Access to legal remedies against a visa refusal based on an objection of another Member State

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Inhoud

1. Introduction

On the 31st of July 2018, the District Court Haarlem ruled on a case concerning a third country national whose visa application was refused by the Dutch authorities based on an objection of another Member State as a result of the consultation procedure codified in Article 22 of the Visa Code (hereafter also: VC).[1] In its ruling, the District Court raised some issues regarding the applicant's access to legal remedies. It notified the parties involved that it intended to refer prejudicial questions to the Court of Justice of the European Union (hereafter: CJEU) regarding these issues. In a judgment of 5 March 2019 the Court referred the preliminary questions to the CJEU. In another case, about a similar issue, the District Court Haarlem also decided to ask preliminary questions.[2] These questions gave rise to writing this expert opinion.

1.1 Legal issues

The first mentioned case before the District Court Haarlem concerns the refusal of a visa application of an Egyptian national who applied for a visa in order to visit his Dutch wife's family in the Netherlands.[3] His application was refused, because a Member State objected to granting him a visa. Article 32(a) under vi VC was applicable. The Dutch authorities did not disclose any information regarding which Member State objected nor on which grounds the objection was based.[4] The applicant discovered by accident, during the appeals procedure, that the objecting Member State was Hungary. The Dutch Minister's position was that there is no duty to communicate any information regarding the objection to the applicant.[5] The inquiry into the objection would not comply with the Visa Code, as it clearly provides that a Member State's objection leads to a refusal of a visa.[6]

In the other case, a Syrian national was refused a visa because the consulted German authorities made an objection. Here too, Article 32(a) under vi VC was invoked against the applicant. The Dutch Minister stated:

> It is not for the Dutch authorities to question the objection of this Schengen Partner. This would be contrary to the Visa Code in which it is laid down that a Schengen Visa is not to be issued if another Member State makes objection. The Visa Code does not leave any discretion here.

Several legal questions arise with regard to the consultation procedure and its procedural safeguards. In the case of the Egyptian national the District Court Haarlem ruled that the limited information provided to the applicant was not enough and that the visa refusal lacked substantiation.[7]

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[1] Council Regulation (EC) No 810/2009 of 15 September 2009 of the European Parliament and of the Council establishing a Community Code on Visa [2009] OJ L 243/1 (Hereafter: 'Visa Code' or 'VC'); By referring to 'Member State', this expert opinion means all countries which ratified the Visa Code. This includes Austria, Belgium, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, the Netherlands, Norway, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden, and Switzerland.

[2] The domestic cases concerned are District Court Den Haag zp Haarlem, 31 July 2018, AWB 17/15895, in which the applicant is represented by Ms. E. Schoneveld, and District Court Den Haag zp Haarlem, AWB 18/7781, in which the applicant is represented by Mr. M.F. Wijngaarden.

[3] District Court Den Haag zp Haarlem, 31 July 2018, AWB 17/15895; Information provided by the lawyer of the case, Ms. E. Schoneveld.

[4] District Court Den Haag zp Haarlem, 31 July 2018, AWB 17/15895, para 4.

[5] Ibid.

[6] Communication to the lawyer of the case, IND Decision after the interim judgment of 13 September 2018, at 6.

[7] District Court Den Haag zp Haarlem, 31 July 2018, AWB 17/15895, para 7.

However, it is unclear whether the objecting Member State has to communicate the reasons for its objection to the consulting Member State. Furthermore, it is not clear from Article 22 VC whether the objection itself is a ground for visa refusal. The District Court Haarlem ruled that the appeal did not constitute a legal remedy as required by Article 47 of the Charter of Fundamental Rights of the European Union (hereafter: 'the Charter' or 'CFR'). On 5 March 2019, it referred the following questions for a preliminary ruling to the CJEU:

1. Is an effective remedy provided, as meant in art. 47 EU Charter, by the appeal as meant in art. 32(3) VC against a final decision to refuse a visa on the ground mentioned in art. 32(1.a.vi) VC in the following circumstances:

    - The Member State has limited the reasons of the decision to the following: 'you are perceived by one or more Member States as a threat to public order, national security, public health or the international relations of one of the Member States'.

    - The Member State does not mention in its decision or the appeal on which specific ground or grounds of the four grounds mentioned in Article 32(1.a.vi) VC the visa has been refused

    - In the appeal, the Member State does not provide further information about, or further or substantiation of the ground or grounds on which the objections of the other Member State or Member States are based?

2. In the situation as described under 1, has the right to good administration in the meaning of Article 41 of the Charter been complied with, in particular the authorities' duty to state reasons for their decisions?

3. a. Should the questions under 1 and 2 be answered differently, if the Member State refers in its final decision on the visa application, to a real and clearly specified possibility to appeal in the other Member State against the specifically mentioned authority in that other Member State (or Member States), which issued an objection in the meaning of Article 32(1.a.vi) VC, in which this ground for refusal can be challenged?

    b. Is it required for an affirmative answer to question 1 in relation to question 3a, that the decision in the appeal in and against the Member State, which has taken the final decision, is suspended until the applicant has had the opportunity to make use of the possibility to appeal and, if the applicant indeed makes use of this possibility, until the (final) decision on that appeal?

4. Does it matter for the answer, whether the (authority in) the Member State (or the Member States), which has issued the objection against the issuance of a visa can be offered the opportunity to join the proceedings as a second defending party and in this capacity can be offered the opportunity to provide substantiation of the ground or grounds, on which his objection is based?[8]

1.2 Outline

This expert opinion examines the preliminary questions referred by the District Court of Haarlem. The expert opinion will first explain the consultation procedure and argue that this procedure should

[8] District Court Den Haag zp Haarlem, 5 March 2019, ECLI:NL:RBDHA:2019:2095 and ECLI:NL:RBDHA:2019:2097.

respect EU fundamental rights (Chapter 2). Moreover, it will discuss the scale on which the consultation procedure is applied within the Netherlands and the EU as a whole and show that the Dutch courts have developed divergent case law concerning the consultation procedure (Chapter 3). Chapter 4 focuses on the administrative proceedings. It addresses the question whether the decision to refuse a visa application on the basis of an objection of another Member State, should state the reasons for that decision. Chapter 5 concerns the right to an effective remedy before the national court. We will first investigate which Member State is obliged to guarantee this right in visa cases, in which the rejecting decision was based on the objection of another Member State. After that, the expert opinion analyses how the remedy provisions of the Visa Code should be interpreted in the light of the EU right to an effective remedy laid down in Article 47 of the Charter. We pay attention to the question whether the wide discretion granted to the Member States in visa cases and the nature of the rights and interests at stake in a visa case (in particular the interest of national security) may justify the far-reaching limitations of the right to an effective remedy in the visa cases concerned. The expert opinion concludes with a summary of the analysis and will propose answers to the preliminary questions raised by the District Court of Haarlem.

2. The Visa Code and the consultation procedure

The aim of the Visa Code is to establish common conditions and procedures for issuing short-term visas (maximum of 90 days in any 180-day period) to enter and transit the European Union and the associated States applying the Schengen Agreement. Thereby, the Visa Code contributes to the further development of a common visa policy aimed at facilitating legitimate travel and tackling illegal immigration.[9] In the establishment of common conditions and procedures, special emphasis is placed on the dignified treatment of the applicant.[10] The Preamble of the Visa Code stresses that the procedure of application must be conducted in a respectful and proportionate manner and that the services provided to the public shall follow good administrative practices.[11] From the drafting history, it can further be deduced that the Visa Code aims to enhance transparency and legal certainty and to strengthen procedural guarantees.[12]

2.1 The Consultation Procedure

Article 22 VC introduces a system of prior consultation to be applied, if a Member State `require[s] the central authorities of other Member States to consult its central authorities during the examination of applications lodged by nationals of specific third countries or specific categories of such nationals`.[13] From this, it can be deduced that Member States have to cooperate. Information regarding visa applications are shared via the uniform Schengen consultation network (VISION).[14] After being consulted, the second Member State has one week to decide whether to object or not.[15]

According to the Dutch immigration authorities ('Immigratie en Naturalisatie Dienst', hereafter: IND), the objection of another Member State leads to an automatic visa refusal; the IND cannot investigate the substance of the objection. The question rises whether this is in accordance with EU law. The Visa Code and case law of the CJEU have so far remained silent on this issue. As no guidance on the implementation of the consultation procedure can be found in the Visa Code itself, the examination of other sources is required.

2.1.1 Drafting history: cooperation in the consultation procedure

The drafting history provides some background information, which is useful to identify the purpose of the consultation procedure. From this history, it becomes clear that during the negotiations some political disagreements arose with regard to the function and relevance of the consultation procedure. Member States responsible for the assessment of the application felt penalised by the duty to await the outcome of the decision of the consulted Member State[16]. Some Member States further noted that the additional value of the consultation procedure for the issuance of a visa is very limited[17]. Some Member States stated that `the primary objective of the consultation procedure is for their

[9] Recital 3 Preamble VC.
[10] Recital 6 Preamble VC.
[11] Recitals 6 and 7 Preamble VC.
[12] European Commission, Draft proposal for a Regulation of the European Parliament and of the Council establishing a Community Code on Visas, COM (2006)403 final/2, section 1.
[13] Art 22(1) VC.
[14] Art 22(5) VC. See also S. Peers, E. Guild and J. Tomkin (Eds.) *EU immigration and asylum law*, *Volume 1 Visas and border controls* (Leiden, Martinus Nijhoff, 2012), p 262.
[15] Art 22(2) VC.
[16] Council of the European Union, Draft Regulation of the European Parliament and of the Council establishing a Community Code on Visas [2009], document no. 7293/09, para 3.1.1.
[17] Ibid.

central authorities to be informed of issuances rather than requesting refusals`[18]. Finally, it was questioned whether the consultation procedure would remain relevant after the installation of the Visa Information System (hereafter: VIS), a system allowing for the exchange of data on short term visa applications. The VIS would become operational after the adoption of the Visa Code and would enable the Member States to have access to all relevant information.[19]

This background information reveals that the Member States did not intend to attribute much weight to the prior consultation in the assessment of visa applications. The drafting history seems to indicate that the essence of the consultation procedure concerned the sharing of relevant information on visa applicants rather than the possibility of automatic refusal due to the objection of another Member State.

This impression is further supported by the Handbook of the European Commission for the organisation of visa sections and local Schengen cooperation.[20] This Handbook recommends that Member States `exchange information on the introduction or withdrawal of requests for prior consultation for nationals of certain third countries or certain categories of such nationals`[21] and on the refusals and refusal rates[22].

2.1.2 Cooperation and fundamental rights

In other fields of law, several approaches concerning the procedural safeguards for individuals in cases where cooperation between Member States is involved, can be distinguished. In the case of *Aranyosi/Căldăraru*, which dealt with the European Arrest Warrant[23], the CJEU held that the principle of cooperation cannot suspend the obligation to respect fundamental rights enshrined in the Charter. This especially holds true, if the respective legal framework requires the Member States to comply with fundamental rights.[24] The Preamble of the Visa Code makes clear that the Visa Code must respect the fundamental rights enshrined in the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter: ECHR) and the Charter.[25] Furthermore, in *El-Hassani*, the CJEU stated that `the interpretation of the provisions of the Visa Code, as is clear from recital 29 thereof, must be carried out in accordance with the fundamental rights and principles recognised by the Charter`.[26]

It can be concluded that the drafting history and the case law emphasise that Member States are obliged to share information on the applicant when conducting the consultation procedure. Furthermore, it follows from the CJEU's case law that Member States are obliged to respect fundamental rights when applying the consultation procedure.

[18] Ibid.

[19] Ibid. See Regulation (EC) No 767/2008 of the European Parliament and of the Council of 9 July 2008 concerning the Visa Information System (VIS) and the exchange of data between Member States on short-stay visas (VIS Regulation) [2008], *OJ* L 218.

[20] European Commission, Commission Decision of 11 June 2010 establishing the Handbook for the organisation of visa sections and local Schengen cooperation, C(2010)3667 final.

[21] Ibid, Annex Part II, para 2.1.

[22] Ibid, Annex Part II, para 3.

[23] Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States - Statements made by certain Member States on the adoption of the Framework Decision [2002] OJ L 190/1.

[24] CJEU Joined Cases C-404/15 and C-659/15 PPU *Aranyosi and Others* [2016], para 83.

[25] Recital 29 Preamble VC.

[26] CJEU Case C-403/16 *El Hassani* [2017], para 32.

2.2 Article 32 VC: Refusal of a Visa

The refusal of a visa is based on Article 32(1) VC. Member States are required to disclose grounds of the refusal to the applicant as provided in the standard form in Annex VI VC.[27] The form is divided in 11 reasons for refusal, annulment or revocation. Point 5 of the form addresses situations, in which the refusal is based on an alert for the purpose of refusing entry issued by another Member State in the Schengen Information System (hereafter: SIS). Point 6 of the form uses the wording of Article 32(2) VC and provides that a visa can be refused when: 'one or more Member State(s) consider you to be a threat to public policy, internal security, public health as defined in Article 2(19) of Regulation (EC) No 562/2006 (Schengen Borders Code, hereafter also: SBC) or the international relations of one or more of the Member States).'[28] As confirmed by the CJEU in *Koushkaki*, the listed grounds for refusal in Art. 32(1) VC are exhaustive.[29]

[27] Art 32(2) VC.

[28] Annex VI, Point 6 VC.

[29] CJEU Case C-84/12 *Koushkaki* [2013], para 38. See also S. Peers, E. Guild and J. Tomkin (Eds.) *EU immigration and asylum law*, *Volume 1 Visas and border controls* (Leiden, Martinus Nijhoff, 2012), p. 261.

3. Scale of application and divergent case law

In practice, the consultation procedure is used by many Member States and in a large number of visa applications. This chapter will provide some insight in the scale of this practice, displaying the nationalities subject to the consultation procedure, the frequency of consultations and the frequency of visa refusals based on objections. It should be noted that the data provided in the section is limited due to the confidentiality upheld by the Member States.[30] Moreover, this chapter will show that there is divergent case law in the Netherlands about the consultation procedure, which leads to legal uncertainty. Therefore, it is important that the CJEU provides guidelines for the use of the consultation procedure in all Member States.

3.1 Nationalities requiring prior consultation

According to Article 53 VC, Member States should inform the European Commission of the third countries, for which they require prior consultation in the context of a visa application. The European Commission issues a list containing these countries of origin.[31] By 2013, the list consisted of 30 third countries.[32] In the current version of 2017, this list was expanded to 38 third countries.[33] The applicants subject to prior consultation are mostly nationals of African, Asian and Arabic-speaking states.[34] The three most 'refugee producing' countries are included in the list.[35] Stateless persons and refugees, regardless which nationality they hold, are included in the list as well.

3.2 The consultation procedure and visa for the Netherlands

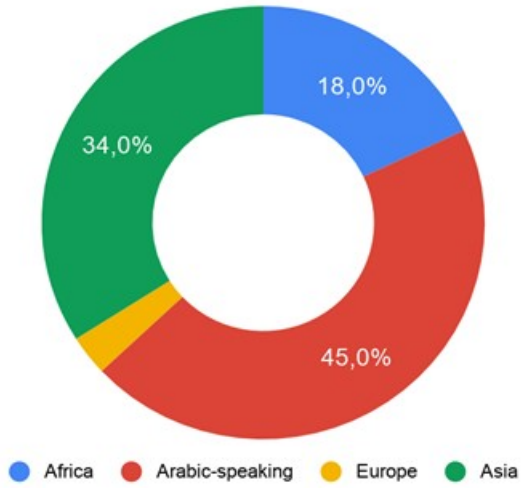
In 2017, the Member States together received a total of 16.155.613 applications for a short-term or Schengen visa, and issued 14.653.724 visas.[36] The Netherlands received a total of around 621.000 applications[37] from applicants of 86 different nationalities.[38] The Dutch authorities issued 550.910 visas and refused around 10% of all applications.[39] The most frequent reasons for the refusal by the

[30] Part of the information listed in this section was provided on request by the Dutch Ministry of Foreign Affairs. The Ministry stressed that it could not share all information regarding the procedure, as parts of it are confidential.
[31] See Annex I and Annex II of this expert opinion.
[32] See Annex II of this expert opinion.
[33] See Annex I of this expert opinion.
[34] Arabic-speaking countries in this context include countries where Arabic is one of or the official language(s).
[35] See UNHCR, Figures at a glance, https://www.unhcr.org/figures-at-a-glance.html
[36] European Commission, Visa Statistics for consulates: 2017, available at https://ec.europa.eu/home-affairs/what-we-do/policies/borders-and-visas/visa-policy_en
[37] Statistics of the European Commission on 2017 state the amount of 621.431 applications. The Dutch Ministry of Justice and Safety states the amount of 621.590 applications. See Dutch Ministry of Justice and Safety, *Rapportage Vreemdelingenketen 2017*, available at https://www.rijksoverheid.nl/documenten/rapporten/2018/04/30/rapportage-vreemdelingenketen-periode-januari-december-2017, p 17. In its communication with the Migration Law Clinic the Dutch Ministry of Foreign Affairs, Section Consular Affairs and Visa Policy, stated 'over 622.000 applications'.
[38] Most applications received are from nationals from: (1) India, (2) Turkey, (3) China and (4) Russia. *See* Dutch Ministry of Justice and Safety, *Rapportage Vreemdelingenketen 2017*, p 17.
[39] European Commission, Visa Statistics for consulates: 2017, available at https://ec.europa.eu/home-affairs/what-we-do/policies/borders-and-visas/visa-policy_en

Dutch authorities in 2017 concerned risk of settlement (e.g. a lack of ties to country of origin) and non-compliance with formal requirements (e.g. not meeting the income requirement).[40]

According to the Dutch Ministry of Foreign Affairs, in 2017 around 142 visas were refused based on the objection of another Member State.[41] This number increased in 2018 to 195 applications as of the beginning of December. According to the Ministry, information regarding which Member States objected and for which nationalities objections were raised remains confidential.

Figure 1: Classification of the countries on the list of the European Commission



3.3 The consultation procedure in other EU Member States

Although at the EU-level, data on the consultation procedure is lacking, it appears that the consultation procedure is widely used and debated beyond the Netherlands as well. In 2012, the Bundesverwaltungsgericht Switzerland (Administrative Federal Tribunal) dealt with the question whether the objection of another Member State automatically results in a refusal of the visa application.[42] In this case no reasons for the objection were given by either the objecting or the consulting state. The applicant asked whether Switzerland had the obligation to request further information on the objection of the other Member State.[43] The Bundesverwaltungsgericht stated that the objection by a Member State in the framework of the consultation procedure has the effect of a veto. It addressed the question whether a limited territorial visa could be granted, if another Member State objects to the issuing of a Schengen visa, and came to the conclusion that there were no grounds for such a visa in the present case.[44]

In response to the decisions taken by the Swiss courts, the German party 'DIE LINKE' requested the German government to disclose statistics concerning the consultation procedure. According to information submitted to the German Parliament ('Bundestag'), from October 2011 until September 2012, the German authorities were required to consult other Member States 1.440.397 times.[45] This

[40] M. van Benthem and B. Tieben, *Toegangswaarde: De maatschappelijke kosten en baten van het Schengen-visumbeleid voor Nederland* (Amsterdam, SEO Economisch Onderzoek, 2018), available at www.seo.nl/uploads/media/2018-80_Toegangswaarde.pdf, p 28.

[41] Information provided by the Dutch Ministry of Foreign Affairs, Section Consular Affairs and Visa Policy, at request of the Migration Law Clinic.

[42] Bundesverwaltungsgericht Switzerland, C-6033/2009 [2012], para D.

[43] Ibid.

[44] Ibid, para 2.1.

[45] Drucksache 17/11016, Deutscher Bundestag, 17. Wahlperiode, 17. Oktober 2012, p 9f.

led to the refusal of 2293 applications for Schengen visa.[46] In the same period, the German authorities were consulted 1.603.433 times by other Member States,[47] and objected in 3.050 cases against the issuance of a visa.[48]

3.4 Diverging case law about the consultation procedure in the Netherlands

In the Netherlands there is diverging case law concerning the consultation procedure. It is important to note that this is (partly) due to the fact that the District Courts are all highest courts in visa cases. The Administrative Jurisdiction Division of the Council of State does not have jurisdiction in visa cases.[49] In contested visa decisions the IND has provided the applicants and courts with varying amounts of information regarding the objection of another Member State against the issuing of a visa, ranging from a little information to absolutely none.

In August 2017, the District Court of Utrecht ruled on a decision refusing a visa based on an objection raised by the Greek authorities.[50] The objection referred to Article 32(a)(vi) VC without any further specification. The District Court followed the reasoning of the Dutch Minister, ruling that as the Netherlands cannot amend or assess the objection of the other state, there was no obligation for the Minister to verify whether the investigation on which the Greek objection was based, was legitimate and lawful. Furthermore, the District Court found there was no obligation to evaluate whether the applicant was a threat to public policy, internal security or public health within the meaning of Article 32(a)(vi) VC.[51] The Court added that the applicant's rights to an effective remedy had been respected, since the applicant could turn to the Greek authorities to inquire about and request a correction of the information concerning him registered in the VIS.[52]

In January 2018, the same District Court ruled on a visa refusal based on an objection raised by the Hungarian authorities.[53] The objection referred to Article 32(a)(ii) and 32(a)(vi) VC as well as to an application for a residence permit in Hungary which the applicant lodged in the past. The Court noted that the Visa Code requires the Netherlands to refuse a visa, if the applicant is a threat to public order.[54] It ruled that Article 22 VC obliges the Netherlands to refuse a visa application, if a Member State objects to it. Therefore, the Netherlands had no obligation to inquire into the objection.

While the District Court Haarlem was examining the case, which gave rise to this expert opinion, it dealt with another case concerning a visa refusal based on the objection of a Member State.[55] The case concerns an Iraqi national living and working in New-Zealand. The decision of the Dutch authorities by which his visa was refused, merely states that one or more Member States objected to grant him a visa because he is considered 'a threat to public order, national safety, public health or international relations'.[56] However, the decision did not disclose which Member State objected, nor on the basis of which of these four grounds.[57] The District Court decided to stall the case until the CJEU will have answered its prejudicial questions concerning the consultation procedure.

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[46] Ibid, p 9f.
[47] Ibid, p 4.
[48] Ibid, p 5.
[49] Art 84(b) Aliens Act 2000.
[50] District Court Den Haag zp Utrecht, 29 August 2017, AWB 17/3064.
[51] Ibid, para 6.
[52] Ibid, para 6; See https://ec.europa.eu/home-affairs/what-we-do/policies/borders-and-visas/visa-information-system_en.
[53] District Court Den Haag zp Utrecht, 29 January 2018, AWB 17/134511.
[54] Ibid, para 5.
[55] Forthcoming case at District Court Den Haag zp Haarlem, AWB 18/7781.
[56] Information provided by the lawyer of the case, Mr. M. Wijngaarden.
[57] Information provided by the lawyer of the case, Mr. M. Wijngaarden.

3.5 Conclusion

The consultation procedure is applied on a large scale by the Member States of the European Union. Moreover, in the Netherlands the application of the consultation procedure leads to diverging case law. In its answers to the preliminary questions submitted by the District Court of Haarlem, the CJEU can provide important guidelines for the use of the consultation procedure in all Member States. The answers to these questions will be relevant for the immigration authorities and national courts, but also for the rights of a large number of visa applicants.

4. The duty to state the reasons of a visa refusal

In this chapter, we will first investigate how the possibility for a Member State to make *objections* to the issuance of a visa, relates to the grounds on which a visa may be *refused* by another Member State. After that, we will discuss the information, which should be provided in the standard form for refusal of a visa under the Visa Code. It will be argued that this standard form should not only mention the ground on the basis of which the visa application was refused, but also the reasons why this ground is considered applicable in the individual case. In this context, the legislative history and objectives of the Visa Code will be addressed.

4.1 The grounds for refusal of a visa application

The text of the Visa Code seems to give room for a refusing Member State to take the opinion of other Member States into account, without any notable restrictions or conditions. According to point vi of Article 32(1) (a) VC, a visa can be refused if the applicant is *considered* to be a threat to public policy, internal security, public health as defined in Article 2(19) SBC.[58] A visa can also be refused, if the international relations of *any* of the Member States is threatened, in particular where an alert has been issued in Member States' national databases for the purpose of refusing entry on the same grounds.

This chapter addresses the question whether this provision, as its wording suggests, gives a *carte blanche* for refusal regardless of whether solid grounds are adduced for the relevant 'consideration' of 'any Member State', or for the 'alert' in the national database of 'any' Member State?

There are several reasons for contesting such a *carte blanche* interpretation of the cited provision. First, according to recital 29 of the Preamble, the Visa Code respects the fundamental rights and observes the principles recognised in particular by the ECHR and by the Charter. As will be set out below, these principles entail a duty to substantiate decisions and to conduct investigations of the relevant facts and circumstances. Second, as far as public policy is concerned, the CJEU considered that the concept of 'risk to public policy' presupposes, in any event, the existence of a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, assessed on a case-by-case basis.[59] The CJEU ruled that, where internal security is at stake, it is for the national authorities to perform an overall assessment of all the elements of that person's situation, in order to determine whether an applicant for a visa represents a threat, if only potential, to public security.[60]

With regard to 'public health', the relevant provision in the Schengen Borders Code only allows measures pertaining to diseases with epidemic potential as defined by the International Health Regulations of the World Health Organization and other infectious diseases or contagious parasitic diseases, if they are the subject of protection provisions applying to nationals of the Member States. Thus, it should in any individual case be investigated whether it is about a disease with epidemic potential or another infectious or contagious disease subject to protection measures applying to nationals of the Member States.

Accordingly, this expert opinion will support the view, that the grounds mentioned in Article 32(1) (a) point vi VC must be assessed on a case-by-case basis and that the refusal decision must be sufficiently substantiated. Below, we will further elaborate on this view.

[58] Currently Article 2(21) of Regulation (EU) 2016/399 (Schengen Borders Code).
[59] CJEU Case 544/13 *Zh. and O* [2015], paras 50, 60.
[60] CJEU Case C-544/15 *Fahimian* [2017] para 43.

4.2 Notification of refusal grounds in the standard form

The drafting history of the Visa Code makes clear that it aims to clarify, develop and supplement the Schengen acquis, which has been integrated into the framework of the European Union.[61] The Schengen acquis concerns *inter alia* the strengthening of procedural guarantees for visa applicants and the transparency of the refusal process. It follows from these objectives, that decision-making procedures should guarantee transparency and equal treatment of all applications.[62]

The standard form included in Annex VI VC requires Member States to choose among eleven reasons, corresponding to the refusal grounds in Article 32(1)(a)(vi) VC.[63] It follows from the wording of the standard form, that its purpose is not only to `notify` the visa applicant of the refusal, but also to `substantiat[e]` the refusal.[64] The duty to substantiate the refusal is further apparent from the drafting history of the standard from. The form was introduced, because of the problem that some Member States `neither notifie[d] nor substantiate[d] grounds for refusal to the applicant, whereas others only substantiate[d] refusals of certain categories of applicants.`[65] `For reasons of transparency and equal treatment of visa applicants` it is now `mandatory [..] both to notify and indicate grounds for refusal in all cases`.[66] The requirement of substantiating a decision can also be found in the legislative context of the Visa Code. In this respect, the legislator considered that the Schengen Border Code[67] contains a provision requiring that an `entry may only be refused by a substantiated decision stating the precise reasons for the refusal [..], [which] shall be given by means of a standard form`.[68] By also introducing a similar standard form in the Visa Code, the legislator aimed to `ensure coherence in related legislation`.[69]

However, the standard form only contains summary information, indicating the formal ground for refusal without providing any information on how the refusing Member State came to its assessment. The 'complex nature of the examination of visa applications'[70] is not mirrored by these simplified standard reasons for refusal. In light of the huge numbers of visa applications, which must be processed efficiently and expeditiously, the use of standard forms for substantiating refusals may be understandable as a general practice. However, when a visa applicant wishes to challenge the decision, he will have to be provided with more precise reasons for the visa refusal, than just a short reference to the standard form. Otherwise, it would be impossible to ascertain whether the decision is based on legal grounds and on a sufficient factual basis.

In this regard, special attention must be given to point 6 of the standard form. If the ground for refusal is based on point 6 of the standard form, then the applicant will read that 'one or more Member State(s) consider you to be a threat to public policy, internal security, public health as defined

[61] European Commission, Draft proposal for a Regulation of the European Parliament and of the Council establishing a Community Code on Visas, COM (2006)403 final, p 5.
[62] Ibid, p 8, section 3.1.
[63] Annex VI VC.
[64] In languages of other Member States which are equally relevant `substantiating` has the meaning of giving reasons (Dutch: `motivering`; French: `motiver`; Italian `motivazione`; German: `Begründung`).
[65] European Commission, Draft proposal for a Regulation of the European Parliament and of the Council establishing a Community Code on Visas, COM (2006)403 final, p. 9.
[66] Ibid.
[67] Regulation (EU) 2016/399 of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) [2016] OJ L 77/1.
[68] Art 14(2) SBC.
[69] European Commission, Draft proposal for a Regulation of the European Parliament and of the Council establishing a Community Code on Visas, COM (2006)403 final, p 9, section 3.1.
[70] CJEU Case C-84/12 *Koushkaki* [2013], paras 56-58.

in Article 2(19) of Regulation (EC) No 562/2006 (Schengen Borders Code) or the international relations of one or more Member States'.[71]

Thus, if a visa refusal is based on point 6 of the standard form in Annex VI VC, this will only inform the visa applicant that the decision is based on one (or more) of these four substantially very different grounds. This means that the applicant will not know which of the four was brought against him or her, let alone on what factual basis the assessment was made by which Member State. It is therefore questionable whether point 6 of the standard form is in line with the wording, objectives and the legislative context of the Visa Code. Point 6 is formulated in unclear terms, which do not refer to any factual circumstances. Thus, point 6 fails to meet the premises of the wording of the standard form (`substantiating`) as well as the objective of transparency through substantiation of the refusal grounds as pursued by the drafter.

It follows from the reference to the definition of public health as defined in Article 2(19) SBC, that the legislator wanted to interpret point 6 of the Visa Code standard form coherently with the SBC.[72] However, point 6 fails to achieve this legislative coherence. The standard form for the refusal of entry is to be found in Annex V, part B SGB. The wording of its point (I) is nearly the same as in point 6 of the Visa Code standard form. However, in contrast to the latter, the former contains an additional text in italic, namely 'each State must indicate the references to national law relating to such cases of refusal of entry'.

4.3 Conclusion

On the basis of the legislative history, objectives and wording of the Visa Code and the Schengen Borders Code, it must be concluded that point 6 of the standard form in the Visa Code alone is not a sufficient substantiation for the visa refusal. This also holds true, if the visa refusal is based on an objection of another Member State. Moreover, the legislative coherence between the Visa Code and the Schengen Borders Code should be guaranteed. Drawing on the standard form in the Schengen Borders Code, Member States should - also in the context of the Visa Code - in addition to ticking point 6 of the Visa Code standard form, `indicate [further] references relating to such cases of [visa refusals]`. [73] In the consultation procedure, additional information which exceeds the mere information of an existing objection is required - already at the administrative stage.

[71] The reference to the Schengen Borders Code is outdated and should be read as: Art 2(21) of Regulation (EU) 2016/399 (Schengen Borders Code)

[72] The fact that reference is made here to Schengen Borders Code of 2006 does not change the interpretation as the relevant text in the Schengen Borders Code of 2016 (Annex V, part B) remained the same.

[73] See Annex V, part B, point 6 SBC.

5. The right to an effective remedy

Article 32(3) VC provides a visa applicant whose application is refused with a right to appeal against the refusal decision. This right to appeal has been considered by the European Parliament as a 'key element' of legal guarantees for visa applicants.[74] This chapter examines how this provision should be interpreted in the light of Article 47 of the Charter. Which Member State is responsible for providing an effective remedy? Which rights with regard to judicial review and the statement of reasons follow from Article 47 of the Charter? May these rights be limited in visa cases to the extent that no reasons need to be provided for the objection of another Member State against the issuance of a visa?

5.1 An effective remedy in the objecting state?

Before focusing on the merits of the right to appeal against refusal of a visa, it should be investigated which Member State is obliged to guarantee this right. Article 32(3) VC provides that 'appeals shall be conducted against the Member State that has taken the final decision on the application'. This is reiterated in the Visa Code Handbook of the European Commission.[75] Clearly, the VC grants a right to appeal solely against the final decision of the refusing Member State.[76] There is no right to appeal in the VC against an objection of another Member State.

Nevertheless, it has been suggested to applicants, whose visa was refused based on an objection, to seek legal remedies against the refusal in the objecting Member State.[77] Apart from the fact that the Visa Code does not oblige an objecting Member State to offer the possibility to a legal remedy, it is open to serious doubt whether this would constitute an effective legal remedy. The practical problems an applicant would run into may obstruct access to a legal remedy. The process could take a lot of time, which is unreasonable for a short-term visa application. Moreover, as emphasised by the Dutch national ombudsperson (*Nationale Ombudsman*) in a report of 2015 on visa representation in the framework of the Visa Code, it is '(almost) impossible' for the applicant to litigate in a foreign language and foreign legal system.[78] The procedures to appeal visa decisions vary widely in the national legal systems of the Member States, in terms of language requirements, timelines of submitting the appeal and possibilities of judicial appeal or administrative review.[79] Especially in a country where there is no family member or other sponsor residing, applicants will have a lot of trouble to gain access to information regarding the procedures.[80] Similar issues play a role in preliminary questions concerning the access to effective judicial protection in the case of visa representation, which are currently pending before the CJEU.[81] The practical problems connected with

[74] Council of the European Union, Draft Regulation of the European Parliament and of the Council establishing a Community Code on Visas [2009], document no. 7293/09, p 2.

[75] European Commission, Consolidated version of the Handbook for the processing of visa applications and the modification of issued visas, C (2011) 5501 (2011), p 77.

[76] See also the Opinion of Advocate-General Sharpston in Vethanayagam, C-680/17, para. 64 et seq.

[77] District Court Den Haag zp Utrecht, 29 August 2017, AWB 17/3064, para 6, District Court Den Haag zp Utrecht, 29 January 2018, AWB 17/134511, para 5.

[78] Nationale Ombudsman, *Hoe is jouw Zweeds?*, Report no. 2015/128 (2015), available at www.nationaleombudsman.nl/system/files/rapport/20150128.pdf, p. 4.

[79] P. Boeles, Annotation with District Court Den Haag zp 's-Hertogenbosch, 22 February 2016, AWB 15/1746 in *JV* 2016/126, European Union Agency for Fundamental Rights, *Annual Report Fundamental rights: challenges and achievements in 2013* (2014), p 71 (table 2.4). A further example is the reasoned opinion to start infringement procedures by the European Commission in October 2014 against Member States lacking a national procedure to appeal a refused visa. See Commission, 'Memo 14/589: October infringements package: main decisions' (2014), available at http://europa.eu/rapid/press-release_MEMO-14-589_en.htm, p 5.

[80] E.R. Brouwer, 'Uitspraak uitgelicht: Gebrekkige rechtsbescherming bij visumweigering op basis van vertegenwoordiging' *Asiel & Migrantenrecht* (2016), p 190

[81] CJEU Case C-680/17 *Vethanyagham*.

appeal in a foreign country are a '*de facto* bar to appeal'.[82] This is also illustrated in the underlying cases of this expert opinion.[83] The lawyer of the applicant requested multiple Hungarian authorities to provide information regarding the objection against the issuance of the visa by the Dutch authorities. None of these Hungarian authorities was willing to comment on the objection, nor to inform the lawyer where to submit further inquiries. In conclusion, referring the applicant whose visa has been refused by the consulted state, to seek remedy in the objecting Member State does not guarantee access to a legal remedy.

5.2 Relevance of Article 47 of the Charter

The right to appeal should be read in accordance with Article 47 CFR, protecting the right to effective judicial remedy.[84] The CJEU found in *El-Hassani* that 'the interpretation of the provisions of the Visa Code, as is clear from recital 29 thereof, must be carried out in accordance with the fundamental rights and principles recognised by the Charter'.[85] From this judgment, it follows that although the Visa Code leaves room for the Member States to decide about the nature and specific proceedings of the appeal,[86] the right to appeal must be effective.[87] Furthermore, as held by the CJEU in *El Hassani*, the national procedures shall not make 'the right to appeal excessively difficult or impossible in practice' (principle of effectiveness) and the appeal procedure shall be 'not less favourable than [those] governing similar domestic situations' (principle of equivalence).[88]

5.3 Interpretation of Article 47 CFR in the light of the ECHR

Article 47(1) CFR is based on Article 13 ECHR, but the scope of the former is broader. Article 47 CFR guarantees the right to an effective remedy before a court. Article 47(2) CFR corresponds to Article 6(1) ECHR, which entails the right to a fair trial. Contrary to Article 6(1) ECHR, however, Article 47(2) CFR is not confined to civil law rights and obligations.[89] The fact that Article 47 CFR has `acquired a separate identity and substance under that article which are not the mere sum of the provisions of Articles 6 and 13 of the ECHR`, was emphasised by A-G Cruz Villalón in the case *Samba Diouf*.[90] In this respect, it ruled that `Article 47 of the Charter secures in EU law the protection afforded by Article 6(1) of the ECHR. It is necessary, therefore, to refer only to Article 47.'[91]

Nevertheless, the case law of the ECtHR is relevant to interpret the standard of Article 47 CFR. Article 52(3) CFR states: `In so far as this Charter contains rights which correspond to rights guaranteed by the ECHR, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law for providing more extensive protection.` From

[82] Nationale Ombudsman, *Hoe is jouw Zweeds? ('How is your Swedish?')* , Report no. 2015/128 (2015), p 4.
[83] See section 1.1 of this expert opinion.
[84] Art 52(1) of the Charter obliges the Member States to respect the fundamental rights of the Charter whenever they act within the scope of EU law. See also Explanations relating to the Charter of Fundamental Rights, [2007] OJ C 303/17, Art 51 and CJEU Case C-403/16 *El-Hassani* [2017], paras 32-33, 42, CJEU Case C-256/11 *Dereci* [2011], para 71.
[85] CJEU Case C-403/16 *El-Hassani* [2017], para 32. See also the Opinion of Advocate-General Sharpston in Vethanayagam, C-680/17, para. 80.
[86] Ibid, para 25. Art 32(3) VC stipulates that 'the appeal shall be conducted [...] in accordance with the national law of that Member State'.
[87] CJEU Case C-403/16 *El-Hassani* [2017], para 26; European Union Agency for Fundamental Rights, 'Annual Report Fundamental rights: challenges and achievements in 2013' (2014), p. 70
[88] CJEU Case C-403/16 *El Hassani* [2017], para 26.
[89] Explanations relating to the Charter of Fundamental Rights, [2007] OJ C 303/17**,** Art 47.
[90] CJEU Case C-69/10 *Samba Diouf* [2011], Opinion Advocate General Cruz Villalón, para 39.
[91] CJEU Case C-199/11 *Otis and Others* [2012], para 47, Case C-386/10P *Chalkor v Commission*, para 51.

this provision it follows that `consistency between the Charter and the ECHR` has to be maintained.[92] In this regard, the Explanation of the Charter clearly states that not only the text of the ECHR is relevant to determine the scope of the rights, but also the case law of the ECtHR. Furthermore, it is clear that `[i]n any event, the level of protection afforded by the Charter may never be lower than that guaranteed by the ECHR`.[93]

As the ECtHR case law on Articles 6 and 13 ECHR serves the CJEU as a guidance for interpretation of Article 47 CFR,[94] this expert opinion will refer to the case law of the ECtHR in addition to the case law of the CJEU.

5.4 Requirements following from Article 47 of the Charter

Article 47 CFR requires that every contested decision taken by the authorities of the Member States is subject to an effective judicial review.[95] The national court needs to be capable to `consider all the questions of fact and law that are relevant to the case before it`.[96] Furthermore, as established by the CJEU, the court `must be able to review the merits of the reasons` which led the authority to take the decision.[97] This means that the court is entitled to review the very substance of a case besides matters of jurisdiction, procedure and form. In *El Hassani* the CJEU emphasised that `all relevant issues` of the administrative decision have to be `subject to subsequent control by a judicial body`.[98]

5.4.1 The rights of the defence and the right to be heard

The right to an effective remedy includes the rights of the defence, which in its turn encompasses the right to be heard, the right to equality of arms and the right to adversarial proceedings. The principle of equality of arms guarantees that each party must be afforded a reasonable opportunity to present his case, including evidence, under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent.[99] The right to adversarial proceedings entails the opportunity for the parties to have knowledge of and comment on the observations filed or evidence adduced by the other party.[100]

The right to be heard applies in all procedures in which national authorities make a decision affecting an individual [101], regardless of whether it is expressly established in the applicable legislation.[102] This right ensures the possibility for the affected individual to express his or her views on the facts, evidence and grounds on which a decision is based,[103] so as to enable the person to correct an error or to submit information that can be important for the decision.[104] As a consequence,

[92] Explanations relating to the Charter of Fundamental Rights, [2007] OJ C 303/17, Art 52.
[93] Ibid.
[94] CJEU Case C-348/16 *Moussa Sacko* [2017], paras 39-40, Case C-562/13 *Abida* [2014], paras 47, 52, Case C-465/07, *Elgafaji* [2009], para 28.
[95] CJEU Case C-327/ 02 *Panayotova* [2004], para 27, CJEU Case C-506/04 *Wilson* [2004], para 46.
[96] CJEU Case C-199/11 *Otis and Others* [2012], para 49, CJEU Case C-430/10 *Gaydarov* [2011], para 41, CJEU Case C-69/10 *Samba Diouf* [2011], para 57, CJEU Case C-506/04 *Wilson* [2004], paras 46 and 61 and further.
[97] CJEU Case C-348/16 *Moussa Sacko* [2017], para 36, Case C-69/10 *Samba Diouf* [2011], CJEU Case C-222/86 *Unectef* [1987], para 15
[98] CJEU Case C-403/16 *El Hassani* [2017], para 39.
[99] CJEU Case C-199/11 *Otis and Others* [2012], para 71.
[100] ECtHR 23 June 1993, *Ruiz Mateos v Spain*, Appl No 12952/ 87, para 63.
[101] CJEU Case C-277/11 *M.M.* [2012], para 85.
[102] CJEU Case C-166/13 *Mukarubega* [2014], para 49 and case law cited therein.
[103] Ibid, para 46.
[104] Ibid, para 47, Case C-348/16 *Moussa Sacko* [2017], para 35.

the right to be heard in itself requires the individual to have access to these facts.[105] Authorities are required to provide reasons for the decision to the applicant as a precondition for an effective exercise of the right to be heard.[106]

In this context, it is relevant whether the national court holds enough information without hearing the applicant (e.g. from the case-file) to properly conduct the examination required by the appeals procedure in order to make a decision.[107] A hearing of the applicant can only be omitted, if the individual circumstances of the case raise no issues of fact and evidence[108], allowing the court to decide the case fairly and reasonably without a hearing.[109] A violation of the right to be heard will result in an annulment of the concerned decision, if the outcome of the decision 'might have been different' if the individual concerned was heard.[110]

5.4.2 The duty to state reasons

It has been underlined by the CJEU in previous case law that the right to be heard implies that the authorities `state reasons for a decision which are sufficiently specific and concrete to allow the person concerned to understand why his application is being rejected`.[111] A sufficiently reasoned decision ensures that the applicant has the opportunity to effectively express his or her view on this decision.[112]

Moreover, the duty to state reasons is closely related to the right to an effective remedy. The CJEU considered that

> if the judicial review guaranteed by Article 47 of the Charter is to be effective, the person concerned must be able to ascertain the reasons upon which the decision taken in relation to him is based, either by reading the decision itself or by requesting and obtaining notification of those reasons, without prejudice to the power of the court with jurisdiction to require the authority concerned to provide that information [..], so as to make it possible for him to defend his rights in the best possible conditions and to decide, with full knowledge of the relevant facts, whether there is any point in his applying to the court with jurisdiction.[113]

According to the CJEU, a sufficiently reasoned decision puts the court 'fully in a position in which it may carry out the review of the lawfulness of the national decision in question'.[114] General and stereotyped reasons which do not behold any specific element of information related to the individual case of the applicant, are not sufficient to meet the requirements of substantiation.[115]

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[105] General Court Case T-228/02 *Organisation des Modjahedines du peuple d'Iran v Council* [2006], para 93, CJEU Joined Cases C-402/05 P and C-415/05 P *Kadi v Council* [2008], para 348, M. Reneman, *EU Asylum Procedures and the Right to an Effective Remedy* (Diss, Leiden, 2012) p 97.

[106] CJEU Case C-277/11 *M.M.* [2012], para 88.

[107] CJEU Case C-348/16 *Moussa Sacko* [2016], para 44.

[108] This was explicitly stated by the CJEU in CJEU Case C-348/16 *Moussa Sacko* [2016], paras 39 and 47, where it referred to the case law of the ECtHR. See ECtHR 12 November 2002, *Döry v Sweden*, Appl no 28394/95, para 37, ECtHR 23 November 2006, *Jussila v Finland*, Appl no 73053/01, para 41.

[109] ECtHR 23 November 2006, *Jussila v Finland*, Appl no 73053/01, para 41.

[110] Case C-383/13 PPU, *G and R* [2013], para 38, CJEU Joined Cases C-191/09 P and C-200/09 P *Council and Commission v Interpipe Niko Tube and Interpipe NTRP* [2012], para 79. See also D Leczykiewicz, 'Human Rights and the Area of Freedom, Security and Justice', in: M. Fletcher, E. Herlin-Karnell and C. Matera (eds.), *The European Union as an Area of Freedom, Security and Justice* (London, Routledge, 2016) p 79, M Reneman, *EU Asylum Procedures and the Right to an Effective Remedy* (Diss, Leiden, 2012) p 103.

[111] CJEU Case C-166/13 *Mukarubega* [2014], para 48, CJEU Case C-277/11 *M.M.* [2012], para 88.

[112] CJEU Case C-277/11 *MM* [2012], para 8.

[113] CJEU Case C-300/11 *ZZ* [2013], para 53.

[114] Ibid.

[115] CJEU Case T-132/03 *Casini v Commission* [2005], para 35.

5.5 Limitations to the right to an effective remedy

The CJEU considered that the failure to provide an individual the opportunity to be heard in appeal 'constitutes a restriction of the rights of the defence'.[116] The right to an effective remedy, including the rights of the defence and the right to be heard, are not absolute. Art. 52(1) of the Charter provides that limitations of a fundamental right (such as Article 47 of the Charter)

> must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.[117]

Whether a limitation of the right to an effective remedy is justified, must be examined according to the individual circumstances of the case.[118]

5.5.1 Limitations of the right to an effective remedy in visa proceedings

It is clear that the omission of a statement of reasons for the refusal of a visa application and the lack of judicial review of the reasons underlying the other Member State's objection to the issuance of a visa, constitute a limitation to the right to an effective remedy. The question is whether such limitation is justified by the wide discretion granted to Member States and the nature of the rights and interests at stake in visa cases.

In his opinion with the *El Hassani* case, Advocate-General Bobek stated that the wide margin of discretion that Member State enjoy in matters of visas `logically translates into a lighter standard of judicial review to be carried out by the Member States' courts'.[119] In his view, it is sufficient for national courts to ensure that the visa refusal was not arbitrarily decided, but corresponded to the facts as ascertained by the administrative authority and was taken within the confines of the administration's discretion. This line of thought was not repeated in the CJEU's judgment in that case. In para 36, the Court rather underlined that the wide margin of appreciation cannot detract from the applicability of the EU law:

> Although it is true that in examining a visa application the national authorities have a broad discretion as regards the conditions for applying the grounds of refusal laid down by the Visa Code and the evaluation of the relevant facts, the fact remains that such discretion has no influence on the fact that the authorities directly apply a provision of EU law.

However, earlier in the same year, in a case about visas and national security, the CJEU had used similar wordings as Advocate-General Bobek. In *Fahimian*, the CJEU considered:

> since the competent national authorities have a wide discretion in assessing the facts, judicial review is limited, as far as that assessment is concerned, to the absence of manifest error. Judicial review must also relate to compliance with procedural guarantees, which is of fundamental importance. Those guarantees include the obligation for those authorities to examine carefully and impartially all the relevant elements of the situation in question [..], and

[116] CJEU Case C-348/16 *Moussa Sacko* [2016], para 37.
[117] See also CJEU Case C-348/16 *Moussa Sacko* [2016], para 38, Case C-166/13 *Mukarubega* [2014], para 53.
[118] CJEU Case C-348/16 *Moussa Sacko* [2016], para 41, Joined Cases Joined Cases C-584/10 P, C-593/10 P and C-595/10 P *Commission and Others v Kadi* [2013], para 102.
[119] CJEU Case C-403/16 *El Hassani* [2017], Opinion Advocate General Bobek, para 109.

> also the obligation to give a statement of the reasons for their decision that is sufficient to enable the national court to ascertain, in connection with the right of challenge provided for in Article 18(4) of Directive 2004/114, whether the factual and legal elements on which the exercise of the power of assessment depends were present.[120]

It is not clear, whether this paragraph of the *Fahimian* case must be considered to impact on all visa procedures, or remains limited to cases where national security is at issue. In de next section, some observations are devoted to the specific character of national security cases.

5.5.2 Limitations in cases concerning national security

There may be a justification to keep information underlying the decision confidential in the specific case that a refusal of a visa is based on a threat to public security. Therefore, this paragraph contains some specific observations with regard to this point. It should be borne in mind, that such confidentiality is in principle not justified ,if a refusal is based on the other grounds mentioned in point 6 of the standard form: a threat to public order, public health or international relations.

In *Fahimian*, the CJEU repeated its view that the concept of 'public security' covers both the internal security of a Member State and its external security. Public security may thus be affected by a threat to the functioning of institutions and essential public services and the survival of the population, as well as by the risk of a serious disturbance to foreign relations or the peaceful coexistence of nations, or a risk to military interests.[121]

Limitations to the elements of the rights of the defence may be justified to protect national security, however under the condition, as held by both the CJEU and the ECtHR, that these limitations are proportional to the rights and interests of the individual and serve a legitimate aim.[122] In such cases, a fair balance has to be found between the state interest to preserve sensitive information and the individual's right to an effective remedy.[123] The non-disclosure of confidential information has to be counterbalanced by guaranteeing the applicant additional procedural safeguards.[124]

The rights of the defence of the applicant may be limited in cases concerning national security, but its essence should be respected. When asked to review a decision involving confidentiality, the CJEU has used Article 31(3) of the Council Directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (Union Citizenship Directive)[125] as a source of inspiration.[126] According to this provision, the appeal against a decision affecting a person based on grounds of public policy, public security or public health 'shall allow for an examination of the legality of the decision, as well as of the facts and circumstances on which the decision is based'.[127] Judicial review has to be possible to the extent that it is able to

[120] CJEU Case C-544/15 *Fahimian* [2017], para 46.
[121] Ibid, para 39.
[122] CJEU Case C-348/16 *Moussa Sacko* [2016] para 38; CJEU Case C-249/13 *Boudjlida* [2014], para 43, ECtHR 19 February 2009 *A and Others v The United Kingdom* Appl No 3455/05, para 205, ECtHR 16 February 2000 *Fitt v The United Kingdom* Appl No 29777/96, para 45, ECtHR 20 June 2002 *Al-Nashif v Bulgaria* Appl No 50963/99 para 136.
[123] CJEU Case C-300/11 *ZZ*, para 64. See also ECtHR 19 February 2009 *A and Others v The United Kingdom* Appl No 3455/05, paras 205-208, 217-218.
[124] ECtHR 19 February 2009 *A and Others v The United Kingdom* Appl No 3455/05, paras 205-210
[125] Council Directive 2004/38/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC [2004] OJ L 158/77.
[126] General Court Case T-228/02 *Organisation des Modjahedines du peuple d'Iran v Council* [2006], para 157.
[127] Art 31(3) Directive 2004/38/EC.

guarantee 'the obligation for [..] authorities to examine carefully and impartially all the relevant elements of the situation in question'.[128]

As a consequence, the authorities are obliged 'to give a statement of the reasons for their decision that is sufficient to enable the national court to ascertain, [..] whether the factual and legal elements on which the exercise of the power of assessment depends were present'.[129] Moreover, the reviewing court must be able to verify whether the disclosure of the allegedly confidential information would indeed constitute a risk for national security.[130] National security considerations thus cannot justify the non-disclosure of the reasons for a decision and its underlying evidence to the national courts.

National security concerns may justify non-disclosure of evidence underlying a decision or reasons for the decision to the applicant.[131] The CJEU considered that sometimes disclosure of such evidence

> is liable to compromise State security in a direct and specific manner, in that it may, in particular, endanger the life, health or freedom of persons or reveal the methods of investigation specifically used by the national security authorities and thus seriously impede, or even prevent, future performance of the tasks of those authorities.[132]

However, the CJEU has held in the context of Directive 2004/38/EC that the failure to disclose the reasons for and evidence underlying the decision should be limited to that, which is 'strictly necessary'.[133] Moreover, it considered that

> the person concerned must be informed, in any event, of the essence of the grounds on which a decision […] is based, as the necessary protection of State security cannot have the effect of denying the person concerned his right to be heard and, therefore, of rendering his right of redress as provided for in Article 31 of that directive ineffective.[134]

It follows from the above that a person can only make effective use of his or her right to an effective remedy, if at least the essence of the grounds of the decision is provided to him. The CJEU held that the interest of national security cannot justify that the essence of the grounds of the decision is not disclosed to the person concerned.

The European Courts have held that States should apply 'techniques and rules of procedural law which accommodate, on the one hand, legitimate State security considerations regarding the nature and sources of the information taken into account in the adoption of such a decision and, on the other hand, the need to ensure sufficient compliance with the person's procedural rights, such as the right to be heard and the adversarial principle'.[135] One such safeguard is to make use of special advocates who will represent the applicant with knowledge of the confidential information without

[128] CJEU Case C-544/15 *Fahimian* [2017], para 46.
[129] Ibid. See also CJEU Case C-300/11 *ZZ*, para 59.
[130] CJEU Case C-300/11 *ZZ*, para 62. See also General Court Case T-228/02 *Organisation des Modjahedines du peuple d'Iran v Council* [2006], paras 155 and further, ECtHR 20 June 2002 *Al-Nashif v Bulgaria*, Appl No 50963/99, para 137.
[131] CJEU Case C-415/05 P *Kadi v Council and Commission* [2008] ECR I-6351, para 342.
[132] CJEU Case C-300/11 *ZZ*, para 66.
[133] Ibid, paras 64, 69.
[134] Ibid, para 65.
[135] Ibid, para 57, ECtHR 20 June 2002 *Al-Nashif v Bulgaria*, Appl No 0963/99, para 95.

sharing the information to the applicant.[136] The ECtHR also suggested to provide the applicant a redacted summary of the relevant confidential information.[137]

5.6 Application of Article 47 to the Visa Code

In the cases under consideration, there are three reasons for deeming Article 47 CFR violated. In the first place, the Dutch authorities only based their decision to refuse the visa on the objection of the other EU Member State, without asking for the reasons for this objection. Such a simple referral to an unsubstantiated objection by another Member State can hardly be considered as a 'careful' and 'impartial' examination of 'all the relevant elements', as was required by the CJEU in *Fahimian*.[138]

Secondly, the national court was not informed of the evidence and the reasons underlying the other Member State's decision to object to the issuance of a visa to the applicant. As a result the court was not able to assess whether it was necessary (in the light of national security or for other reasons) to keep the reasons for the objection confidential. Moreover, the court was not able to effectively review whether a manifest error was made and whether procedural guarantees were complied with by the refusing and the objecting Member State. The national court could have made use of its power to request further information from the authorities.[139] However, if the authorities refuse to give further information, the court will be powerless. It has no choice but to quash the decision, because it is not able to review the decision on the visa application.[140]

Finally, it was rendered impossible or at least excessively difficult for the visa applicants to exercise the right to an appeal against the visa decision conferred by the Visa Code. The mere referral to an objection by another Member State cannot be qualified as a sufficient statement of reasons, which enables the applicant to 'defend his rights in the best possible conditions and to decide, with full knowledge of the relevant facts, whether there is any point in his applying to the court with jurisdiction'.[141] The national courts did not apply any techniques in order to accommodate the applicant's procedural right, even though that would be possible in visa cases.

5.6.1 Charter-conform interpretation of the Visa Code

The complete lack of substantiation in visa cases in which the consultation procedure is applied, is partly due to the text of the Visa Code itself. As was shown above, the obligation for the Member State to substantiate a refusal decision is limited in the Visa Code to the obligation to fill in a standard form, which is particularly unsatisfactory with regard to the four grounds sampled in point 6 of the standard form, applicable in the case at hand. Even if the use of a standard form may generally be justified by the huge numbers of applications that must be processed efficiently and expeditiously, its contribution to an effective judicial remedy is almost nihil.

The problem regarding the insufficiency of the standard form must be solved by Charter-conform interpretation. As the CJEU stated in *El Hassani*, the interpretation of the provisions of the Visa Code must be carried out in accordance with the fundamental rights and principles recognised by the Charter.[142] In this case, it is not the text of the Visa Code itself falling short of guaranteeing the rights of the applicant, but primarily the text of an Annex of the Visa Code. There is room to read a

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[136] ECtHR 20 June 2002 *Al-Nashif v Bulgaria*, Appl No 0963/99 para 95, ECtHR 19 February 2009 *A and Others v The United Kingdom*, Appl No 3455/05, para 209, ECtHR 24 April 2008 *CG and Others v Bulgaria*, Appl No 1365/07, para 57

[137] ECtHR 19 February 2009 *A and Others v The United Kingdom*, Appl No 3455/05, para 210

[138] CJEU Case C-544/15 *Fahimian* [2017], para 46.

[139] CJEU Case C-222/86 *Unectef* [1987], para 15, CJEU Case C-430/10 *Gaydarov* [2011], para 41.

[140] Compare CJEU Case C-300/11 *ZZ* [2013], para 63.

[141] CJEU Case C-300/11 *ZZ* [2013], para 53.

[142] CJEU Case C-403/16 *El Hassani* [2017], para 32.

wider obligation to state reasons than those embodied in the standard form in the Visa Code itself. The annex does not have the same weight as a regulation, and can be amended by the European Commission.[143]

5.6.2 Obligations of an objecting Member State

This expert opinion has focused on the obligations of the refusing Member State to investigate the facts, to state reasons and to offer an effective judicial remedy before the national court. What can in this regard be said about obligations of Member States making an objection against the issuance of a visa? Are they also under an obligation to conduct 'complex evaluations based, inter alia, on the personality of that applicant, his integration in the country where he resides, the political, social and economic situation of that country and the potential threat posed by the entry of that applicant to public policy, internal security, public health or the international relations'?

It is difficult to find convincing reasons why Member States would be allowed to apply a less rigorous scrutiny, when considering to make an objection against the issuance of a visa than the deciding Member State. It should be noted that the final decision may be decisively influenced by the objecting Member State. According to the Dutch authorities, an objection should even automatically lead to the refusal of the visa application. The duty of Member States to cooperate in order to facilitate the procedure, mentioned in recital 13, 18 of the Visa Code, should also extend to the consultation procedure. The duty to communicate the reasons for the objection to the consulting Member State is supported by the `principle of genuine cooperation underlying the *Schengen acquis*`,[144] which finds expression in various points of the Visa Code. Recital 13 refers to several cooperation forms, Recital 18 refers to the Local Schengen Cooperation for which the Commission, based on Article 53(2) VC, drafted a handbook containing operational instructions for the that cooperation.[145] Article 22(5) VC points to the consultation procedure to be carried out via the Schengen Consultation Network until its replacement. Drawing on this principle of cooperation, a statement of the CJEU in *Commission v Spain*, referring to the consultation procedure within the SIS,[146] becomes equally applicable to the consultation procedure within Article 22 VC. Applying the statement to the VC, it could be phrased in the following way: `[..] although the principle of genuine cooperation underpinning the Schengen acquis implies that the [consulting state] should give due consideration to the [objection of another Member State], it also implies that the [objecting Member State] should make supplementary information available to the consulting Member State to enable it to gauge, in the specific case, [whether that person is a threat to one of grounds listed in Article 32(1)(a)(vi) if the Visa Code].`[147]

This would entail an obligation for all involved Member States to cooperate in duly assessing the facts and stating reasons for the decision. This has also been acknowledged by Peers who stated that `an obligation for the consulted Member State to give reasons for its objection is necessarily implied for the Visa Code, for in the absence of such reasons it would be impossible for the consulting Member State [..] to satisfy its obligation to give reasons for its rejection of the application, and for

[143] See Recital 21 Preamble VC.

[144] CJEU Case C-503/03 *Commission of the European Communities v Kingdom of Spain* [2006], para 56.

[145] Draft Commission Decision of 11 June 2010 establishing the Handbook for the organisation of visa sections and local Schengen cooperation, Recital 2, p 3.

[146] CJEU Case C-503/03 *Commission of the European Communities v Kingdom of Spain* [2006], para 56.: `although the principle of genuine cooperation underpinning the Schengen *acquis* implies that the State consulting the SIS should give due consideration to the information provided by the State which issued the alert, it also implies that the latter should make supplementary information available to the consulting State to enable it to gauge, in the specific case, the gravity of the threat that the person for whom an alert has been issued is likely to represent.`

[147] Ibid.

the applicant to exercise effectively his or her right of appeal against this rejection [...]`.[148] The principle of mutual trust cannot exempt the authorities from complying with fundamental rights. In *Donnellan,* the CJEU explicitly referred to mutual trust within the area of freedom, security and justice.[149] It held that the authorities of one Member State do not have to enforce the decision made by the authorities of another Member State if the latter did not comply with Article 47 CFR,[150] in particular with their duty to state reasons of the decision.[151] An objection is not a decision having direct effects towards the visa applicant. Nevertheless, if the consulting authorities automatically refuse a visa based on an objection of another Member State, this objection affects the applicant as if it were a decision.

However, the final responsibility for granting or rejecting the visa should rest with the deciding Member State, which is the 'natural forum'[152]. Thus, if an objecting Member State would refuse to give sufficient information to support the decision in the visa application to the deciding Member State, there should be no other option for the deciding Member State to ignore the objection and to make its own assessment.

5.7 Conclusion

It should be concluded that the essence of the right to equality of arms, the right to be heard and as a result the right to an effective remedy is not respected, if the applicant and the court remains fully ignorant about (a) which of the four grounds mentioned in point 6 of the standard form is applicable to the individual application and (b) on what concrete grounds the Member State based its assessment. This is the more so, if the refusal is not based on an assessment by the refusing Member State itself but on an unspecified objection by another Member State. Even if it is summarily indicated that it is a matter of public policy, internal security, public health or international relations, there is no guarantee in such cases that arbitrary refusals of visas are prevented. Such severe limitations of the right to an effective remedy cannot be justified by the wide discretion for the Member State or the nature of rights and interests (including national security) at stake in visa cases.

The problem could be solved by interpreting the Visa Code in conformity with Article 47 of the Charter. The Annex to the Visa Code, which includes the standard form for refusal of a visa should be amended in order to ensure that sufficient reasoning of a visa decision is provided to the person concerned.

It follows from the Member States' duty to examine a visa application carefully and impartially, taking into account the individual circumstances of the case, that the objecting Member State should provide information and reasons underlying the objection to the Member State deciding on the visa application. This can also be derived from the duty to cooperate in the context of the visa system.

[148] S. Peers, E. Guild and J. Tomkin (Eds.) *EU immigration and asylum law*, *Volume 1 Visas and border controls* (Leiden, Martinus Nijhoff, 2012), p 261.
[149] CJEU Case C-34/17 *Donnelan* [2018], paras 40 and 50.
[150] Ibid, para 62.
[151] Ibid, para 55.
[152] In the wordings of Advocate-General Sharpston in her opinion in Vethanayagam, C-680/17, para. 65.

6. Conclusion

This expert opinion concerns the rejection of visa applications by the Dutch authorities on the basis of an objection of another Member State made during the consultation procedure. The decision to reject the visa application does not mention which Member State objected to the issuance of a visa nor on which information or reasons this objection was based. In the standard form for rejecting a visa application (included in Annex VI to the Visa Code), it is just indicated that the refusal is based on point 6: 'one or more Member State(s) consider you to be a threat to public policy, internal security, public health as defined in Article 2(19) of Regulation (EC) No 562/2006 (Schengen Borders Code) or the international relations of one or more of the Member States)'. In this expert opinion it was argued that this practice is not in conformity with the legislative history, objectives and wording of the Visa Code and the requirements following from Article 47 of the Charter.

Legislative history, objectives and wording of the Visa Code
The legislative history, objectives and wording of the Visa Code indicate that decisions to refuse a visa application should be sufficiently substantiated. In the legislative history of the Visa Code the importance of transparency and of the rights of the applicant were emphasized. The aim of the EU legislator to ensure transparency and consistency of the visa decision-making by the Member States, involves disclosing at least questions of facts and law underlying the visa refusal. The analysis in this expert opinion reveals that point 6 of the standard form does not provide a basis to ensure that the visa refusal provides sufficient information on the facts nor the applicable national law. The refusing Member State should provide information and grounds beyond the objection and the standard form.

The right to and effective remedy
Article 32(3) VC provides a visa applicant whose application is refused with a right to appeal against the refusal decision. This right to appeal has been considered by the European Parliament as a 'key element' of legal guarantees for visa applicants.[153] The applicant is not entitled to lodge a separate appeal against the decision of a Member State to object against the issuance of a visa. Therefore, it is upon Member State, which refuses the visa, to provide for an effective remedy.

Article 32(3) VC needs to be interpreted in the light of the right to an effective remedy guaranteed by Article 47 of the Charter. This right includes the right to equality of arms and adversarial proceedings and the right to be heard. The CJEU has held that the right to an effective remedy and the right to be heard can only be effectively exercised, if an administrative decision is sufficiently reasoned. An applicant is not able to give his view on the decision to reject a visa, if he does not know on which grounds or information this decision is based. Moreover, he cannot assess whether there is any point in appealing to the court and is not able defend his case before the court. Finally, if the court is not provided with the reasons of the decision, it is not able to effectively review this decision.

The lack of reasoning of a decision to reject a visa application based on an objection of another Member State can be considered a severe limitation of the right to an effective remedy. Such limitation is only allowed, if it respects the essence of that right. Moreover, this limitation should be proportionate, which means that it should be necessary and should genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others. In this expert opinion it was argued that the wide discretion left to the Member States, nor the rights and interests at stake in visa cases can justify a complete lack of reasoning.

The CJEU held in *Fahimian* that in visa cases, judicial review by the national courts is limited due to the wide discretion left to the Member States. However, it considered that the national court should be able to examine whether there was a manifest error and whether the authorities have

[153] Council of the European Union, Draft Regulation of the European Parliament and of the Council establishing a Community Code on Visas [2009], document no. 7293/09, p 2.

complied with procedural guarantees, including the obligation to examine carefully and impartially all the relevant elements and the duty to state reasons for their decision. In particular, the statements of reasons should be 'sufficient to enable the national court to ascertain [..] whether the factual and legal elements on which the exercise of the power of assessment depends were present'.[154]

Moreover, the CJEU ruled that even in cases where national security is at stake, Article 47 of the Charter requires that the national court be provided with the reasons of and the evidence underlying the decision. The court must be able to review whether the non-disclosure of evidence and reasons for the decision is justified.[155] It must also be able to effectively review the legality of the contested decision, which can only be done if it receives the (non-disclosed) reasons and evidence. Importantly, the CJEU also held that the person concerned should always be provided at least with the essence of the grounds of the decision, enabling him to defend himself before the national court.[156]

Violation of Article 47 of the Charter by the refusing Member State

There are three reasons for concluding that the essence of Article 47 CFR has not been respected in the cases in which the preliminary questions were referred. The Dutch authorities only based their decision to refuse the visa on the objection of the other EU Member State, without asking for the reasons for this objection. Such a simple referral to an unsubstantiated objection by another Member State, cannot be considered a 'careful' and 'impartial' examination of 'all the relevant elements', as was required by the CJEU in *Fahimian*.[157]

Secondly, the national court was not informed of the evidence and the reasons underlying the other Member State's decision to object to the issuance of a visa to the applicant. As a result, the court was not able to assess whether it was necessary (in the light of national security or for other reasons) to keep the reasons for the objection confidential. Moreover, the court was not able to effectively review whether a manifest error was made and whether procedural guarantees were complied with by the refusing and the objecting Member State. This may lead to arbitrary decision-making.

Finally, it was rendered impossible or at least excessively difficult for the visa applicants to exercise the right to an appeal against the visa decision conferred by the Visa Code. The mere referral to an objection by another Member State cannot be qualified as a sufficient statement of reasons, which enables the applicant to 'defend his rights in the best possible conditions and to decide, with full knowledge of the relevant facts, whether there is any point in his applying to the court with jurisdiction'.[158] The national courts did not apply any techniques in order to accommodate the applicant's procedural right, even though that would be possible in visa cases.

Obligations of the objecting Member State

It was argued that not only the refusing Member State, but also the objecting Member State has a duty state reasons for the objection against the issuance of the visa. This duty can be derived from the duty to provide reasons of the refusing Member State. As the refusal of the visa needs to be justified by specific and concrete facts, the objection needs to be specific and concrete as well. Moreover, the principle of cooperation implies that information supplementary to the bare objection have to be delivered to the other Member State.

[154] CJEU Case C-544/15 *Fahimian* [2017], para 46.
[155] CJEU Case C-300/11 *ZZ* [2013], para 60-63.
[156] Ibid, para 65.
[157] CJEU Case C-544/15 *Fahimian* [2017], para 46.
[158] CJEU Case C-300/11 *ZZ* [2013], para 53.

Solutions
The problem could be solved by interpreting the Visa Code in conformity with Article 47 of the Charter. The Annex to the Visa Code, which includes the standard form for refusal of a visa should be amended in order to ensure that sufficient reasoning of a visa decision is provided to the person concerned.

6.1 Answers to the preliminary questions

On the basis of the foregoing findings we would recommend the following answers to the first two questions asked by the District Court:

1. No effective remedy is provided by the appeal against a final decision to refuse a visa on the ground mentioned in art. 32(1.a.vi) VC if:

- The Member State has limited the reasons of the decision to the following: 'you are perceived by one or more Member States as a threat to public order, national security, public health or the international relations of one of the Member States';

- The Member State does not mention in its decision or the appeal on which specific ground or grounds of the four grounds mentioned in Article 32(1.a.vi) VC the visa has been refused;

- In the appeal, the Member State does not provide further information about, or substantiation of the ground or grounds on which the objections of the other Member State or Member States are based?

2. The principle of good administration has also not been complied with in the situation as described under question 1.

As we found that under the Visa Code only the deciding Member State is responsible for the substantiation of a refusal of a visa and for offering an effective remedy, we do not see room for answering the third and the fourth question.

3. a. Should the questions under 1 and 2 be answered differently, if the Member State refers in its final decision on the visa application, to a real and clearly specified possibility to appeal in the other Member State against the specifically mentioned authority in that other Member State (or Member States), which issued an objection in the meaning of Article 32(1.a.vi) VC, in which this ground for refusal can be challenged?

   b. Is it required for an affirmative answer to question 1 in relation to question 3a, that the decision in the appeal in and against the Member State, which has taken the final decision, is suspended until the applicant has had the opportunity to make use of the possibility to appeal and, if the applicant indeed makes use of this possibility, until the (final) decision on that appeal?

4. Does it matter for the answer to the questions, whether the (authority in) the Member State (or the Member States), which has issued the objection against the issuance of a visa can be offered the opportunity to join the proceedings as a second defending party and in this capacity can be offered the opportunity to provide substantiation of the ground or grounds, on which his objection is based?

Annex I - Third countries, whose nationals (or specific categories of nationals) are subject to prior consultation, as of 01/12/2017

Third countries	Specific categories concerned if applicable
Afghanistan	
Algeria	
Azerbaijan	
Bangladesh	
Belarus	Applies only to holders of diplomatic and service passports.
D.R. Congo	
Egypt	Does not apply to holders of diplomatic and service passports.
Eritrea	
Ethiopia	
Iran	
Iraq	
Jordan	
Kenya	
Kirgisistan	
(North) Korea	
Lebanon	
Libya	

Mali	
Mauritania	
Morocco	
Niger	
Nigeria	
Pakistan	
Palestine	
Russian Federation	Applies only to holders of service passports.
Rwanda	
Saudi Arabia	Does not apply to holders of diplomatic passports.
Somalia	
South Sudan	
Sri Lanka	
Sudan	
Syria	
Tajikistan	
Tunisia	
Turkmenistan	
Uzbekistan	
Vietnam	

Yemen	

Category of persons	
Refugees	
Stateless persons	

source: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/e-library/documents/policies/borders-and-visas/visa-policy/docs/prior_consultation_en.pdf

Annex II - Third countries whose nationals (or specific categories of nationals) are subject to prior consultation, as of 01/03/2013

Third countries	Specific categories concerned if applicable
Afghanistan	
Algeria	
Bangladesh	
Belarus	Applies only to holders of diplomatic and service passports.
D.R. Congo	
Egypt	Does not apply to holders of diplomatic and service passports.
Iran	
Iraq	
Jordan	
(North) Korea	
Lebanon	
Libya	
Mali	
Mauritania	
Morocco	
Niger	
Nigeria	

Pakistan	
Russian Federation	Applies only to holders of service passports.
Rwanda	
Saudi Arabia	Does not apply to holders of diplomatic passports.
Somalia	
South Sudan	
Sri Lanka	
Sudan	
Syria	
Tunisia	
Uzbekistan	Does not apply to holders of diplomatic passports or soldiers and police officers who travel for the purpose of exercising their duty
Vietnam	
Yemen	

Category of persons	
Palestinians	
Refugees	
Stateless persons	

source: ***https://www.government.nl/documents/regulations/2015/09/08/third-countries-whose-nationals-or-specific-categories-of-such-third-country-nationals-who-are-subject-to-prior-consultation***

Annex III - Standard form for notification of visa refusal

STANDARD FORM FOR NOTIFYING AND MOTIVATING REFUSAL, ANNULMENT OR REVOCATION OF A VISA

REFUSAL/ANNULMENT/REVOCATION OF VISA

Ms/Mr _____,

_____ The Embassy/Consulate-General/Consulate/[other competent authority] in _____ [on behalf of (name of represented Member State)]:

[Other competent authority] of _____

The authorities responsible for checks on persons at : _____ has/have:

examined your visa application;

examined your visa, number: _____ issued: _____ [day/month/year].

The visa has been refused The visa has been annulled The visa has been revoked

This decision is based on the following reason(s):

1. a false/counterfeit/forged travel document was presented
2. justification for the purpose and conditions of the intended stay was not provided
3. you have not provided proof of sufficient means of subsistence, for the duration of the intended stay or for the return to the country of origin or residence, or for the transit to a third country into which you are certain to be admitted, or you are not in a position to acquire such means lawfully
4. you have already stayed for three months during the current six-month period on the territory of the Member States on the basis of a uniform visa or a visa with limited territorial validity
5. an alert has been issued in the Schengen Information System (SIS) for the purpose of refusing entry by _____ (indication of Member State)
6. one or more Member State(s) consider you to be a threat to public policy, internal security, public health as defined in Article 2(19) of Regulation (EC) No 562/2006 (Schengen Borders Code) or the international relations of one or more of the Member States)
7. proof of holding an adequate and valid travel medical insurance was not provided

8. the information submitted regarding the justification for the purpose and conditions of the intended stay was not reliable

9. your intention to leave the territory of the Member States before the expiry of the visa could not be ascertained

10. sufficient proof that you have not been in a position to apply for a visa in advance, justifying application for a visa at the border, was not provided

11. revocation of the visa was requested by the visa holder (1).

(1) Revocation of a visa based on this reason is not subject to the right of appeal.

Remarks:

Comments: The person concerned may appeal against the decision to refuse/annul/revoke a visa as provided for in national law. The person concerned must receive a copy of this document. Each Member State must indicate the references to the national law and the procedure relating to the right of appeal, including the competent authority with which an appeal may be lodged, as well as the time limit for lodging such an appeal.

Date and stamp of embassy/consulate-general/consulate/of the authorities responsible for checks on persons/of other competent authorities

Signature of person concerned (2)

(1) If required by national law.

Source: https://eeas.europa.eu/sites/eeas/files/annex_vi_visa_refusal_form_en_0.pdf