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LEGAL SERVICE OPINION

Subject: Proposal for a Regulation determining the third countries whose nationals must be in possession of a visa when crossing external borders

– 6398/95 ASIM 119

1. At its meeting on 4 April 1995 the Visa Working Party sought the Legal Service's views as to whether Article 100c of the EC Treaty allows the Council to impose a visa requirement on persons producing a passport or travel document issued by the authorities of a territorial entity not recognized by all Member States. That is the purpose of this opinion.
2. Article 100c(1) of the Treaty refers to "*the third countries whose nationals must be in possession of a visa when crossing the external borders of the Member States.*"

While that provision does not refer in so many words to the specific case of territorial entities not recognized by all Member States, its scope is not explicitly confined to States recognized by them. Its coverage has to be determined in the light of its context and of the objectives of the Treaty, so as to ensure its effectiveness, in line with the case law of the Court of Justice of the European Communities ⁽¹⁾.

⁽¹⁾ E.g. Case 184/73, ECR 1974, p. 517, and Case 792/79, ECR 1980, p. 119.

3. The objective of Article 100c(1) is to determine those third countries which pose a particular risk in terms of security and uncontrolled immigration, making it advisable to impose a visa requirement on their nationals. That requirement represents a minimum safeguard as regards the entry of such persons into the internal market, which comprises *"an area without internal frontiers"* under Article 7a of the Treaty. For, in accordance with Article 3(c) and (d) of the Treaty, Community activities include *"an internal market characterized by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital"* and *"measures concerning the entry and movement of persons in the internal market as provided for in Article 100c."*
4. As the Legal Service stated in an opinion of 6 May 1994 ⁽²⁾, *"the only interpretation which gives full effect to Article 100c(1) is to regard it as being an appropriate legal basis for establishing the comprehensive list of third countries whose nationals must be in possession of a visa when crossing the external borders of the Community. This therefore implies that, once the Council has carried out full harmonization, nationals of third countries not on that list would be exempted from the visa requirement for entry into all the Member States."*

The risks in terms of security and uncontrolled immigration apply just the same in the case of persons from unrecognized territorial entities or countries as for nationals of States recognized as such. It would be illogical and inconsistent with its wording (see also Article 3(d)) to contend that it could be the intention and effect of Article 100c of the Treaty that Member States should severally continue to enjoy the option of imposing a visa requirement on persons producing travel documents issued by a territorial entity not recognized by any given Member State.

The effectiveness of Article 100c would thus be unduly restricted and such a restrictive interpretation would damage the Community's ability to maintain its security, not least in reacting to emergency situations as envisaged in Article 100c(2).

⁽²⁾ 6773/94 ASIM 93, p. 4.

The coverage of Article 100c thus extends to all third countries, irrespective of their status under international law.

5. When the Council decides that persons producing travel documents issued by the authorities of a territorial entity not recognized by all Member States must be in possession of a visa, that measure will not be tantamount to recognition by the Community or by the Member States of the authority or entity in question ⁽³⁾. It would in fact be conceivable (as proposed by the Commission) for the Regulation expressly to state as much.
6. In conclusion, the Legal Service is of the opinion that the Council may decide that persons producing travel documents issued by the authorities of third countries not recognized by all Member States must be in possession of a visa when crossing the external borders of the Member States.

⁽³⁾ The imposing of a visa requirement is a purely restrictive measure. It is thus very different from the practice adjudged wrong by the Court of Justice in the Anastasiou case (Case C-432/92, ECR 1994 I-3087). That was a case in which some Member States had accepted phytosanitary certificates issued by authorities other than the competent authorities, contrary to the Association Agreement of 19 December 1972 between the EEC and the Republic of Cyprus.

On the other hand, the International Court of Justice ruled in the Nottebohm case (ICJ reports 1955, pp. 17 and 18) that, in inserting a reentry visa in the Liechtenstein passport of Mr N..., the Guatemalan authorities had not recognized the naturalization granted him as entitling Liechtenstein to exercise diplomatic protection. The Court held, on the issue of the visa, that its *"only purpose ... was to make possible or facilitate entry into Guatemala, and nothing more ..."*. When Nottebohm thus presented himself before the Guatemalan authorities, the latter had before them a private individual: there did not thus come into being any relationship between governments."

Similarly, in its opinion on the legal consequences of the continued presence of South Africa in Namibia notwithstanding Security Council Resolution 276 (1970), the International Court of Justice held that *"the non-recognition of South Africa's administration of the Territory should not result in depriving the people of Namibia of any advantages derived from international cooperation. In particular, while official acts performed by the Government of South Africa on behalf of or concerning Namibia after the termination of the Mandate are illegal and invalid, this invalidity cannot be extended to those acts, such as, for instance, the registration of births, deaths and marriages, the effects of which can be ignored only to the detriment of the inhabitants of the Territory"* (ICJ reports 1971, p. 16, paragraph 125).

Lastly, the Community has often adopted acts referring to territorial entities not recognized by all Member States. The Council has adopted a number of Regulations concerning products from Taiwan, e.g. Regulation (EEC) No 3951/92 of 29 December 1992 on the arrangements for imports of certain textile products originating in Taiwan (OJ No L 350, 31.12.1994, p. 3). It also adopted Regulation (EC) No 2471/94 of 10 October 1994 introducing a further discontinuation of the economic and financial relations between the European Community and the areas of Bosnia-Herzegovina under the control of Bosnian Serb forces (OJ No L 266, 15.10.1994, p. 1). The latter Regulation is based on Articles 228a and 73g of the Treaty, which refer to *"third countries"* in the same way as Article 100c.