used for the purposes of illegal immigration; (2) the foreigner's stay in the territory of the Contracting Party will not pose any threat to their security.¹ The Consul may refuse a visa where there is a reasonable risk that either of these conditions may occur. Pursuant to the CCI, particular risk groups are comprised of, for example, unemployed and those with no regular income.

The Consul shall take their decision on the basis of all the information available and shall assume, in accordance with his or her national powers, full responsibility. The CCI allows private administrative agencies, travel agents, and tour operators and their retailers to act as authorised intermediaries of the applicant.

3.2. Is there coordination among those applying the CCI?

The Schengen States are strongly encouraged to cooperate, in particular, at a local consular level. Pursuant to the CCI (Part VIII),² such cooperation essentially concerns the assessment of immigration risks. The form, scope and intensity of the consular cooperation *in situ* should reflect the local conditions. It may involve notifying, via E-mail, consular representations of other Schengen States (and sometimes, even of non-Schengen States) of visa refusals, dates of regular meetings between their representatives, and dates of special meetings between their

¹ The Schengen Information System is to be used, *inter alia*, for storing data on aliens that are to be detained with a view to their being extradited or to be refused entry (Article 96 of the Schengen Convention).

² See also Council Recommendation of 4 March 1996 relating to local consular cooperation regarding visas (OJ C 80, 18.3.1996, p. 1).

representatives, organised by the Presidency. Under certain circumstances, such cooperation may be carried out in a less formal and structured manner. The information exchanged shall serve as a working instrument for assessing visa applications. It shall not, however, replace the actual examination of the visa application, nor the search in the Schengen Information System, nor consultation with the requesting central authorities.

The monitoring of the consular representations of the Schengen States shows that the determination at a local level of the scope of the supporting documents required is fraught with serious problems. Moreover, there is insufficient coordination of the joint finalisation of information distributed to the public.

The cooperation between the Schengen States may also involve situations where one State authorises another to represent it, the scope and form of such representation being determined between the parties concerned (Part II 1.2). The uniform visa is issued then in the name and on behalf of the State that is being represented. Pursuant to the CCI, the Schengen States are not obliged to ensure that they are represented for visa purposes in all third States (Part II. 1.2. (e)). This causes considerable hardship for applicants living a long distance from consular representations.

3.3. What technical problems are encountered?

It is for each Contracting Party to determine the organisation of its visa section, the number of representations in each country and the composition of each representation. In practice, this results in a diversity of visa practices followed by the Schengen States, and in particular differences in the accessibility of the representations due to their localisation, length of time applicants have to wait for a visa, form and mode in which information is being distributed, and list of the supporting documents required. Some Member States are concerned that such diversity, in particular following the enlargement of the Schengen area, may lead to 'consulate shopping' among applicants who may prefer to deal with more applicant-friendly representations. The Commission has proposed the establishment of joint visa application centres and the collection of biometric data from applicants (COM(2006)269).

4. What are the legal problems related to the CCI?

4.1. How does legal status of the CCI impact on individual rights?

The applicant must submit documents justifying the purpose and conditions of their intended stay. The number and type of the documents required may vary from case to case (the risk of illegal immigration) and the applicant's status (circumstances) in their country of origin may also vary. Therefore, the list of documents required may vary considerably. The CCI lists in detail the various supporting documents that the authorities may require. Such proofs may include: a letter of invitation, summons, return ticket, currency for petrol or car insurance, hotel reservation, statement issued by a local authority guaranteeing that the applicant will be accommodated by a private person or a private institution. On the other hand, proof of sufficient means of subsistence may be furnished in the form of cash, travellers' cheques, credit cards, etc. The level of means of subsistence must be proportionate to the length and purpose of the stay and the cost of living in the Schengen State(s) to be visited.³ Furthermore, the authorities may require the applicant to produce proof of insurance for the Schengen State(s) concerned, proof of place of residence and proof of ties with the country of their residence, and proof of their social and professional status. It is appropriate to note here that the latter two terms are very vague.

³ The respective amounts are determined each year by the competent authorities of the States concerned.

The nature and level of detail of the documents that may be required by the representations of the Contracting Parties give them the right to probe deeply into the private lives of applicants. At the same time, the CCI does not lay down the procedure for the exercise of control over the use of the information so obtained, nor does it authorise any independent body to protect such information or monitor its use. Following the submission of their visa application, the individuals concerned cannot participate actively in the subsequent procedures, nor access the files relating to their case. Such data should be processed in accordance with the provisions on the protection of personal data, laid down in the European Charter of Human Rights (Article 8).⁴

4.2. What appeal rights, if any are there?

It seems that the areas concerned with protecting internal security, where the deciding role is played by an individual, are at risk of irregularities and fraud. Unfortunately, Community legislation lacks provisions that would guarantee the applicant's right to appeal. CISA remains silent on this issue; on the other hand, the CCI indicates clearly that this element of the visa procedures to be followed is to be governed by the law of the Contracting Party concerned. The CCI provides for the standard phrase to be used in notifying the applicant of the reasons for their visa application being refused, but the obligation to provide more detailed explanation is governed by national provisions. Practices followed by the Member States to provide information on reasons for such refusals and on the possible right to appeal remain governed by the national provisions and are therefore different in each Schengen State.

4.3. How is the CCI amended?

Following the expiry of that transitional period on 1 May 2004, the Council adopted Decision 2004/927EC providing for certain areas covered by Title IV of Part III EC to be governed by the procedure laid down in Art. 251.⁵ The rules governing the issue of short-stay visas, including the procedures and conditions for the issue of visas by Member States and the rules on a uniform visa are covered by the procedure laid down in Art. 251 EC. Regulation (EC) no 789/2001⁶ and Art. 3 of Regulation 2004/927 provide that any amendment to Parts II, III, V, VI, VII and VIII of the CCI as well as to Annex 2, Parts II and III of Annex 3 and to Annexes 6, 10, 11, 12, 13, 14 or 15 are to be made on the initiative of the Member State concerned, or of the Commission, by qualified majority. By its judgement of 18 January 2005 in Case C-257/01, the European Court of Justice ruled⁷ that the establishment by the Council of the procedure whereby the Member States submit their proposals for amendments they wish to make to the CCI, which they are entitled to make,⁸ cannot be called into question. Furthermore, the Court did not find any argument for the need to use the uniform procedure in cases where the relevant provision of the CCI refers only to the national law or practice.

⁴ Charter of Fundamental Rights of the European Union (Nice, December 2000) Article 8: Protection of personal data, 2000/C 364/01.

⁵ OJ L 396, 31.12.2004, p. 45.

⁶ OJ L 116, 26.4.2001, p. 2. The Regulation reserves to the Council implementing powers with regard to certain detailed provisions and practical procedures for examining visa applications.

⁷ Judgement of the Court (Full Session) of 18 January 2005 in Case C-257/01: Commission of the European Communities v Council of the European Union, concerning the implementing powers of the European institutions in the area of the implementation of Schengen Agreement.

⁸ Pursuant to Article 2 of Council Regulation 789/2001 this concerns any amendment to Part III of Annex 1, Schedule A or B of Annex 2, Part II of Annex 3 or Annex 4, 5, 7 or 9. Pursuant to this Regulation, any Member State wishing to make an amendment to Annex 4, 5B, 5C, 7 or 9 of the CCI shall first submit a proposal for the amendment to the other Member States and to afford them an opportunity to comment thereon.

However the ECJ specifically stated this situation applied to the transitional period between 1 May 1999 and 1 May 2004.

5. What are the political problems related to the CCI?

The European Parliament will face the challenges concerning the amendments of the CCI in view of the communitarianisation of the rules of entry. The concern for human rights on the one hand, and the interests of the states on the other, are likely to introduce a tension. The proposed CCI impact the sovereignty of the nation states to a larger degree, especially through the introduction of CAC (common application centres). Member States may see their national interests undermined by the Community agenda, and thus any policy of closer relationships with particular third countries may become difficult to uphold. There is a possibility that the MS may bring strong objections to the creation of CAC, claiming the need to develop complimentary measures to control the inflow of the favoured third-country citizens.

CCI do not provide for any regulation related to the role of FRONTEX in the visa policy. The main tasks⁹ of the Agency is to coordinate Member States' actions as regards threat assessment of illegal migration and transborder crime, coordination of operational cooperation on the external borders, training of national border guards, and elaboration of common training standards hereof, support in organising joint deportations of unwanted foreigners, and support in circumstances requiring increased technical and operational assistance at external borders. Thus, FRONTEX is not to be involved in the common visa policy other than in the context of the external border control. However, the Agency is entitled to process the personal data¹⁰ and it will have access to the biometrics gathered in the visa procedures. This access, together with other FRONTEX activities, should be subject to democratic scrutiny and control. The agency is primarily the operative arm of the Member States and the role of the Parliament in its surveillance should be more prominent.

The Community Code¹¹ is thought to be a second line of border management. There is a risk that the decisions banning a visa holder from entering Schengen Area could be discretionary because of the opaque provisions included in the Code. At present, the CCI are not directly related to the Code, the only exception being the processing of biometric data. The European Parliament should put a special emphasis on the protection of the data.

The VIS introduces the Central Visa Information System (CS-VIS) and the National Interface (NI-VIS) for data processing in relation to the short-term visas (uniform visas).¹² The VIS is based on the Schengen Information System (SIS II), which is currently under preparation. It is unclear if the biometric and other personal data can be retrieved from the system automatically, or whether there is a need for a specific legal provision. Thus, the CCI are to be amended accordingly, as regards standards and procedures for the "collection of personal data" and biometrics. The proposed CAC solution seems user-friendly, but it will be such only under the condition that the procedures, requirements and documents are truly uniform. There should be precise measures in place governing the storage and access to the data. The

⁹ Council Regulation (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union.

¹⁰ Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data.

¹¹ Council Regulation establishing a Community Code on the rules governing the movement of persons across borders COM(2004)391 final, which shall replace Article 5 of the Schengen Convention.

¹² Council decision of 8 June 2004 establishing the Visa Information System (VIS) (2004/512/EC)- OJ L 213, 15.6.04.

rights of the third-country nationals should be ensured in regard to the possibility of changing or withdrawing the data.

The cost of the visa – €60 – is too high for many legitimate travellers of third-countries. It may create an obstacle for the ordinary travellers, with little impact on organised crime. Any further developments of the CCI should aim at lowering this cost, especially through a better employment of resources and technologies at the CACs. This will ensure that the EU does not erect new barriers to the movement of bona fide travellers in the name of security.