



Reports of Cases

OPINION OF ADVOCATE GENERAL
TRSTENJAK
delivered on 29 November 2011¹

Case C-606/10

**Association nationale d'assistance aux frontières pour les étrangers
(ANAFE)**

v

Ministre de l'Intérieur, de l'Outre-mer, des Collectivités territoriales et de l'immigration

(Reference for a preliminary ruling from the Conseil d'État (France))

(Regulation No 562/2006 — Schengen Borders Code — Article 13 — Refusal of entry — Article 5 — Conditions for entry into the Schengen area by third-country nationals subject to a visa requirement — Ministerial circular — Re-entry of third-country nationals subject to a visa requirement holding a temporary residence permit — Re-entry visa — Transit for third-country nationals — Legal certainty — Protection of legitimate expectations)

1. This reference for a preliminary ruling from the French Conseil d'État (Council of State) concerns the interpretation of Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code).² In essence, the referring court seeks clarification of the content and scope of the requirements contained in that code with regard to refusal of entry to third-country nationals subject to a visa requirement and in relation to the issue of re-entry visas to third-country nationals.

I – Applicable law

A – *European Union law*

1. Schengen Borders Code³

2. Article 2 of the Schengen Borders Code ('SBC') reads as follows:

'For the purposes of this Regulation the following definitions shall apply:

...

¹ — Original language: German.

² — OJ 2006 L 105, p. 1.

³ — As amended by Regulation (EU) No 265/2010 of the European Parliament and of the Council of 25 March 2010 (OJ 2010 L 85, p. 1).

15. “residence permit” means:

- (a) all residence permits issued by the Member States according to the uniform format laid down by Council Regulation (EC) No 1030/2002 of 13 June 2002 laying down a uniform format for residence permits for third-country nationals;
- (b) all other documents issued by a Member State to third-country nationals authorising a stay in, or re-entry into, its territory, with the exception of temporary permits issued pending examination of a first application for a residence permit as referred to in point (a) or an application for asylum;

...’

3. Under the heading ‘Scope’, Article 3 of the SBC provides:

‘This Regulation shall apply to any person crossing the internal or external borders of Member States, without prejudice to:

- (a) the rights of persons enjoying the Community right of free movement;
- (b) the rights of refugees and persons requesting international protection, in particular as regards non-refoulement.’

4. Under the heading, ‘Entry conditions for third-country nationals’, Article 5 of the SBC provides:

‘1. For stays not exceeding three months per six-month period, the entry conditions for third-country nationals shall be the following:

- (a) they are in possession of a valid travel document or documents authorising them to cross the border;
- (b) they are in possession of a valid visa, if required pursuant to Council Regulation (EC) No 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, except where they hold a valid residence permit or a valid long-stay visa.

...

4. By way of derogation from paragraph 1:

- (a) third-country nationals who do not fulfil all the conditions laid down in paragraph 1 but who hold a residence permit, a long-stay visa or a re-entry visa issued by one of the Member States or, where required, a residence permit or a long-stay visa and a re-entry visa, shall be authorised to enter the territories of the other Member States for transit purposes so that they may reach the territory of the Member State which issued the residence permit, long-stay visa or re-entry visa, unless their names are on the national list of alerts of the Member State whose external borders they are seeking to cross and the alert is accompanied by instructions to refuse entry or transit;
- (b) third-country nationals who fulfil the conditions laid down in paragraph 1, except for that laid down in point (b), and who present themselves at the border may be authorised to enter the territories of the Member States, if a visa is issued at the border in accordance with Council Regulation (EC) No 415/2003 of 27 February 2003 on the issue of visas at the border, including the issue of such visas to seamen in transit.

...

- (c) third-country nationals who do not fulfil one or more of the conditions laid down in paragraph 1 may be authorised by a Member State to enter its territory on humanitarian grounds, on grounds of national interest or because of international obligations. ...’

5. Under the heading, 'Refusal of entry', Article 13(1) of the SBC provides:

'A third-country national who does not fulfil all the entry conditions laid down in Article 5(1) and does not belong to the categories of persons referred to in Article 5(4) shall be refused entry to the territories of the Member States. This shall be without prejudice to the application of special provisions concerning the right of asylum and to international protection or the issue of long-stay visas.'

B – *National law*

6. Article L. 311-4 of the Code on the entry and residence of foreign nationals and the right of asylum states:

'Possession of an acknowledgement of receipt of an application for a residence permit or for renewal of a residence permit, or of an acknowledgement of receipt of an application for asylum or for a temporary residence permit shall entitle a foreign national to be present in France, without prejudice to the final decision that will be taken with regard to his right of residence ...'.

II – Facts, proceedings before the national court and questions referred

7. The subject-matter of the dispute in the main proceedings is a ministerial circular dated 21 September 2009 laying down the conditions for entry into the Schengen area by third-country nationals holding a temporary residence permit or an acknowledgement of receipt of an application for asylum or of an application for a residence permit issued by the French authorities. In relation to this, the circular provides, inter alia, that third-country nationals subject to a visa requirement who have left French territory having only an acknowledgement of receipt of a first application for a residence permit or of an application for asylum or only with a temporary residence permit issued pending examination of an application for asylum may return to the Schengen area only if they have a visa issued by the consular authorities or, exceptionally, by the prefectural authorities. According to that circular, a re-entry visa issued by the prefectural authorities allows the crossing of the external borders of the Schengen area only at a point of entry into French territory.

8. As applicant in the main proceedings, the Association nationale d'assistance aux frontières pour les étrangers (ANAFE) claims that this circular should be annulled in so far as it provides that persons holding an acknowledgement of receipt of a first application for a residence permit or of an application for asylum are to be refused re-entry. It is of the view that the circular does not merely take into account the provisions of the Schengen Borders Code, but supplements those provisions. In addition, it infringes the principles of legal certainty and the protection of legitimate expectations in so far as it is immediately applicable, although third-country nationals with a temporary residence permit who left prior to the issue of this ministerial circular might have expected to be permitted to re-enter French territory on the basis of the interpretation of Article L. 311-4 of the Code on the entry and residence of foreign nationals and the right of asylum which had previously applied.

9. The referring court has come to the conclusion that the assessment of this claim gives rise to questions as to the interpretation and application of the Schengen Borders Code which have not yet been answered. In the light of those considerations it decided to stay the proceedings and to refer to the Court the following questions for a preliminary ruling:

(1) Does Article 13 of Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) apply to re-entry by a third-country national into the territory of a Member State which has issued that person with a temporary residence permit, where re-entry into its territory does not require entry, transit or stay in the territory of the other Member States?

- (2) In what circumstances may a Member State issue to third-country nationals a “re-entry visa” within the meaning of Article 5(4)(a) of that regulation? In particular, may such a visa limit entry only to points of entry into the territory of that State?
- (3) In so far as Regulation No 562/2006 excludes all possibility of entry into the territory of the Member States for third-party nationals who hold only a temporary residence permit issued pending examination of a first application for a residence permit or an application for asylum, contrary to what was allowed under the Convention of 19 June 1990 implementing the Schengen Agreement, in the version prior to its amendment by that regulation, did the principles of legal certainty and protection of legitimate expectations require that transitional measures should be laid down in respect of third-country nationals who left the territory of those States when they were holders of only a temporary residence permit issued pending examination of a first application for a residence permit or an application for asylum, and wish to return there after the entry into force of Regulation No 562/2006?

III – Proceedings before the Court

10. The order for reference dated 15 December 2010 was received at the Registry of the Court on 22 December 2010. In the written procedure, observations were submitted by the applicant in the main proceedings, the French and Belgian Governments and the European Commission. The representatives of the applicant in the main proceedings, the French Government and the Commission participated in the hearing held on 20 October 2011.

IV – Submissions of the parties

11. It is the view of the French and Belgian Governments and the Commission that the first question referred must be answered to the effect that Article 13 of the SBC must also be applied to third-country nationals whose re-entry into the territory of a Member State which has issued them with a temporary residence permit does not require entry, transit or stay in the territory of the other Member States.

12. However, the applicant in the main proceedings answers the first question referred to the effect that Article 5 in conjunction with Article 13 of the SBC must be interpreted as meaning that entry on the basis of a residence permit which does not meet the requirements of Article 2(15) of the SBC may be refused only if the person concerned requests entry, for the purposes of a short stay, at the border of a Member State other than the one which issued that permit.

13. It is the view of the Commission that the second question referred must be answered to the effect that a re-entry visa within the meaning of Article 5(4)(a) of the SBC may not limit re-entry into the Schengen area only to points of entry into the territory of that State. In effect, the applicant in the main proceedings expresses the same view.

14. In relation to this, in its written observations the French Government submits that a re-entry visa within the meaning of Article 5(4)(a) of the SBC is either a national long-stay visa or a short-stay visa within the meaning of Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code).⁴ It argues that if in a specific case a Member State exceptionally considered itself to be obliged to issue a visa with limited territorial validity within the meaning of Article 25 of the Visa Code, such a visa would in principle only entitle the holder to entry into the territory of the issuing Member State. However, at the hearing, the French Government concurred with the submissions of the Commission.

⁴ — OJ 2009 L 243, p. 1.

15. In connection with this, the Belgian Government submits that the Member States are entitled to determine the conditions for the issue of a re-entry visa. However, a re-entry visa could only entitle the holder to enter the issuing State's own territory.

16. In answering the third question, the Belgian Government and the Commission emphasise that the Schengen Borders Code has not substantially changed the content of the European Union law requirements for entry of third-country nationals who are holders of only a temporary residence permit issued pending examination of a first application for a residence permit or an application for asylum. It is the view of the Commission that problems arising from the interpretation of European Union law prior to the circular dated 21 September 2009 or from the application of that circular must consequently be assessed in accordance with national law.

17. It is the view of the French Government that the third question referred must be answered to the effect that the principles of legal certainty and protection of legitimate expectations did not result in any obligation to introduce transitional measures for the benefit of third-country nationals who left the territory of a Member State when they were holders of only a temporary residence permit and wished to return there after the entry into force of the Schengen Borders Code.

V – Legal assessment

A – *The first question*

18. By its first question referred, the referring court seeks clarification of whether the rule laid down in Article 13 of the SBC on refusal of entry in respect of third-country nationals also applies to third-country nationals subject to a visa requirement who, via the external Schengen borders and without entering the territory of another Member State, wish to once more enter the Member State which they left after they received a temporary residence permit.

19. In my view, this question must be answered in the affirmative. I am led to this conclusion by a systematic interpretation of the Schengen Borders Code according to its wording and objective.

20. The spirit and purpose of the Schengen Borders Code⁵ is to define rules for the crossing of the internal and external borders of the Member States of the European Union.⁶ In principle, irrespective of their nationality, persons crossing internal borders between Member States — defined in Article 2(1) of the SBC — are not checked,⁷ so that a border check on persons and effective surveillance of border crossing at the external borders of the Schengen area — defined in Article 2(2) of the SBC — must be ensured.

21. The border control at the external Schengen borders and the refusal of entry at those external borders are regulated in Articles 6 to 13 of the SBC. With regard to the refusal of entry, the first sentence of Article 13(1) of the SBC contains the general rule that third-country nationals who do not fulfil all the entry conditions laid down in Article 5(1) and do not belong to the categories of persons

5 — On the background to the introduction of the Schengen Borders Code see only Peers, S., 'Key Legislative Developments on Migration in the European Union', *European Journal of Migration and Law* 2006, p. 321 et seq.

6 — See Article 1 of the SBC. However, on the territorial application of the Schengen Borders Code see its Recitals 22 to 28. Due to the exceptions which apply to Great Britain, Ireland and Denmark, the Schengen area only extends to Great Britain and Ireland in a few aspects. Bulgaria, Cyprus and Rumania are also not yet full members of the Schengen area. For these purposes, some non-member countries — Norway, Iceland and Switzerland — have associated themselves with the implementation, application and development of the Schengen acquis. See, in relation to this, Röben, in: *Das Recht der Europäischen Union* (publisher Grabitz/Hilf/Nettesheim), Article 67 TFEU, paragraph 149 et seq. (supplementary insert 44, May 2011). See also in connection with this: Genson, R./Van de Rijt, W., 'Décembre 2007 – Un élargissement de l'espace Schengen sans précédent', *Revue du Marché commun et de l'Union européenne* 2007, p. 652 et seq. In addition, it must be pointed out that the Schengen Borders Code only applies to the territories of France in Europe.

7 — See Article 20 of the SBC.

referred to in Article 5(4) are to be refused entry into the Schengen area. The second sentence of Article 13(1) of the SBC adds that this is without prejudice to the application of special provisions concerning the right of asylum and to international protection or the issue of long-stay visas. Article 13(2) to 13(6) of the SBC lays down further detailed rules with regard to refusal of entry. For example, under Article 13(4), border guards shall ensure that third-country nationals refused entry do not enter the territory of the Member State concerned.

22. Pursuant to Article 3 of the SBC, the Schengen Borders Code applies to *any* person crossing the internal or external borders of the Schengen area.

23. Accordingly, a literal interpretation of Article 13 in conjunction with Article 3 of the SBC leads directly to the conclusion that the refusal of entry regulated in Article 13 applies to *all* third-country nationals who wish to enter a Member State via an external Schengen border, irrespective of whether or not that entry is an attempted re-entry with a temporary residence permit of that Member State.

24. Likewise, the fact that a third-country national who, on the basis of a temporary residence permit from a Member State, attempts to re-enter that Member State via an external Schengen Border does not intend to obtain access to the entire Schengen area, does not preclude the application of Article 13 of the SBC.

25. In this regard it is decisive that the Schengen Borders Code abolished internal border control and moved border control to the external borders of the Schengen area. Accordingly, the provisions of the Schengen Borders Code concerning refusal of entry at the external borders are in principle applicable to all cross-border movement of persons, even if entry via the external Schengen borders of a Member State is only for the purpose of a stay in that Member State.

26. This interpretation is supported by the second sentence of Article 13(1) of the SBC, which refers to the possibility of entry into a Member State on the basis of provisions of asylum law or on the basis of a national long-stay visa. The fact that these types of entry via the external Schengen borders of a Member State are expressly mentioned in Article 13 of the SBC for the purposes of a principal⁸ stay of long duration in that Member State confirms that this provision applies to all movement of persons crossing the external Schengen borders.

27. Likewise, the reference to Article 5 of the SBC included in the first sentence of Article 13(1) of the SBC supports the above interpretation. Pursuant to that provision, a third-country national who does not fulfil all the entry conditions laid down in Article 5(1) and does not belong to the categories of persons referred to in Article 5(4) is to be refused entry to the territories of the Member States. Since the entry conditions in Article 5 of the SBC affect both entry into the Schengen area (Article 5(1)) and entry for the purposes of a principal stay in a Member State (Article 5(4)), it is also clearly apparent from that reference in the first sentence of Article 13(1) of the SBC that Article 13 of the SBC also covers the entry of third-country nationals via the external Schengen borders of a Member State in those cases in which that entry is primarily for the purposes of a stay in that Member State.

28. In the light of the above, the first question referred must be answered to the effect that Article 13 of the SBC applies to re-entry by a third-country national via the external Schengen borders into the territory of a Member State which has issued that person with a temporary residence permit even where re-entry into its territory does not require entry, transit or stay in the territory of the other Member States.

8 — Article 21 of the Convention Implementing the Schengen Agreement was amended, by Regulation (EU) No 265/2010 of the European Parliament and of the Council of 25 March 2010 amending the Convention Implementing the Schengen Agreement and Regulation (EC) No 562/2006 as regards movement of persons with a long-stay visa (OJ 2010 L 85, p. 1), to the effect that third-country nationals with a long-stay visa issued by one of the Member States may travel in other Member States for up to three months in any six-month period under the same conditions as the holder of a residence permit. See in relation to this Dienelt, K., in: *Ausländerrecht* (publisher Bergmann, J./Dienelt, K./Röseler, S.), 9th edition, 2011, Paragraph 6 of the Aufenthaltsgesetz (Law on residence), paragraph 37.

29. However, having regard to the specific content of the ministerial circular of 21 September 2009, I would like to point out that the blanket prohibition on re-entry which is contained therein could in practice raise questions as to the compatibility of that prohibition with European Union law requirements in the area of the law on asylum.

30. Specifically, it is apparent from the reference for a preliminary ruling that third-country nationals subject to a visa requirement who have left French territory only with a temporary residence permit issued pending examination of an application for asylum or having only an acknowledgement of receipt of an application for asylum or of a first application for a residence permit may return to the Schengen area only if they have a re-entry visa issued by the consular authorities or, exceptionally, by the prefectural authorities. Consequently, that ministerial circular does not appear to adopt the requirements of the second sentence of Article 13(1) of the SBC, pursuant to which the first sentence of Article 13(1) is without prejudice to the application of special provisions concerning the right of asylum and to international protection. This enabling provision with regard to the right of asylum could, for example, come to bear in cases in which a refusal of re-entry would infringe the so-called principle of *non-refoulement* and accordingly Article 18 of the Charter of Fundamental Rights.⁹ If the lack of such an enabling provision in the ministerial circular were to result in practice in refugees directly or indirectly being returned to a State where they might be subjected to persecution, it would therefore be necessary to examine the conformity of the circular with European Union law from this perspective. However, since this issue is not the subject-matter of the present reference for a preliminary ruling, I will not go into any further detail here.

B – *The second question*

31. By its second question, the referring court seeks information concerning the circumstances under which a Member State may issue to third-country nationals a ‘re-entry visa’ within the meaning of Article 5(4)(a) of the SBC. In particular, it would like to know whether such a visa may limit entry into the Schengen area only to points of entry into the territory of that State.

32. The background to this question is the fact that the circular which is at issue in the main proceedings permits re-entry into the Schengen area, by third-country nationals subject to a visa requirement who have obtained a temporary residence permit issued pending examination of an application for asylum or an acknowledgement of receipt of an application for asylum or of a first application for a residence permit in France and have left only with that permit or acknowledgement, only if they have a re-entry visa issued by the consular authorities or, exceptionally, by the prefectural authorities. In that circular, reference is also made to the fact that a re-entry visa issued by the prefectural authorities essentially only permits the crossing of the external borders of the Schengen area at points of entry into French territory.

33. By its second question, the referring court consequently refers to the requirement included in the ministerial circular that the prefectural re-entry visa essentially only permits re-entry via the external Schengen borders of the French Republic. Against this background, in essence the referring court asks whether a re-entry visa within the meaning of Article 5(4)(a) of the SBC may include the requirement that the re-entry into the issuing Member State may only take place via the external Schengen borders of that Member State.

34. First of all, as regards terminology it must be stated that the concept of a re-entry visa is not defined in the Schengen Borders Code.¹⁰ Nevertheless, Article 5(4)(a) of the SBC supplies significant guidance which could help define that concept. According to its wording, that provision grants third-country nationals who do not fulfil all the conditions for entry into the Schengen area but who hold a residence

9 — In relation to the principle of non-refoulement and the right of asylum pursuant to Article 18 of the Charter of Fundamental Rights, see my Opinion delivered on 22 September 2011 in Case C-411/10 *N.S. and Others* not yet published in the ECR, point 114.

10 — In its Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 562/2006 of the European Parliament and of the Council establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) and the Convention implementing the Schengen Agreement (COM(2011) 118 final), the Commission also proposed that the term ‘re-entry visa’ in Article 5(4)(a) of the SBC should be removed because this term is outdated and misleading.

permit, a national long-stay visa or a re-entry visa issued by one of the Member States a right to enter the territories of the other Member States for transit to the Member State which issued the residence permit, long-stay visa or re-entry visa. It follows from that conceptual distinction between residence permit, national visa and re-entry visa that a re-entry visa within the meaning of Article 5(4)(a) of the SBC is neither a residence permit issued by a Member State nor a national long-stay visa.

35. It can then be inferred from the definition included in Article 2 of Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code)¹¹ that a re-entry visa within the meaning of Article 5(4)(a) of the SBC is not a 'visa' within the meaning of the Visa Code: pursuant to Article 2(2) of the Visa Code, a visa means an authorisation issued by a Member State with a view to transit through or an intended stay in the territory of the Member States of a duration of no more than three months in any six-month period from the date of first entry in the territory of the Member States or with a view to transit through the international transit areas of airports of the Member States. However, Article 5(4)(a) of the SBC typically concerns precisely those cases in which the third-country national is not in possession of a visa within the meaning of Article 2(2) of the Visa Code.

36. In my view, the 'visa with limited territorial validity' defined in Article 2(4) of the Visa Code cannot be equated with a re-entry visa within the meaning of Article 5(4)(a) of the SBC either. If that had been the intention of the legislature, it would have been obvious to expressly use the term 'visa with limited territorial validity' in Article 5(4)(a) of the SBC: this type of visa was already regulated in Article 16 of the Convention implementing the Schengen Agreement of 14 June 1985 ('CSA').^{12 13} Likewise, the Common consular instructions ('CCI')¹⁴ adopted for the purposes of the Schengen cooperation also referred expressly to the category of visas with limited territorial validity in part I, section 2, under the heading 'Definition and types of visa'. Consequently, if a re-entry visa within the meaning of Article 5(4)(a) of the SBC had been intended to mean a 'visa with limited territorial validity', the legislature could have easily used the latter term.

37. It is apparent from the considerations outlined above that a re-entry visa within the meaning of Article 5(4)(a) of the SBC constitutes a permit which can be issued to a third-country national who does not hold either a residence permit, or a long-stay visa, or a visa, or a visa with limited territorial validity, within the meaning of the Visa Code, but nevertheless would like to leave the Member State in which he finds himself, in order to permit his subsequent re-entry into that Member State. Accordingly, a re-entry visa within the meaning of Article 5(4)(a) of the SBC appears to be a permit issued by a Member State which makes it possible for a third-country national who does not hold either a residence permit or a long-stay visa or a visa or a visa with limited territorial validity, within the meaning of the Visa Code, to leave that Member State for a particular purpose and then afterwards to re-enter that Member State.

38. The conditions for the issue of such a national re-entry authorisation are not specifically laid down in the Schengen Borders Code. Therefore in my opinion the Schengen Borders Code does not, in principle, prohibit the Member States from including something in the terms of the re-entry visa to the effect that re-entry into the Member State is only permitted via an external Schengen Border of that Member State.

39. The Commission does not share that view. From the statement in Article 5(4)(a) of the SBC that the holder of a re-entry visa is entitled to a right of transit through the other Member States of the Schengen area, it infers that the re-entry visa must always permit re-entry via the internal Schengen borders of the issuing Member State.

11 — OJ 2009 L 243, p. 1.

12 — Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders (OJ 2000 L 239, p. 19).

13 — Article 16 of the CSA was repealed by the Visa Code.

14 — Common consular instructions on visas for the diplomatic missions and consular posts (OJ 2005 C 326, p. 1).

40. I do not find that analysis convincing. In my view, the right of transit laid down in Article 5(4)(a) of the SBC must be interpreted as meaning that a re-entry visa entitles the visa holder — who is not registered in the national list of alerts — to transit through the other Member States of the Schengen area *provided that* it permits re-entry via the internal Schengen borders of the issuing Member State. However, the question *whether* the re-entry visa must always permit re-entry via the internal Schengen borders of the issuing Member State is not within the material scope of Article 5(4)(a) of the SBC. Accordingly, it may not be inferred from Article 5(4)(a) of the SBC either, that in the event of the issue of a re-entry visa the Member States are obliged to permit re-entry both via their own external and internal Schengen borders.

41. In connection with this, it must in particular be emphasised that the Schengen Borders Code was adopted on the basis of Article 62(1) and (2)(a) EC. Under Article 62(1) EC, the Council is to adopt measures with a view to ensuring the absence of any controls on persons, be they citizens of the Union or nationals of third countries, when crossing internal borders. Under Article 62(2)(a) EC, the Council is to adopt measures on the crossing of the external borders of the Member States which shall establish standards and procedures to be followed by Member States in carrying out checks on persons at such borders. That basis in primary law does not authorise the legislature to adopt a provision which determines the conditions for the issue by a Member State of a national re-entry visa within the meaning of Article 5(4)(a) of the SBC. It is immediately apparent that the individual provisions of the Schengen Borders Code may not be used in order to reduce the competence remaining with the Member States to attach to national re-entry visas entry conditions concerning border crossing points.

42. In the event that despite the view expressed by me, the Court concurs with the view of the Commission, that would also have far-reaching consequences for the issue of national long-stay visas. Since under Article 5(4)(a) of the SBC not only the holders of re-entry visas but also the holders of national long-stay visas are entitled to a right of transit through the other Member States of the Schengen area, an obligation, derived from this right of transit, to issue re-entry visas without limitations on the point of entry would logically be transferable to the issue of a national long-stay visa. Accordingly, as a consequence the possibility of issuing national long-stay visas with limitations on the point of entry would no longer be available to the Member States.

43. These considerations lead me to the conclusion that the right of transit of holders of re-entry visas under Article 5(4)(a) of the SBC is determined by the detailed rules with regard to entry laid down by the Member State of destination and not vice versa. Therefore if a Member State decides to issue a re-entry visa without limitations on the point of entry, that entitles the holder of that visa to transit through the other Member States of the Schengen area pursuant to Article 5(4)(a) of the SBC in the event that the holder of the visa decides to enter via an internal Schengen border of the issuing Member State. On the other hand, if a Member State decides to issue a re-entry visa with an obligation to enter via its own external Schengen borders, the holder of that visa is only permitted entry via the external Schengen borders of that Member State and therefore he also has no right of transit through the other Member States within the meaning of Article 5(4)(a) of the SBC.

44. In summary, it is apparent from my deliberations above that the Schengen Borders Code does not prohibit the Member States from issuing a re-entry visa with limitations on the point of entry.

45. There are no other apparent objections, on the basis of primary or secondary law, to Member States limiting re-entry visas to entry via the external Schengen borders of that Member State. Significant evidence in support of the compatibility, in principle, of such a limitation with European Union law is found in the provision on the Schengen visas with limited territorial validity.

46. Prior to the adoption of the Visa Code, the European Union law requirements with regard to visas with limited territorial validity were found in various articles of various regulatory instruments, in particular in the CSA and in the CCI. In part 1, section 2, point 2.3 of the CCI it was expressly stated in relation to the detailed rules on entry on the basis of a visa with limited territorial validity that both entry and exit had to be through the territory of the Member State to the territory of which the validity of the visa was limited.

47. Although the Visa Code does not contain any clear statement as to the detailed rules on entry on the basis of a visa with limited territorial validity within the meaning of Article 25 of the Visa Code, the Commission's Explanatory Memorandum to the Draft proposal for a Regulation on the Visa Code indicates that in this respect the existing legal position should be retained according to the intention of the legislature.¹⁵ Once more, this provides an important indication of the compatibility, in principle, with European Union law of a national re-entry provision which limits entry into the Schengen area to certain external borders.

48. In the light of the foregoing, the second question referred must be answered to the effect that a Member State which issues to a third-country national a re-entry visa within the meaning of Article 5(4)(a) of the Schengen Borders Code may limit re-entry on the basis of that re-entry visa to its external Schengen borders.

49. Finally, it should be noted that the French Government, in its answer to the second question, submitted that the re-entry of third-country nationals whose temporary residence permit does not entitle them to re-entry is better achieved, if it is necessary, by the issue of a national long-stay visa. The Belgian Government submits that the re-entry of such third-country nationals is in practice made possible by the issue of a visa with limited territorial validity within the meaning of Article 25 of the Visa Code.

50. If, as is submitted by the French Government, a Member State decides to permit the re-entry of third-country nationals whose temporary residence permit does not entitle them to re-entry by the preferred means of issuing a national long-stay visa, in principle European Union law does not preclude a limitation of that visa to re-entry into the Schengen area only via points of entry into the territory of that State: pursuant to Article 18 of the CSA, long-stay visas are national visas, so that in principle the Member States are entitled, from a European Union law perspective, to limit entry into the Schengen area on the basis of that visa to points of entry into the territory of that State.¹⁶

51. In addition, it is apparent from my deliberations above that if a Member State, as the Belgian Government submits, decides to permit the re-entry of third-country nationals by means of the issue of a visa with limited territorial validity within the meaning of Article 25 of the Visa Code, re-entry must generally take place via the external Schengen borders of the Member State to the territory of which the validity of the visa is limited.¹⁷

C – The third question

52. By its third question referred, the referring court refers to the prohibition, laid down in the Schengen Borders Code, on entry for third-country nationals subject to a visa requirement who merely hold a temporary residence permit issued pending examination of a first application for a residence permit or an application for asylum. In essence, it asks if the principles of legal certainty and protection of legitimate expectations preclude the application of those provisions to the prohibition on entry if as a result of their application third-country nationals who left the Schengen area prior to the Schengen Borders Code coming into force on the assumption that they would be able to re-enter with their temporary residence permits are no longer in a position to do so after the entry into force of the Borders Code.

53. The referring court poses this question because, evidently, prior to the ministerial circular dated 21 September 2009 an administrative practice had developed in France pursuant to which third-country nationals subject to a visa requirement who merely held a temporary residence permit issued pending examination of a first application for a residence permit or an application for asylum

15 — It is apparent from the individual Explanatory Notes to the draft that the provisions distributed through the CSA and the CCI in relation to visas with limited territorial validity were intended to be brought together in a single article primarily in the interests of clarity and to ensure the uniform application of the law. See the Draft proposal for a Regulation of the European Parliament and of the Council establishing a Community Code on Visas, COM(2006) 403 final, p. 12.

16 — In relation to the conformity of such a restriction with European Union law, see point 38 et seq. of this Opinion.

17 — See, in relation to this, point 45 et seq. of this Opinion.

could leave national territory via the external Schengen borders and enter that territory again provided that that permit had not expired. By means of the ministerial circular, that practice was to be put to an end without a transitional period, so that third-country nationals subject to a visa requirement who had left French territory prior to the ministerial circular with such a temporary residence permit could no longer return to the Schengen area without a visa or other permit entitling them to entry.

54. For the purposes of answering the third question, it must first of all be stated that the prohibition on re-entry laid down in the ministerial circular dated 21 September 2009 meets the requirements of the Schengen Borders Code. It follows from Article 5(1) of the SBC in conjunction with Article 2(15)(b) and Article 5(4)(a) of the SBC that temporary residence permits which have been issued pending examination of a first application for a residence permit or an application for asylum may not be used for the purposes of entry into the Schengen area. Against this background, the ministerial circular dated 21 September 2009 correctly makes clear that third-country nationals subject to a visa requirement who left French territory with only such a temporary residence permit may not be granted free re-entry via the external Schengen borders.

55. Since pursuant to Article 40 of the SBC, the Schengen Borders Code had already come into force on 13 October 2006, the ministerial circular dated 21 September 2009 merely clarifies the legal position as it applied in France as well, or at least in the territories of France in Europe — from 13 October 2006.¹⁸ Against that background, it is immediately apparent that the fact that third-country nationals subject to a visa requirement left French territory via an external Schengen Border shortly before the ministerial circular dated 21 September 2009, in reliance on an administrative practice which was contrary to European Union law, without holding a permit entitling them to re-entry into the Schengen area cannot be used to call into question the applicable provisions of the Schengen Borders Code in the light of the European Union law principles of protection of legitimate expectations and legal certainty.

56. In relation to the principle of protection of legitimate expectations, it suffices to state in this context that it is possible to invoke that principle as against European Union law rules only to the extent that a situation has been created by the European Union itself, and accordingly by a European Union institution, which can give rise to a legitimate expectation.¹⁹ In the present case, there was no such conduct by a European Union institution which could give rise to a legitimate expectation: in so far as a contrary expectation with regard to their re-entry into French territory had arisen amongst third-country nationals subject to a visa requirement with temporary residence permits which did not entitle them to re-entry into the Schengen area, this was due to a French administrative practice which is contrary to European Union law. Such a national administrative practice which is contrary to European Union law cannot give rise to a legitimate expectation on the part of a third-country national of continued beneficial treatment contrary to European Union law.²⁰

57. It is established case-law that the principle of legal certainty requires that European Union legislation must be certain and its application foreseeable by those subject to it.²¹ In my opinion, the provisions of the Schengen Borders Code on re-entry on the basis of temporary residence permits which have been issued pending examination of a first application for a residence permit or an application for asylum fulfil the requirements of certainty and foreseeability. As I have already stated,

18 — The Schengen Borders Code only applies to the territories of France in Europe: see in relation to this Recital 21 of the Schengen Borders Code.

19 — Case C-14/01 *Niemann* [2003] ECR I-2279, paragraph 56; Case C-292/97 *Karlsson and Others* [2000] ECR I-2737, paragraph 63; and Case C-22/94 *Irish Farmers Association and Others* [1997] ECR I-1809, paragraph 19. See further in relation to this: Bungenberg, M., in: *Handbuch der Europäischen Grundrechte* (publisher: Heselhaus/Nowak), Munich, 2006, section 33, paragraph 11 et seq.; Jarass, D., *Charta der Grundrechte der Europäischen Union*, Munich 2010, introduction, paragraph 37.

20 — See also in connection with this: Case C-153/10 *Sony Supply Chain Solutions (Europe)* [2011] ECR I-2775, paragraph 47; Case C-94/05 *Emsland-Stärke* [2006] ECR I-2619, paragraph 31; Joined Cases C-31/91 to C-44/91 *Lageder and Others* [1993] ECR I-1761, paragraph 35; and Case 316/86 *Krücken* [1988] ECR 2213, paragraph 24.

21 — See only: Case C-194/09 P *Alcoa Trasformazioni v Commission* [2011] ECR I-6311, paragraph 71 and Case C-67/09 P *Nuova Agricast and Cofra v Commission* [2010] ECR I-9811, paragraph 77.

it follows from Article 5(1) of the SBC in conjunction with Article 2(15)(b) and Article 5(4)(a) of the SBC that such temporary residence permits do not entitle the holder to re-entry into the Schengen area.²² In addition, it should be emphasised that the Schengen Borders Code was published in the Official Journal on 13 April 2006 and therefore six months before its entry into force so that the foreseeability of the provisions which applied from 13 October 2006 was also ensured.

58. It follows from the above that the examination of the third question referred has not resulted in anything which would lead to the conclusion of an infringement of the European Union law principles of legal certainty and protection of legitimate expectations in the context of the entry into force of the Schengen Borders Code.

VI – Conclusion

59. In the light of the foregoing considerations, I suggest that the Court should reply to the questions referred for a preliminary ruling as follows:

- (1) Article 13 of Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) does apply to re-entry, via the external Schengen borders, by a third-country national into the territory of a Member State which has issued that person with a temporary residence permit, even where re-entry into its territory does not require entry, transit or stay in the territory of the other Member States.
- (2) A Member State issuing a third-country national a re-entry visa within the meaning of Article 5(4)(a) of the Schengen Borders Code may limit re-entry on the basis of this re-entry visa only to its external Schengen borders.
- (3) The examination of the third question referred has not revealed any factors which would lead to the conclusion of an infringement of the European Union law principles of legal certainty and protection of legitimate expectations in the context of the entry into force of the Schengen Borders Code.

²² — See in relation to this point 54 of the present Opinion.