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COMMISSION OF THE EUROPEAN COMMUNITIES

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2008/0041 (COD)

Proposal for a

REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of [...]

amending Regulation (EC) No 562/2006 as regards the use of the Visa Information System (VIS) under the Schengen Borders Code

(presented by the Commission)

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

- **Grounds for and objectives of the proposal**

The current proposal deals with the required amendments of the Schengen Borders Code (SBC) in order to ensure an efficient use of the Visa Information System (VIS) at the external borders. The objective of this proposal is to lay down common rules on the obligation to use the VIS at the external borders and thus to further develop integrated border management of the European Union.

- **General context**

For the purpose of laying down the conditions, criteria and detailed rules governing checks at external border crossing points and surveillance at the external border, the Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) was adopted on 15 March 2006. In accordance with Article 7(3) of the Schengen Borders Code, all third country nationals shall be subject to thorough checks at the external borders.

The European Parliament and the Council have adopted Regulation (EC) No xx/2008 of concerning the Visa Information System (VIS) and the exchange of data between Member States on short stay-visas (VIS Regulation)¹. The Commission has tabled a proposal for a Regulation of the European Parliament and of the Council amending the Common Consular Instructions (CCI) on visas for diplomatic and consular posts in relation to the introduction of biometrics, including provisions on the organisation of the reception and processing of visa applications².

The VIS Regulation defines the purpose, the functionalities of and responsibilities for the VIS, whereas the amendment of the CCI will create the legal basis for Member States to take mandatory biometric identifiers from visa applicants and also sets out the possibility of collaboration among Member States, for example by creating Common Application Centres (CAC).

Within the overall objective of the VIS to improve the implementation of the common visa policy, one of the purposes of the VIS is to facilitate checks at external border crossing points, including the fight against fraud.

In accordance with Article 18 of the VIS Regulation, border guards have access to search the VIS for the purpose of verification by using the number of the visa sticker in combination with fingerprints of the visa holder. For a maximum period of three years after the start of operations, the search may be carried out using only the number of the visa sticker. The period of three years may be reduced in the case of air borders.

For the efficiency of the border checks at the external border the use of the VIS is of fundamental importance. Only a biometric check can confirm with certainty that the person wishing to enter the Schengen area is the one to whom the visa has been issued. Therefore, a

¹ OJ [...], [...], p. [...].

² COM(2006) 269 final.

systematic consultation of the VIS including a biometric check by the border guards should be performed for each visa holder.

However, the VIS Regulation does not and cannot contain provisions on the obligation to use the VIS at the external borders. The aim of the present proposal is thus to complement the VIS Regulation by establishing common rules to this effect through the amendment of the Schengen Borders Code to ensure that the VIS will be used in an efficient and harmonised way at the external borders. Without a common regime, those border crossing points where the VIS is not systematically used could be exploited by illegal immigrants and criminals.

A systematic consultation of the VIS at the external borders is a prerequisite in order to allow greater flexibility at the time the visa application is submitted: the aforementioned Commission's proposal amending the CCI foresees that in cases of repeated visa applications within a time-frame of 48 months biometric data can be re-used and copied from the previous application stored in the VIS. This allows for maintaining the flexibility of exempting bona fide applicants from the obligation to appear in person at the consulate. The presumption behind this rule was that all visa holders would be checked at the external borders ensuring that possible abuses of the visas are detected. If the VIS is not used systematically at the external borders, biometric data would have to be captured every time at the consulate when a new visa is applied for.

Gradual regional roll out at the consulates

Article 48 of the VIS Regulation provides the mechanism for the gradual regional roll-out of the VIS at the consulates. In accordance with the Council conclusions of 2 December 2005, the roll-out of the VIS should begin with consular posts in North Africa and Near East regions. After the roll-out has started, the consulates in the first region must collect and transmit the data referred to in Article 5(1) of the VIS Regulation for all visa applications in the first region into the VIS data base. This information also comprises the fingerprints of the visa applicants. The Commission shall determine the date from which the transmission of the data referred to in Article 5(1) of the VIS Regulation including the fingerprints of the visa applicants becomes mandatory also in each other region.

Before that date, in each of these other regions the Member States may start collecting and transmitting the data to the VIS in accordance with Article 48(3) of the VIS Regulation by recording at least the alphanumeric data and photographs as stated in the Article 5(1)(a) and (b) of the VIS Regulation.

As a consequence of the gradual regional roll out and the possibility referred to in Article 48(3) of the VIS Regulation, the following types of visa will be in circulation:

- (a) visas issued in a region covered by the mandatory use of the VIS, thus usually including fingerprints;
- (b) visas issued in a region where the roll out has not yet started, but where one or several Member States have started collecting and entering data in the VIS, including fingerprints;
- (c) visas issued in a region, where the roll out has not yet started, but where one or several Member States have started collecting and entering data in the VIS, but without fingerprints (thus only alphanumeric data and photograph);

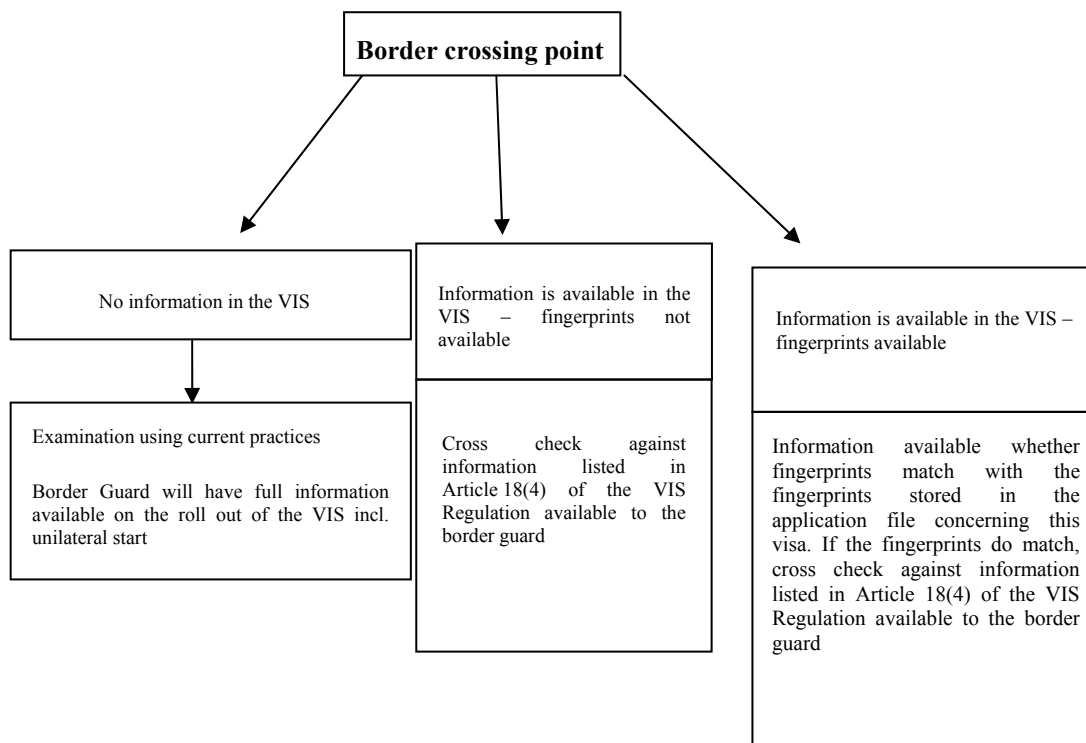
- (d) visas issued in a region, where the roll out has not yet started by Member States which have not started collecting and entering data in the VIS;
- (e) visas issued before the VIS Regulation applies.

It should be noted that after the roll out has been completed, for a certain period of time there will still be visas without biometrics in circulation e.g. multiple-entry visas issued before that date.

Use of the VIS at the external borders

The following table indicates the information available for the border guards when checking the VIS by using the visa sticker number in combination with verification of fingerprints and the actions to be carried out.

USE OF THE VIS AT THE EXTERNAL BORDERS BY USING THE VISA STICKER NUMBER IN COMBINATION WITH VERIFICATION OF FINGERPRINTS



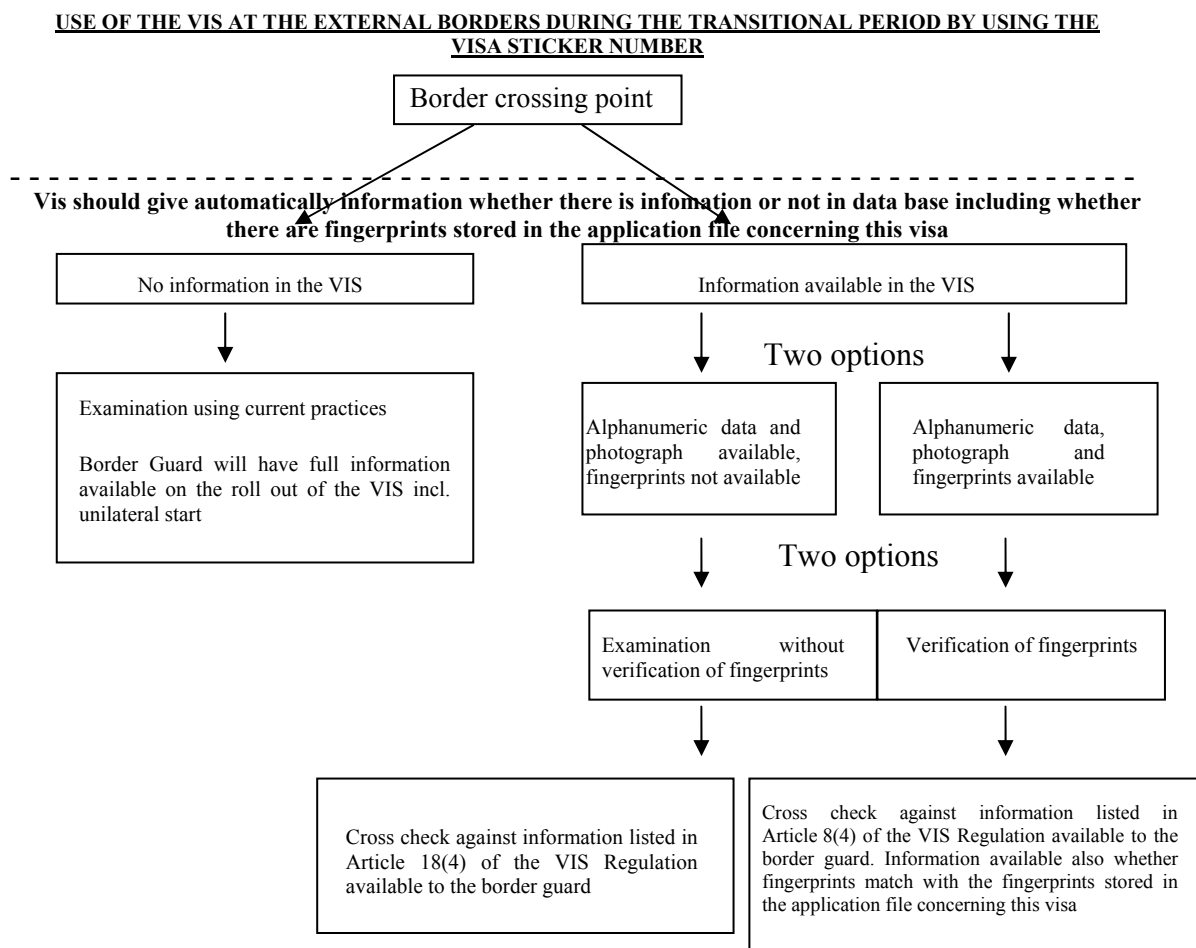
Use of the VIS at the external borders – transitional period and search keys

During the transitional period referred to in Article 18(2) of the VIS Regulation there are two options for consulting the VIS, either with the visa sticker number in combination with verification of fingerprints of the visa holder, or with the visa sticker number alone. In either case the consultation of the VIS on entry will start at least with the visa sticker number.

The search with the visa sticker number in combination with fingerprints would be useless, if there are no fingerprints in the VIS which could be matched against the fingerprints of the visa holder. Therefore, during the transitional period the VIS should give immediately after the check with the visa sticker number the information not only whether there is information related to the visa in the VIS, but also whether there are fingerprints stored in the application file concerning this visa. If the visa holder has been exempted from giving fingerprints

i.e. diplomats, young children and people who have lost their hands or whose fingerprints cannot physically be taken, they are not available in the VIS. In this case, the VIS should give the information “no fingerprints in the VIS”³.

The following table indicates the information available for the border guards when checking the VIS during the transitional period and the actions to be carried out.



In order to allow the border guard to assess whether the person is fulfilling the entry conditions, he must have access to the full information on the roll out and on Member States making use of the unilateral start of operations of the VIS according to the second sentence of Article 48(3) of the VIS Regulation.

Consequently, the notifications in accordance with Article 48(5) of the VIS Regulation, (which will be published in the Official Journal), as well as the information on Member States making use of Article 48(3), must be made available to the border guard. It is suggested adding this information in an annex to the Practical Handbook for Border Guards (C(2006) 5186), which is available on CIRCA in electronic form.

³ Quotation marks indicate that the exact wording of the information appearing on the screen is not yet known.

- **Existing provisions in the area of the proposal**

Regulation of the European Parliament and of the Council (EC) No 562/2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code).

Regulation of the European Parliament and the Council (EC) No xx/2008 Visa Information System (VIS) and the exchange of data between Member States on short stay-visas (VIS Regulation).

2. CONSULTATION OF INTERESTED PARTIES AND IMPACT ASSESSMENT

- **Consultation of interested parties**

Member States were consulted (within the Frontiers Working Party of the Council) regarding the “VIS and borders” and on the compulsory use of the VIS at the external border. According to their responses, the VIS should be used at border crossing points and biometric readers should be available; this would involve a combined check of the number of the visa sticker and fingerprints of the holder of the visa.

Member States considered the compulsory use of the VIS at the external borders feasible and necessary in all situations, including taking advantage of both search keys (visa sticker number and fingerprints). However, some expressed doubts whether searches could be carried out in a fast and reliable manner, especially when using portable devices (e.g. in cars or trains). According to this latter view, the compulsory use of the VIS would only be feasible when the technological development would reliably support the use of portable devices, with fast data transfer and reliable verification.

On the basis of discussions on the VIS Regulation with the Council and the Parliament, as well as on the basis of the agreed compromise text, the Commission is of the opinion that the compromise should be understood to be that the use of the VIS at the external borders should be compulsory, and that after the transitional period both search keys should be used. It needs to be emphasised that in accordance with Article 50(5) of the VIS Regulation, the Commission shall report on the technical progress made regarding the use of fingerprints at external borders and the implication on the duration of searches using the number of the visa sticker in combination with verification of the fingerprints of the visa holder, including whether the expected duration of such a search entails excessive waiting time at border crossing points.

- **Impact assessment**

The impact assessment carried out for the VIS Regulation is based on the finding that, “the inefficiencies in combating visa shopping, fraud and of conducting the checks are causing also inefficiencies in relation to internal security of the Member States. Criminals and suspected persons could get a visa or have chances to use a falsified visa when entering the Schengen area. Concerning persons involved in terrorism or in organised crime in most cases they don’t travel in their own identity but alter their personal details to make identification more difficult”. As regards border checks, the impact assessment comes to the conclusion that “very significant increases in efficiency of border checks are anticipated in the VIS with biometrics. The use of biometric data would ensure that the person who is travelling with the

visa is the same person for whom the visa was issued, and thus confirm the identity of the traveller”.

The prerequisite of the above-mentioned “very significant increases in efficiency of border checks” is that the VIS should be systematically used at the first line during border checks carried out at the external borders.

A systematic consultation of the VIS at the external borders is also a prerequisite in order to allow greater flexibility at the time the visa application is submitted.

3. LEGAL ELEMENTS OF THE PROPOSAL

• Summary of the proposed actions

The VIS contains information which is relevant for the checks at the external borders. To that end the VIS Regulation must be complemented by adding rules on the use of the VIS at the external borders to the Schengen Borders Code.

• Legal basis

Article 62(2)(a) of the Treaty establishing the European Community is the legal basis for this Regulation, as this proposal amends the Schengen Borders Code, which is based on this Article and as it will further specify the measures on the crossing of the external borders of the Member States and develop standards and procedures to be followed by Member States in carrying out checks on persons at such borders.

• Subsidiarity principle

Under Article 62(2)(a) of the EC Treaty, the Community has the power to adopt measures relating to the crossing of the external borders of the Member States. The current Community provisions on the crossing of the external borders of the Member States, the Schengen Borders Code, needs to be adapted to take into account the setting up of the VIS, as a common regime is needed in order to establish harmonised rules on the mandatory use of the VIS at the external borders.

Therefore, the objective of the proposal cannot be sufficiently achieved by the Member States.

• Proportionality principle

Article 5 of the EC Treaty states that action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty. The form chosen for this Community action must enable the proposal to achieve its objective and be implemented as effectively as possible. The proposed initiative – the amendment of the Schengen Borders Code – constitutes a further development of the Schengen acquis in order to ensure that common rules at external borders are applied in the same way in all the Schengen Member States. The proposal therefore complies with the proportionality principle.

- **Choice of instrument**

Proposed instruments: regulation.

Other means would not be adequate for the following reason(s).

The present proposal amends a Regulation. Moreover the use of the VIS at the external border at entry should be mandatory for all Member States and therefore only a Regulation can be chosen as a legal instrument.

4. BUDGETARY IMPLICATION

The proposal has no implication for the Community Budget.

5. ADDITIONAL INFORMATION

- **Participation**

This proposal builds upon the Schengen acquis. Therefore the following consequences in relation to the various protocols have to be considered:

Iceland and Norway:

The procedures laid down in the Association Agreement concluded by the Council and the Republic of Iceland and the Kingdom of Norway concerning the latter's association with the implementation, application and development of the Schengen acquis are applicable, since the present proposal builds on the Schengen acquis as defined in Annex A of this Agreement.

Denmark:

Pursuant to the Protocol on the position of Denmark annexed to the TEU and the TEC, Denmark will not participate in the adoption of the Regulation and is therefore not bound by it or subject to its application. Given the fact that the Regulation is an act which aims to build upon the Schengen acquis in accordance with the provisions of Title IV of the TEC, Article 5 of the above-mentioned Protocol applies.

United Kingdom and Ireland:

In accordance with Articles 4 and 5 of the Protocol integrating the Schengen acquis into the framework of the European Union and Council Decision 2000/365/EC of 29 May 2000 concerning the request of the United Kingdom of Great Britain and Northern Ireland, and Council Decision 2002/192/EC of 28 February 2002 concerning Ireland's request to take part in some of the provisions of the Schengen acquis, the United Kingdom and Ireland do not take part in Regulation (EC) No 562/2006 (Schengen Borders Code) and in Regulation (EC) No xx/2008 (The VIS Regulation). Therefore, the United Kingdom and Ireland are not taking part in the adoption of these Regulations and are not bound by them or subject to their application.

Switzerland:

This Regulation constitutes a development of the provisions of the Schengen acquis within the meaning of the Agreement signed by the European Union, the European Community and the Swiss Confederation on the latter's association with the implementation, application and development of the Schengen acquis which fall within the area referred to in Article 4(1) of the Council decision on the signing, on behalf of the European Community, and on the provisional application of certain provisions of this Agreement.

New Member States:

Since the VIS constitutes an act building upon the Schengen acquis or otherwise related to it within the meaning of Article 3(2) of the 2003 Act of Accession and Article 4(2) of the 2005 Act of Accession, also this Regulation providing for the use of the VIS at external borders shall only apply in a new Member State pursuant to a Council decision taken in accordance with this provision.

- **Detailed explanation of the proposal by Articles**

Article 1

Article 1 lays down the use of the VIS for 1) entry checks, 2) exit checks and 3) identification purposes.

The first paragraph provides for the compulsory consultation of the VIS for verification purposes at entry, if the third country national holds a visa referred to in Article 5(1)(b) of the Schengen Borders Code.

The second and the third paragraphs determine the optional use of the VIS; for verification during exit checks and for identification during entry and exit checks. Those verifications and identifications should be done when appropriate and applicable in accordance with Articles 18 and 20 of the VIS Regulation, and especially when doubts arise whether visa is a genuine or valid.

Article 2

Article 2 lays down the rules when consultations of the VIS should be started at the external borders.

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THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

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

Having regard to the proposal from the Commission¹,

Acting in accordance with the procedure laid down in Article 251 of the Treaty,

Whereas:

- (1) Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code)² lays down the conditions, criteria and detailed rules governing checks at border crossing points and surveillance at the border, including checks in the Schengen Information System.
- (2) Regulation (EC) No xx/2008 [of the European Parliament and the Council of (date) on the Visa Information System (VIS) and the exchange of data between Member States on short stay-visas (VIS Regulation)]³ aims at improving the implementation of the common visa policy. It also provides that the purposes of the VIS include facilitating both checks at external border crossing points and the fight against fraud.
- (3) Regulation (EC) No xx/2008 [VIS Regulation] lays down search criteria and conditions for the access of competent authorities, for the purpose of carrying out checks at external border crossing points, to data for verifying the identity of visa holders, the authenticity of the visa and whether the entry conditions are fulfilled, and for identifying any person who may not fulfil, or who no longer fulfils, the conditions for entry, stay or residence on the territory of the Member States.
- (4) Since only a biometric check can confirm with certainty that a person wishing to enter the Schengen area is the person to whom the visa has been issued, provision should be made for the use of the VIS at external borders.

¹ OJ C [...], [...], p. [...].

² OJ L 105, 13.4.2006, p. 1.

³ OJ [...], [...], p. [...].

- (5) In order to verify whether the entry conditions laid down in Article 5 of Regulation (EC) No 562/2006 are fulfilled and to manage their tasks successfully, border guards should use all necessary information available, including data which may be consulted in the VIS.
- (6) In order to prevent circumvention of border crossing points where the VIS may be used and to guarantee its full effectiveness, there is a particular need to use the VIS in a harmonised way when entry checks are carried out at the external borders.
- (7) Since, in cases of repeated visa applications within a time-frame of [48] months, it is appropriate for biometric data to be re-used and copied from the first visa application in the VIS, use of the VIS for entry checks at the external borders should be compulsory.
- (8) Regulation (EC) No 562/2006 should therefore be amended accordingly.
- (9) Since the objectives of the proposed action, namely the establishment of the rules applicable on the use of the VIS at the external borders, cannot be sufficiently achieved by the Member States and can therefore be better achieved at Community level, the Community may adopt measures, in accordance with principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve those objectives.
- (10) This Regulation respects the fundamental rights and observes the principles recognised by Article 6(2) of the Treaty on European Union and reflected in the European Convention for the Protection of Human Rights and Fundamental Freedoms as well as in the Charter of Fundamental Rights of the European Union.
- (11) As regards Iceland and Norway, this Regulation constitutes a development of the provisions of the Schengen *acquis* within the meaning of the Agreement concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the latters' association with the implementation, application and development of the Schengen *acquis*⁴, which fall within the area referred to in Article 1, point A, of Council Decision 1999/437/EC⁵ on certain arrangements for the application of that Agreement.
- (12) As regards Switzerland, this Regulation constitutes a development of provisions of the Schengen *acquis* within the meaning of the Agreement signed between the European Union, the European Community and the Swiss Confederation concerning the association of the Swiss Confederation with the implementation, application and development of the Schengen *acquis*, which fall within the area referred to in Article 1, point A, of Decision 1999/437/EC read in conjunction with Article 4(1) of Council Decisions 2004/849/EC⁶ and 2004/860/EC⁷.

⁴ OJ L 176, 10.7.1999, p. 36.

⁵ OJ L 176, 10.7.1999, p. 31.

⁶ OJ L 368, 15.12.2004, p. 26.

⁷ OJ L 370, 17.12.2004, p. 78.

- (13) In accordance with Articles 1 and 2 of the Protocol on the position of Denmark annexed to the Treaty on European Union and to the Treaty establishing the European Community, Denmark is not taking part in the adoption of this Regulation and is not bound by it, or subject to its application. Given that this Regulation builds upon the Schengen *acquis* under the provisions of Title IV of Part Three of the Treaty establishing the European Community, Denmark should, in accordance with Article 5 of the said Protocol, decide within a period of six months after the adoption of this Regulation whether it will implement it in its national law.
- (14) This Regulation constitutes a development of provisions of the Schengen *acquis* in which the United Kingdom does not take part, in accordance with Council Decision 2000/365/EC of 29 May 2000 concerning the request of the United Kingdom of Great Britain and Northern Ireland to take part in some of the provisions of the Schengen *acquis*⁸. The United Kingdom is therefore not taking part in its adoption and is not bound by it or subject to its application.
- (15) This Regulation constitutes a development of provisions of the Schengen *acquis* in which Ireland does not take part, in accordance with Council Decision 2002/192/EC of 28 February 2002 concerning Ireland's request to take part in some of the provisions of the Schengen *acquis*⁹. Ireland is therefore not taking part in its adoption and is not bound by it or subject to its application.
- (16) This Regulation constitutes an act building upon the Schengen *acquis* or otherwise related to it within the meaning of Article 3(2) of the 2003 Act of Accession and Article 4(2) of the 2005 Act of Accession,

⁸ OJ L 131, 1.6.2000, p. 43.

⁹ OJ L 64, 7.3.2002, p. 20.

HAVE ADOPTED THIS REGULATION:

Article 1
Amendment

In Regulation (EC) No 562/2006, Article 7(3) is amended as follows:

(1) the following point (aa) is inserted:

“(aa) if the third country national holds a visa referred to in Article 5(1)(b), the thorough checks on entry shall also comprise verification of the identity of the holder of the visa and of the authenticity of the visa, by consulting the Visa Information System (VIS) in accordance with Article 18 of Regulation (EC) No xx/2008 of the European Parliament and of the Council^(*);

^(*) OJ [...], [...], p. [...].”

(2) the following sentence is added at the end of point (c)(i):

“such verification may comprise consultation of the VIS in accordance with Article 18 of Regulation (EC) No xx/2008;”

(3) the following point (d) is added:

“(d) for the purpose of identification of any person who may not fulfil, or who may no longer fulfil, the conditions for entry, stay or residence on the territory of the Member States the VIS may be consulted in accordance with Article 20 of Regulation (EC) No xx/2008.”

Article 2
Entry into force

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

It shall apply from [DD/MM/YY – to be the twentieth day following the date referred to in Article 48(1) of Regulation (EC) No xx/2008].

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

Done at Brussels, [...]

For the European Parliament
The President
[...]

For the Council
The President
[...]