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Subject: Draft Regulation of the European Parliament and of the Council amending the Common Consular Instructions on visas for diplomatic and consular posts in relation to the introduction of biometrics including provisions on the organisation of the reception and processing of visa applications

The Visa Working Party examined Article 1 (1) and (2).

The draft Regulation is set out in the Annex to this note with delegations' comments set out in footnotes, including those made on the rest of the text at previous meetings.

Draft

**REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL
amending the Common Consular Instructions on visas for diplomatic missions and
consular posts in relation to the introduction of biometrics including provisions on the
organisation of the reception and processing¹ of visa applications**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

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

Having regard to the proposal from the Commission²,

Acting in accordance with the procedure laid down in Article 251 of the Treaty³,

Whereas:

- (1) To ensure reliable verification and identification of visa applicants it is necessary to process biometric data in the Visa Information System (VIS) established by Council decision 2004/512/EC of 8 June 2004⁴ and to provide for a legal framework for the capturing of these biometric identifiers. Furthermore, the implementation of the VIS requires new forms of organisation for the reception of applications for visas.
- (2) The integration of biometric identifiers in the VIS is an important step towards the use of new elements, which establish a more reliable link between the visa holder and the passport in order to avoid the use of false identities. Therefore the personal appearance of the visa applicant –at least for the first application- should be one of the basic requirements for issuing a visa with the registration of biometric identifiers in the VIS.

¹ FR, IT and PT wished to delete the reference to 'processing'.

² OJ C , , p. .

³ OJ C , , p. .

⁴ OJ L 213, p. 15.6.2004, p.5.

- (3) The choice of the biometric identifiers is made in the [*Regulation of the European Parliament and of the Council concerning the Visa Information System (VIS) and the exchange of data between Member States on short-stay visas*]. This Regulation defines the standards for the collection of these biometric identifiers by referring to the relevant provisions set out by the International Civil Aviation Organisation (ICAO). No further technical specifications are required in order to ensure interoperability.¹
- (4) In order to facilitate the registration of visa applicants and to reduce the costs for Member States, new organisational possibilities need to be envisaged in addition to the existing framework of representation. Firstly a specific type of representation limited to the reception of visa applications and enrolment of biometric identifiers should be added to the Common Consular Instructions.
- (5) Other options such as co-location, common application centres and outsourcing should be introduced. An appropriate legal framework for these options should be established, taking into account in particular data protection issues. Under the legal framework established Member States should be free to determine which type of organisational structure they will use in each third country. Details of those structures should be published by the Commission.
- (6) When organising co-operation, Member States should ensure that the applicant is directed to the Member State responsible for the processing of his application.
- (7) It is necessary to make provisions for situations in which Member States' central authorities decide to outsource part of the visa handling process to an external service provider. Such arrangements should be established in strict compliance with the general principles for issuing visas, respecting the data protection requirements set out in Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

¹ DE suggested that a reference be made to the involvement of the "Article 6 Committee".

- (8) Member States shall conclude contracts with external service providers which should contain provisions on their exact responsibilities, direct and total access to their premises; information of applicants, confidentiality and circumstances, conditions and procedures for suspending or terminating the contract.
- (9) To ensure the compliance with data protection the working group created by Article 29 of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data and the European Data Protection Supervisor have been consulted.
- (10) Member States should be able to allow certain categories of applicants or all applicants direct access to their consular offices or diplomatic missions for humanitarian or other reasons.¹
- (11) In order to facilitate the procedure of any subsequent application, it should be possible to copy biometric data from the first application within a period of 48 months in accordance with the retention period laid down in the VIS Regulation. Once this period of time has elapsed, the biometric identifiers should be captured again
- (12) Due to the requirement to capture biometric identifiers, commercial intermediaries such as travel agencies should no longer be used for the first application but only for the subsequent ones.
- (13) The Common Consular Instructions on visas for diplomatic missions and consular posts should therefore be amended accordingly.
- (14) The Commission should present a report on the implementation of this Regulation two years after its entry into force, covering the implementation of the enrolment of biometric identifiers, the principle of the "first application" and the organisation of the reception and the processing of visa applications.

¹ IT found the wording of this recital too vague.

- (15) The subsidiarity principle applies insofar as the proposal does not fall under the exclusive competence of the Community. This Regulation does not go beyond what is necessary in order to achieve the objectives pursued in accordance with the third paragraph of Article 5 of the Treaty.
- (16) In accordance with the principle of proportionality, it is necessary and appropriate for the achievement of the basic objective of introducing common standards and interoperable biometric identifiers to lay down rules for all Member States implementing the Schengen Convention. This Regulation does not go beyond what is necessary in order to achieve the objectives pursued in accordance with the third paragraph of Article 5 of the Treaty.
- (17) In accordance with Articles 1 and 2 of the Protocol on the position of Denmark annexed to the Treaty on European Union and to the Treaty establishing the European Community, Denmark is not taking part in the adoption of this Regulation, and is not bound by it or subject to its application. Given that this Regulation builds upon the Schengen *acquis* under the provisions of Title IV of Part Three of the Treaty establishing the European Community, Denmark shall, in accordance with Article 5 of the said Protocol, decide within a period of six months after the Council has adopted this Regulation, whether it will implement it in its national law.
- (18) As regards Iceland and Norway, this Regulation constitutes a development of provisions of the Schengen *acquis* within the meaning of the Agreement concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the association of those two States with the implementation, application and development of the Schengen *acquis* which fall within the area referred to in Article 1, point B of Council Decision 1999/437/EC of 17 May 1999 on certain arrangements for the application of that Agreement¹.

¹ OJ L 176, 10.7.1999, p. 31.

- (19) This Regulation constitutes a development of provisions of the Schengen *acquis* in which the United Kingdom does not take part, in accordance with Council Decision 2000/365/EC of 29 May 2000 concerning the request of the United Kingdom of Great Britain and Northern Ireland to take part in some of the provisions of the Schengen *acquis*. The United Kingdom is therefore not taking part in its adoption and is not bound by it or subject to its application.
- (20) This Regulation constitutes a development of provisions of the Schengen *acquis* in which Ireland does not take part, in accordance with Council Decision 2002/192/EC of 28 February 2002 concerning Ireland's request to take part in some of the provisions of the Schengen *acquis*). Ireland is therefore not taking part in its adoption and is not bound by it or subject to its application.
- (21) As regards Switzerland, this Regulation constitutes a development of the provisions of the Schengen *acquis* within the meaning of the Agreement signed by the European Union, the European Community and the Swiss Confederation on the latter's association with the implementation, application and development of the Schengen *acquis* which fall within the area referred to in Article 4 (1) of the Council decision on the signing, on behalf of the European Community, and on the provisional application of certain provisions of this Agreement.
- (22) This Regulation constitutes an act building on the Schengen *acquis* or otherwise related to it within the meaning of Article 3(2) of the 2003 Act of Accession,

HAVE ADOPTED THIS REGULATION:

Article 1

The Common Consular Instructions on visas for diplomatic missions and consular posts are amended as follows:

(1) In Point II, point 1.2 is amended as follows:

(a) In (b) the following paragraph is added:

"A Member State may also represent¹ one or more other Member States solely for the reception of applications and the enrolment of biometric identifiers. The relevant provisions of 1.2 (c) and (e) shall apply. The reception and transmission of files and data to the represented consular post shall be carried out respecting the relevant data protection and security rules²".

¹ **FR** maintained its reservation in relation to this new type of representation, adding that the main basic problem with the Commission proposal was the hierarchical organisation of the options (i.e. only if all other listed options had been exhausted, Member States would be allowed to have recourse to external service providers). **IT** shared that latter point. However, **IT** could support the principle of "limited representation" but found that it would be impossible to apply this option in practice and wondered why the UK could not collect biometric data for Schengen States. **AT** noted that Austria is already being represented by non-Schengen States and this trend would be pursued. **SI** was also of the opinion that "non-Schengen" Member States should be able to collect biometric data/applications for Schengen States. **UK** wondered what would be the legal problem, as UK consular representations would not process the applications, but just collect them. **COM** would consider the points raised by UK in the light of certain arrangements made in relation to Frontex, where UK (and IE) although not being "fully in", could participate in certain activities.

PT would not prevent others from using the option of limited representation but also found it difficult to use in practice. **BE, HU, EE** supported the proposal, recalling that it was an option to be explored among others. **DE** could accept the proposal as long as the personal interview with applicants was maintained.

COM noted in principle all options were open to Member States but that the main problem in relation to outsourcing was data protection issues, i.e. a public instance (consular representation) cannot allow an external organism with the handling of personal data. Recalling that the draft Regulation was to be adopted in co decision, COM noted that he would want to hear the opinion of the European Parliament to these issues before amending the original proposal.

² **DE** suggested adding a reference to the transmission of data from the central VIS by for instance a PKI infrastructure in order to make the possible transmission as secure as possible and found that this should be expressed concretely.

(b) Point (d) is replaced by the following:

"When uniform visas are issued pursuant to (a) and (b), the representation shall be reflected in the table of representation for the issuing of uniform visas set out in Annex 18."

(2) In Point III, point 1 is replaced by the following:

1.1 Visa application forms-number of application forms

Applicants shall also be required to fill in the uniform visa form. Applications for a uniform visa must be made using the harmonised form a specimen of which is given in Annex 16.

At least one copy of the application form must be filled in so that it may be used during consultation with the central authorities. Member States may, insofar as national administrative procedures so require, request several copies of the application.

1.2. Biometric identifiers

a) Member States shall collect biometric identifiers comprising the facial image and ten fingerprints from the applicant in accordance with the safeguards laid down in the European Convention for the Protection of Human Rights and Fundamental Freedoms and in the United Nations Convention on the Rights of the Child.

At the moment of submission of his/her first visa application each applicant shall be required to appear in person. At that time the following biometric identifiers shall be collected:

- a photograph, scanned or taken at the time of application and
- ten fingerprints taken flat and digitally captured.

For any subsequent application the biometric identifiers shall be copied from the first application, providing the last entry is not older than 48¹ months. After this period a subsequent application is to be considered as a "first application".

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- ¹ The **Chair** suggested that in order to facilitate an agreement in relation to the lower age limit the "frequency" of giving biometric data could be set to 24 months.
- DE** could accept an age limit of 6 years if applicants would be required to give biometric data every 24 months. This delegation noted that it would be important to inform border control authorities that the data on children in the VIS might not match and suggested that this issue be raised in the Frontiers Working Party.
- NL** suggested the addition of two elements: it should be made technically possible to see in the system when the original data was taken and that this type of exemption should be linked to the exemption to appear in person (III.4 of the present CCI), which holds for bonafide businessmen, people well-known at the consular post, etc.
- AT** wondered whether a better solution would be to have a 24 month deadline for children and maintain 48 months for adults. **BE**, supported by **SI**, was in favour of this suggestion adding that in the case of children both fingerprints and digital image should be collected every 24 months.
- EE** was in principle in favour of the suggestion, but found that attention should be made to the digital image as well. Most applicants are adults and the physical appearance also changes relatively fast.
- FR**, supported by **PT**, suggested that a clause be added taking account of technical progress making it possible to collect and exploit fingerprints from younger children. As for the shorter interval between the collection of data, 24 months was of course better than 48 months but FR would prefer children to give their data at each application. In any case both adults and children should give a photo at each application. FR shared the concerns of DE in relation to the border control authorities.
- HU** was in favour of distinguishing photos from fingerprints, as applicants are already now required to bring photos each time they apply for visa, and there would be no reason for changing that.
- COM** reserved his position in relation to the Presidency suggestion at this stage, noting that the clause referring to technical development could be added in a recital.
- The Chair noted that the European Parliament was currently preparing their report, but the Presidency did not want to lose time and therefore suggested a compromise text as a basis for further discussions.

The technical requirements for the photograph and the fingerprints shall be in accordance with the international standards as set out in ICAO document 9303 part 1 (passports) 6th edition.¹

The biometric identifiers shall be taken by qualified and duly authorised staff of the diplomatic mission or consular post or, under their supervision, of the external service provider referred to in point 1.B.

The data shall be entered in the Visa Information System (VIS) only by duly authorised consular staff according to Articles 4(1), Article 5 and Article 6(5) and (6) of the VIS regulation.

¹ **DE** suggested that the current text be replace by the following:

"The technical requirements for the photograph shall be in accordance with the international standards as set out in ICAO Doc 9303 part 1 6th edition. The fingerprints shall be taken in accordance with ICAO standards, the technical requirements set out for the VIS and the passports delivered by Member States to their nationals in accordance with Regulation 2252/2004."

DE also noted that the "Article 6 Committee" should be involved to ensure uniformity of approach in relation to the technical aspects, cf. footnote 1), page 4). **COM** drew delegations' attention to Decision 512/2004/EC on VIS (OJ L 213, 15.6.2004), where the SIS II Committee is given these tasks.

b) Exceptions¹

The following applicants shall be exempt from the requirement to give fingerprints:

- Children under the age of 6;
- Persons where fingerprinting is physically impossible². If, however, fingerprinting of less than ten fingers is possible, the respective number of fingerprints shall be taken.

¹ The **Chair** recalled that delegations had previously expressed general support for a harmonised approach and clearly defined exemptions, and therefore the Presidency suggested that holders of diplomatic passports be exempted in the case of heads of states or governments and official delegations invited by governments or international organisations, when visiting such international organisations. **AT, LU, FR, IT, EE** and **BE** were satisfied with this suggestion. **EL** found that it was paradoxical that bilateral arrangements on general exemptions from visa requirements existed on the one hand and then other arrangements be made for exemption from giving biometric data.

² The **Chair** suggested that it be specified in the text this "impossibility" referred to a permanent situation. **FR** and **AT** was of the opinion that exemption should only be given in cases of permanent incapacity to give finger prints.
HU found that the exemption should also be granted in the case of accidents. **PT** entered a scrutiny reservation.

A Member State may provide for exceptions from the requirement of collecting biometric identifiers for holders of diplomatic passports, service/official passports and special passports.

In each of these cases an entry “not applicable” shall be introduced in the VIS.

- (3) In Point VII, point 1 is replaced by the following text:

1 A Organisation of the reception and processing of visa applications

Each Member State shall be responsible for organising the reception and processing of visa applications.

For each location Member States shall either equip their consular office with the required material for capturing/collecting biometric identifiers or without prejudice to the above mentioned options of representation, decide to cooperate with one or more other Member States. Any cooperation shall take the form of co-location or the establishment of a Common Application Centre or co-operation with external service providers.¹

- a) Where “co-location” is chosen, staff from the diplomatic posts and consular missions of one or more Member States process the applications (including biometric identifiers) addressed to them at the diplomatic post and consular mission of another Member State and share the equipment of that Member State. The Member States concerned shall agree on the duration and conditions for the termination of the co-location as well as the part of the administrative fee to be received by the Member State whose diplomatic post or consular mission is being used.

¹ **FR** recalled its opposition of principle to the inclusion of provisions on the various types of cooperation among Member States, noting that despite the invitation given to the Commission in the Hague Programme, the legal basis could not cover these issues and moreover there was no need for such provisions. **FR** suggested that Article 1 (3), 1A (a) and (b) be deleted. **IT** supported the idea of creating a common legal framework for these types of cooperation, but given the predictable enormous practical, administrative and financial problems with such cooperation, the proposal should rather set out very general principles.

DE supported the Commission proposal, in particular in relation to CACs, and wondered whether more emphasis should not be given to the role of the Community (and the Commission).

SI and **LV** were in favour of all the types of cooperation listed.

COM noted that given the fact that some delegations found the Commission's proposal too detailed and others that it was not detailed enough was maybe the proof that the proposal struck the right balance. However, as this proposal was amending the existing CCI, the proposal remained within that framework which provided no room from increasing the role to be played by the Commission. COM did not exclude that Article 66 of the TEC could serve as a legal basis for such enhanced involvement.

- b) Where "Common Application Centres": are established, staff of diplomatic posts and consular missions of two or more Member States are pooled in one building in order to receive the visa applications (including biometric identifiers) addressed to them. Applicants shall be directed to the Member State responsible for the processing of the visa application. Member States shall agree on the duration and conditions for the termination of this co-operation as well as the cost sharing among the participating Member States. One Member State shall be responsible for contracts in relation to logistics and diplomatic relations with the host country.
- c)¹ Co-operation with external service providers in accordance with 1.B

1.B Co-operation with external service providers

Where for reasons relating to the local situation of the consular post it is not appropriate to equip the diplomatic mission or consular office for capturing/collecting biometric identifiers or to organise co-location or a Common Application Centre, a Member State or several Member States jointly may co-operate with an external service provider for the reception of visa applications (including biometric identifiers). In such a case, the Member State(s) concerned shall remain liable for compliance with data protection rules for the processing of visa applications.

¹ FR found this paragraph incompatible with national rules in a number of areas (among others public accounting) (cf. 10540/1/06 VISA 158 COMIX 552 REV 1, p.8). DE reserved its position in relation to the cooperation with external service providers.

1.B.1 - Types of co-operation with external service providers¹

Cooperation with external service providers shall take [one of] the following form[s]:

- a) the external service provider acts as a call-centre providing general information on the requirements for applying for a visa and in charge of the appointment system;
- b) the external service provider provides general information on the requirements for applying for a visa, collects applications, supporting documents and biometric data from visa applicants and collects the handling fee (as provided for by Part VII, point 4 and Annex 12) and transmits completed files and data to the diplomatic mission or consular post of the Member State competent for the processing of the application.²

1.B.2. Obligations of Member States

The Member State(s) concerned shall select an external service provider who is able to ensure all the technical and organisational security measures and appropriate technical and organizational measures requested by the Member State(s) to protect personal data against accidental or unlawful destruction or accidental loss, alteration, unauthorized disclosure or access, in particular where the processing involves the transmission of data over a network as well as the reception and transmission of files and data to the consular post, and against all other unlawful forms of processing.

¹ **IT**, supported by **ES**, found the distinction between 1.B.1 a) and b) artificial and extremely fragile from a legal point of view (cf. outcome of previous meeting 10540/1/06 REV 1, p. 7) and both foresaw considerable practical problems because of this distinction.

² **DE**, supported by **FR**, was not in favour of allowing external service providers collect biometric data from applicants. **PT** expressed doubt in relation to this issue. Referring to the introduction to 1.B, **COM** drew delegations' attention to the fact that this type of cooperation should only take place if all other possibilities had been exhausted and that a link was made to provisions on data protection. COM also recalled that there is no obligation for Member State to have recourse to outsourcing.

When selecting external service providers, Member States' diplomatic missions or consular posts shall scrutinise the solvency and reliability of the company (including necessary licences, commercial registration, company statutes, bank contracts and shall ensure there is no conflict of interests¹.

External service providers shall not have access to the Visa Information System (VIS) for any purpose. Access to the VIS shall be reserved exclusively to duly authorised staff of diplomatic missions or consular posts.

The Member State(s) concerned shall conclude a contract with the external service provider in accordance with Article 17 of Directive 95/46. Before concluding such a contract, the diplomatic mission or consular post of the Member State concerned shall within local consular cooperation inform² the diplomatic missions and consular posts of other Member States and the Commission delegation why the contract is necessary.

In addition to the obligations set out in Article 17 of Directive 95/46, the contract shall also contain provisions which:

- a) define the exact responsibilities of the service provider;
- b) require the service provider to act under the instructions of the responsible Member States and to process the data only for the purposes of processing of personal data of visa applications on behalf of the responsible Member States in compliance with Directive 95/46;
- c) require the service provider to provide the applicants with the information required under Regulation [draft VIS regulation];³
- d) provide for access by consular staff to the premises of the service provider at all times;

¹ **DE** suggested the addition of the following text:
"and that the technical and organisational measures for the protection of personal data are respected. The Member States shall seek to harmonize the use of these criteria at local level."

² **IT** could not accept this provision. **NL** and **BE** were in favour of sharing information in LCC but there should be no need to justify using outsourcing.

³ **FR**: reservation.

- e) require the service provider to observe rules of confidentiality (including the protection of the data collected in relation to visa applications);
- f) contain a suspension and termination clause.¹

The Member State(s) concerned shall monitor implementation of the contract, including:

- a) the general information provided by the service provider to visa applicants;
- b) the technical and organisational security measures and appropriate technical and organizational measures to protect personal data against accidental or unlawful destruction or accidental loss, alteration, unauthorized disclosure or access, in particular where the processing involves the transmission of data over a network, and against all other unlawful forms of processing as well as the reception and transmission of files and data to the consular post;
- c) the capturing of biometric identifiers²;
- d) the measures taken to ensure compliance with data protection provisions.

The total amount of fees charged by the external service provider for processing the visa application shall not exceed the fee set out in Annex 12³.

The consular staff of the Member State(s) concerned shall give training to the service provider, corresponding to the knowledge needed to offer appropriate service and sufficient information to visa applicants.

1.B.5 - Information

Precise information on the means of obtaining an appointment and submitting a visa application shall be displayed by Member States' diplomatic missions and consular posts for the general public.

¹ DE could accept this provision, provided that it be defined what it covers.

² SE: scrutiny reservation.

³ FR, IT, ES and BE were strongly opposed to this provision, IT noting that the fee charged by the service provider was to cover the service offered and not the processing of the application which was the responsibility of the consular post. NL added that contrary to the argument put forward by COM, outsourcing would not allow Member States to reduce costs as it necessary to maintain integrity of the handling of visa applications and data.

1.C Maintenance of direct access for applicants to Member States diplomatic missions and consular posts

Irrespective of the type of cooperation chosen, Member States may decide to maintain the possibility of allowing for applicants' direct access to lodge an application for a visa directly at the premises of its diplomatic mission or consular posts. Member States shall assure the continuity of reception and processing of visa application, in the event of sudden termination of cooperation with other Member States or any type of external service provider.

1.D Decision and publication

Member States shall inform the Commission of how they intend to organise the reception and processing of visa applications in each consular location. The Commission will ensure appropriate publication.

Member States shall provide the Commission with the contracts they conclude.

(4) In point VIII, point 5.2 is amended as follows:

a) the title is replaced by the following:

5.2. Member States' diplomatic missions and consular posts' cooperation with commercial intermediaries

b) the following sentence is inserted between the title and point 5.2 (a):

For repeated applications in the sense of point III 1.2, Member States may allow their diplomatic missions or consular posts to cooperate with commercial intermediaries (i.e. private administrative agencies, transport or travel agencies (tour operators and retailers)).

Article 2

The Commission shall present a report to the European Parliament and to the Council on the implementation of the present regulation two years after its entry into force.

Article 3

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

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels,

For the European Parliament

The President

For the Council

The President