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From: Visa Working Party/Mixed Committee
EU-Iceland/Liechtenstein/Norway/Switzerland)

On: 17 July 2014

Subject: Draft Regulation of the European Parliament and of the Council on the
Union Code on Visas (Visa Code) (recast)

1. At its meeting of 17 July 2014, the Working Party examined Articles 3 to 7 of the above draft Regulation as set out in 8401/14.
2. The text of the aforementioned Articles is included in the Annex. Delegations' general comments can be found below. Comments in relation to the provisions of the Articles are set out in the footnotes of the Annex.

General comments

DE, SE FR, AT, NL, DK, CZ, in the context of their general concerns about the financing of the extra cost that would be generated by the recast of the Visa Code, asked for a cost-benefit analysis by the Commission; **SE** wondered whether a raise of the visa fee would be an answer. In this vein, **DE** stressed that such analysis should not be postponed for the end of the negotiations. The **representative of the Commission (COM)** emphasised that such analysis is not possible without proper feedback from Member States regarding the necessary data; hence, **COM** invited delegations to provide all the data required for the sought cost-benefit analysis and with a view to making the visa procedure less costly.

By way of general introduction to the airport transit visas (ATV) provisions recast, **COM** pointed out that the main objective of the proposal is to accentuate their emergency character and render them more compatible to the Schengen Governance legal framework. Moreover, the Working Party thought more opportune to deal with the issues linked with the choice between delegated or implemented acts in the context of ATV at a later stage, with a view to applying a coherent approach on these issues at the entire future Regulation.

Proposal for a

REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

on the Union Code on Visas (Visa Code)

(recast)

TITLE II

AIRPORT TRANSIT VISA

Article 3

Third-country nationals required to hold an airport transit visa¹

1. Nationals of the third countries listed in Annex III shall be required to hold an airport transit visa when passing through the international transit areas of airports situated on the territory of the Member States.

¹ **DE, FR, NO, PL:** reservations on the recast Article's added value, because they considered that the current national systems, based on a risk-assessment decision-making process, have been functioning in a satisfactory way for a long time. **DE, FR, NL, AT** pointed out that in this analysis, the public security element should be equally evaluated along with the migration risk factors. In the same vein, **NL** pointed out that non-compliance from a third country with its obligations arising from a readmission agreement should also be explicitly mentioned as possible factors in this assessment. **COM** recalled that in some cases some third countries remain for an unreasonably long time in the national list and a Schengen-Governance-inspired approach (such as this contained in this recast provision) could curb this automaticity in the management of the lists. As regards the aforementioned widening of the scope of the relevant risk analysis, **COM** indicated that, albeit taking into account security factors seems not be possible under the current ATV regime, this suggestion should be further examined. **COM** also pointed to the **NL** proposal as worthy of further consideration.

2. The Commission shall be empowered to adopt delegated acts in accordance with Article 48 concerning amendments to the list of the third countries set out in Annex III.

Where in the case of emerging risks, imperative grounds of urgency so require, the procedure provided for in Article 49 shall apply to delegated acts adopted pursuant to this paragraph.¹

3. Where there is a sudden and substantial influx of irregular immigrants, a Member State may require nationals of third countries other than those referred to in paragraph 1 to hold an airport transit visa when passing through the international transit areas of airports situated on its territory. The duration of such a measure shall not exceed 12 months.² The scope and duration of the airport transit visa requirement shall not exceed what is strictly necessary to respond to the sudden and substantial influx of irregular³ immigrants.

¹ **FR** expressed its preference for the use of implementing acts in the context of this Article; **NL** indicated that the ordinary procedure should be used, given that the adaptation of the list is an essential element of the basic act. **RO**: underlined that prior consultation of the Member State (MS) concerned should be necessary in the implementation of this provision. **COM** recalled the agreed approach to touch upon these issues only after a clearer picture of the MS' preferences on the substance of the recast proposal is to be attained.

² **BE, CH, CZ, DE, DK, ES, FR, IT NL NO, AT, PL, RO**: expressed strong concerns against abolishing ATV after a maximum period of 1+1 years, given that the emergency situation may persist further to this deadline. In this sense, **these delegations**, recalled that each MS may be faced with migration influxes of different magnitude, hence, maintaining the national lists of the MS, instead of a joint one, would provide the necessary flexibility. **IT** queried whether the two 12-month terms should be consecutive or not. **BE** acknowledged that a revision of the list mechanism may be proven useful, by requiring MS justifying the maintenance of a third country in the relevant national list (and not through the adoption of a joint one). By way of compromise, **BE** suggested providing for the **COM**'s possibility to give an opinion for each prolongation, which should be lasting for as long as the emergency. **SE** entered a reservation on the Article and pointed out that, (while supportive in general of a joint list), a yearly review thereof during which MS concerns would be taken into account, would be of great importance. **COM** stressed that the introduction of an ATV should be a temporary safeguard measure to counter an emergency and that this purpose would be better served by keeping a joint list, which could be regularly reviewed.

³ **EL, RO** reiterated their wish to use the term "illegal" instead of "irregular", throughout the text. **COM** recalled that the term used in the Treaties is "illegal immigration"; however, it would not be correct to refer to persons (notably migrants) as "illegal". Hence the term "irregular migrants" should be used instead, as in recent legislation. **CLS** agreed with **COM**. **FR** expressed strong concerns about the implementation of this provision, also for security-related reasons. **DE** queried **COM** about the scope of the wording "sudden and substantial influx...".

4. Where a Member State plans to introduce the airport transit visa requirement in accordance with paragraph 3, it shall as soon as possible notify the Commission, and shall provide the following information:

- (a) the reason for the planned airport transit visa requirement, substantiating the sudden and substantial influx of irregular immigrants;
- (b) the scope and duration of the planned introduction of the airport transit visa requirement.

5. Following the notification by the Member State concerned in accordance with paragraph 4, the Commission may issue an opinion.¹

¹ **DK, IT, PL, SK:** queried about the consequences of divergent views between the MS concerned and **COM**. **SK** also asked whether **COM** would have a deadline in delivering its opinion. **COM** pointed out that there will not be any suspensive effect in the decision making of the MS, during the reflection period of the **COM**, nor the latter would be obliged to submit an opinion at first place. If however, **COM** ascertains non-compliance with the Visa Code, then it could act in accordance with the Treaties.

6. The Member State may prolong the application of the airport transit visa requirement only once where the lifting of the requirement would lead to a substantial influx of irregular migrants.

Paragraph 3 shall apply to such prolongation.¹

7. The Commission shall, on an annual basis, inform the European Parliament and the Council about the implementation of this Article.

8. The following categories of persons shall be exempt from the requirement to hold an airport transit visa provided for in paragraphs 1 and 3:

(a) holders of a valid uniform visa, touring visa, national long-stay visa or residence permit issued by a Member State;²

(b) third-country nationals holding a valid residence permit issued by a Member State³ which does not take part in the adoption of this Regulation or by a Member State which does not yet apply the provisions of the Schengen *acquis* in full, or third-country nationals holding one of the valid residence permits listed in Annex IV issued by Andorra, Canada, Japan, San Marino or the United States of America guaranteeing the holder's unconditional readmission, or holding a residence permit for the Caribbean parts of the Kingdom of the Netherlands (Aruba, Curaçao, Sint Maarten, Bonaire, Sint Eustatius and Saba);

(c) third-country nationals holding a valid visa for a Member State which does not take part in the adoption of this Regulation, or for a Member State which does not yet apply the provisions of the Schengen *acquis* in full, or for a country party to the Agreement on the European Economic Area, or for Canada, Japan or the United States of America, or holders of a valid visa for the Caribbean parts of the Kingdom of the Netherlands (Aruba, Curaçao, Sint Maarten, Bonaire, Sint Eustatius and Saba), when travelling to the issuing country or to any other third country, or when, having used the visa, returning from the issuing country;⁴

¹ See comments of the delegations under para. 3.

² **SK:** explicit reference to Art. 2(15)(b) of the Schengen Borders Code cases should be added in this provision, in particular with regard to stateless persons. **COM** recalled that stateless persons, as well as refugees are granted a residence permit / a travel doc. by the MS, which recognised their status; **COM** will further reflect on the suggestion.

³ **BE:** add the wording “of the EU”, in order to clarify that **UK, IE**, fall under the scope of this provision; this suggestion applies to point (c) as well. **FR:** scrutiny reservation on possible application of this exception clause to its overseas territories.

⁴ **DE:** the time line of this provision should be better clarified.

(d) family members of citizens of the Union as referred to in Article 3 of Directive 2004/38/EC;¹

(e) holders of diplomatic, service, official or special passports;²

(f) flight crew members who are nationals of a contracting Party to the Chicago Convention on International Civil Aviation.³

9. The Commission shall be empowered to adopt delegated acts in accordance with Article 48 concerning the amendments to the list of valid residence permits entitling the holder to transit through the airports of Member States without being required to hold an airport transit visa, set out in Annex IV.⁴

¹ **BE** indicated its preference for the definition of family members of a more limited scope, by virtue of Art. 3(1) of the Directive 2004/38/EC, also due to the fact that carriers etc. would not be able to verify a family link outside the scope of the current regime. **DE, IT:** similar concerns against the extension of the scope of the family members. **COM:** confirmed that the term “family members” refers only to those who are entitled to benefit from Dir. 2004/38 in order to enter a MS and therefore, should be exempted from the ATV rules.

² **CZ, DE, EL, IT, NO:** reservations on the proposed addition of service, official or special passports. **COM** recalled that this provision draws on the possibility (pursuant to Regulation 539/2001/EC) for the MS to grant exemption from the visa requirement for the holders of such passports.

³ **CZ** pointed out that the persons under this provision should always produce a travel doc. and not just a professional badge.

⁴ **FR, IT** expressed concerns about the scope of this provision. **COM:** the choice of delegated acts could facilitate the updating of the Visa Code in compliance with the Lisbon Treaty and the ensuing case law of the Court of Justice.

TITLE III

CONDITIONS AND PROCEDURES FOR ISSUING VISAS

CHAPTER I

AUTHORITIES TAKING PART IN THE PROCEDURES RELATING TO APPLICATIONS

Article 4

Authorities competent for taking part in the procedures relating to applications

1. Applications shall be examined and decided on by consulates.¹
2. By way of derogation from paragraph 1, applications may be examined and decided on at the external borders of the Member States by the authorities responsible for checks on persons, in accordance with Articles 32, 33² and 34.
3. In the non-European overseas territories of Member States, applications may be examined and decided on by the authorities designated by the Member State concerned.

¹ **PL** suggested replacing "by consulates" with "at consulates", in order to bring it in line with the Vienna Convention. **COM:** it would be more appropriate to entrust such an adaptation to the legal linguists. **PL** proposed adding at the end of the point the wording "without prejudice to paragraph 4". **COM:** it seems unnecessary as Art. 4 has to be read together as a whole; it could be resolved by the legal linguists.

² **FR, NL, SE:** reservations about the inclusion of Art. 33 in the scope of this provision. **COM:** the concerns of the delegations should be addressed while dealing with Art. 33 itself.

4. A Member State may require¹ the involvement of authorities other than the ones referred to in paragraphs 1 and 2 in the examination of and decision on applications.

5. A Member State may require to be consulted or informed by another Member State in accordance with Articles 19 and 28.

Article 5

Member State competent for examining and deciding on an application

1. The Member State competent for examining and deciding on an application for a uniform visa shall be:

- (a) the Member State whose territory constitutes the sole destination of the visit(s);
- (b) if the visit includes more than one destination, or if several separate visits are to be carried out within a period of two months,² the Member State whose territory constitutes the main destination of the visit(s) in terms of the length of stay, counted in days;³ or
- (c) if no main destination can be determined, the Member State whose external border the applicant intends to cross in order to enter the territory of the Member States.

¹ **SE** suggested replacing the word "require" with "decide". **COM:** this issue could be confirmed by the legal linguists.

² **NL, LV, PL, SK:** queried **COM** why the referred period is two months, instead of 90 days. **COM:** the two-month option was qualified, following calculations, as the maximum necessary period for the completion of all the relevant procedures and the actual trip to a MS. **COM** indicated that this issue could be further considered.

³ **PL:** reservation on the abolition of the purpose-related criterion from the recast. **MT:** reservation on this point, recalling that it may not be feasible for the consulates to be informed about the main destination of the traveller. **BE** queried **COM** whether a shorter stay for professional purposes in one MS could be qualified as the main destination, over a longer stay for tourist reasons (i.e. taking into account the character of the stay). **COM** would be open to consider this suggestion, as long as it would not be a likely cause of misinterpretations.
In the same vein, **CH, SI** stressed that MS should have the discretion to consider themselves competent to examine an application, on the basis of the purpose of stay of the person concerned and on the basis of the national interest of the MS concerned. **DE:** positively inclined towards this suggestion.
In support of the **COM**, **FR**, pointed out that this provision could help thwarting the visa shopping incidents.

¹2. If the Member State that is competent in accordance with paragraph 1, point (a) or (b), is neither present nor represented in the third country where the applicant lodges the application in accordance with Article 6, the applicant is entitled to lodge the application:

- a) at the consulate of one² of the Member States of destination of the envisaged visit,
- b) at the consulate of the Member State of first entry, if point a) is not applicable,
- c) in all other cases at the consulate of any of the Member States that are present in the country concerned.

3. The Member State competent for examining and deciding on an application for an airport transit visa shall be:

- (a) in the case of a single airport transit, the Member State on whose territory the transit airport is situated; or
- (b) in the case of double or multiple airport transit, the Member State on whose territory the first transit airport is situated.

¹ **SE, NO, DK:** queried about which MS should be responsible to examine an application for international protection in the context of the Dublin Regulation, if a visa is issued through a mandatory representation, or via the external service provider. **COM** acknowledged that the issue has to be clarified lest the relevant provisions of the Dublin Regulation become inapplicable.

BE: by way of compromise, instead of providing for mandatory representation, bilateral agreements could be concluded between the MS concerned, over a set period of time, to enhance legal security in the field. **DE, FR, NL, NO, PL, SI** expressed concerns / reservations vis-à-vis the concept of mandatory representation and were positively inclined towards the above **BE** proposal for bilateral agreements. Also, **CZ, DK, ES, HU, AT** expressed concerns / reservations against the mandatory representation.

CH, FR underlined the need to find a workable solution, which would avoid an unequal burdening on certain MS. In this vein, **NO** suggested reflecting on how best use the external services providers, where representation is not possible, in order to mitigate the administrative burden for the MS concerned. **COM:** this idea could be further examined. At any rate the spirit of the Schengen solidarity and cooperation should not be forgotten.

SI, SK, were not in principle against the mandatory representation; **SK** pointed out that the applicant should be furnished with a remedy in the provision. **COM** recalled that an appeal is not feasible to be mounted, given that one MS is referred to another one (the representing one).

LU: the list of all the established representation agreements should be available to the future applicants, via the relevant MS' delegations.

² **AT:** this wording may lead to abuses (visa shopping).

Article 6

Consular territorial competence

1. An application shall be examined and decided on by the consulate of the competent Member State in whose jurisdiction the applicant legally resides.
2. A consulate of the competent Member State shall examine and decide on an application lodged by a third-country national legally present but not residing in its jurisdiction, if the applicant has provided justification for lodging the application at that consulate.

Article 7

Competence to issue visas to third-country nationals legally present within the territory of a Member State

1. Third-country nationals who are legally present¹ in the territory of a Member State and who are required to hold a visa to enter the territory of one or more other Member States shall apply for a visa at the consulate of the Member State that is competent in accordance with Article 5.
- ²2. Third-country nationals who have lost their travel document, or from whom this document has been stolen, while staying in the territory of a Member State, may leave that territory on the basis of a valid travel document entitling them to cross the border issued by a consulate of their country of nationality without any visa or other authorisation.³

¹ In reply to **PL**, **COM** recalled that the scope of this provision covers only legally staying third-country nationals; **COM** will further check the wording of this provision regarding such people who are family members of an EU citizen.

² **FI**: scrutiny reservation on paragraphs 2 and 3. **AT**; the wording of paragraph 2 belongs rather to the Schengen Borders Code.

CZ: it should be clarified that the person concerned would not be entitled to leave the MS before the issue of the travel doc.; the length of stay shall be the one to which the person was entitled in order to avoid abuses.

³ **FR**: suggested adding at the end of the sentence the wording: "... and after the presentation of a declaration of loss or theft". **COM** recalled that provisions such as paragraph 2 are contained in Visa Facilitation Agreements and their implementation has not caused any problem.

¹3. Where the third-country national, referred to in paragraph 2, intends to continue travelling in the Schengen area, the authorities in the Member State² where he declares the loss or theft of his travel document, shall issue a visa with a duration of validity and period of allowed stay identical to the original visa on the basis of the data registered in the VIS.³

¹ **FR:** entered a scrutiny reservation on the provision, pointing out that such competence does not lie with its national authorities (prefectures).

² **NO:** given that these authorities are not the normal visa-issuing ones, it would better for clarification purposes say: “the competent authorities according to the Visa Code”. **COM** acknowledged that MS shall designate such competent authorities in the implementation of the future Regulation.

³ **NL:** the new visa could be treated as an extended one, as regards the fee to be levied, i.e. 30 euros. **COM** will further examine this practical issue, which however, should not be dealt with within this Article which provides for MS' competence.

SE, AT: the interaction of this provision with the Dublin Regulation should be clarified with regard to which MS (the one of first entry, or the one where the person concerned is present) should be responsible to grant the authorisation to the said person to cross the border. **COM;** paragraphs 2 and 3 of Art. 7 will be further checked against the Dublin Regulation.

AT, SK: queried about where to fix the sticker if the passport is lost. **COM** will further examine these practical issues, which however, should not be dealt with within this Article which provides for MS' competence.

AT also suggested clarifying whether the issuing MS should carry out any check before issuing the new sticker.

SK suggested notifying to **COM** the authorities competent to issue a visa under this provision. **ES** pointed out that the MS responsible to issue the visa should be the one to which the person wishes to travel and not the one at which he/she lost the travel doc.

LV: add, for clarification purposes, that the visa shall be valid on the basis of the travel doc., which would accompany it. Furthermore, the travel doc. in question shall be in compliance with Art. 11 (former 12 of the Visa Code) of the proposal with regard to its validity (for three months after leaving the MS).