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NOTE

From: Presidency
To: Visa Working Party/Mixed Committee
Working Party on Frontiers/Mixed Committee
(EU-Iceland/Liechtenstein/Norway/Switzerland)
Subject: Duration of short-stay in the Schengen area - Extension of that duration under bilateral agreements concluded by Member States with third countries - Draft regulations on Entry/Exit system and Touring visa

The Commission has proposed to amend Article 20(2) of the Convention implementing the Schengen Agreement (CISA) both under Article 54 of the draft Regulation establishing the Entry Exit System (EES) and under Article 12 of the draft Regulation on the touring visa.¹

According to Article 20(2) of the CISA, if a Member State has concluded a bilateral visa waiver agreement with a third country listed in Annex II of the Visa Regulation ('visa-free list') before the entry into force of the CISA (or the date of the Member State's later accession to the Schengen Agreement), the provisions of that bilateral agreement may serve as a basis for that Member State to 'extend' a visa-free stay for longer than three months on its territory for nationals of the third country concerned.

¹ See respectively 7675/16 FRONT 165 VISA 91 CODEC 391 COMIX 268 (COM(2016)194 final) and 8406/14VISA 91 CODEC 974 COMIX 202 (COM(2014) 163 final).

The current situation has created ground for different interpretations of the above provision. The vast majority of Member States interpret it to the effect that bilateral agreements that had been agreed before accession to Schengen, allow the third country nationals concerned to stay within the territory of the Schengen area beyond the period of 90 days in one 180 day period. Such interpretation makes it possible to merge the several short-term stays of the third country nationals on the basis of those bilateral agreements and to stay within the territory of the Schengen area for several years continuously.

The Commission has indicated in its proposals that the Treaty on the Functioning of the European Union (TFEU) no longer limits the ‘short stay’ in the Schengen area to three months; it does not specify its duration. However, the Commission is of the opinion that Article 20(2) and the existence of bilateral ‘extensions of stays’ is still incompatible with Article 77(2)(a) and (c) of the TFEU, because the common policy on visas cannot be based on the existence of bilateral agreements from the past. The scope of third-country nationals’ freedom to travel should not depend on the number and content of bilateral agreements concluded in the past. The same rules should apply to all visa-free third-country nationals.

The Commission states further that the implementation of Article 20(2) raises practical problems and creates legal uncertainty both for authorities and travellers, especially when the latter are to depart from the Schengen area. In addition, the future Entry/Exit System requires clear-cut rules and for technical reasons, account cannot be taken of the possible continued application of bilateral visa waiver agreements when the period of authorised stay is to be verified. Finally, the Commission has put forward its proposal regarding the touring visa precisely to provide a legal framework and appropriate authorisation enabling visa-free third-country nationals to stay in the Schengen area for longer than 90 days.

The Presidency is also of the opinion that based on the legal provisions concerned (in particular Recital 1 of Regulation (EC) No 539/2001) the short-term stay within the territory of the Schengen area is defined as up to 90 days and becomes a long-term stay beyond 90 days (covered by national visas, residence permits, etc.) both for the nationals of third countries subject to the visa requirement and for those who are exempt from that requirement.

Given the automatic nature of the EES, the EES would unfoundedly flag these third country nationals as overstayers if they stay longer than 90 days within 180 days. In earlier discussions, also in the context of the Touring Visa proposal, possible ways forward have been explored, which focused on (fully) renegotiating the bilateral agreements, including (administrative) limitations to the right of legal stay, introducing manual checks on the EES list of overstayers and appropriate exemptions for third country nationals enjoying rights under the bilateral agreements. None of the solutions had sufficient support to take this issue forward.

As the Presidency is aware of the importance of the bilateral agreements for delegations, this paper presents a compromise proposal, which aims at respecting the existence of those bilateral agreements as much as possible and at the same time seeks to maximize the benefit of the EES.

The principle of this compromise avoids any contradiction with the existing bilateral agreements and thereby any renegotiation. Furthermore, it does not tackle the question of combining stays based on different bilateral agreements. However, by submitting the application of the bilateral agreements to strict administrative formalities (notification, request, decision of a competent authority of a specific Member State, flag in the EES) it will limit the effects of the bilateral agreements and considerably reduce the risk of abuse.

Delegations will find in the Annex a compromise suggestion concerning Recital 8b and Article 54 of the EES draft Regulation.

The solution proposed, if agreed by delegations, would be retained in both proposals (EES and Touring visa).

New Recital 8b

8b. For the purpose of verification of the compliance with the limit of 90/180 days, the calculator included in the EES should take into account all the stays in the territory of the Member States, regardless of their nature and legal basis. Notably, apart from the initial period of stay, should be taken into account all the extensions granted in accordance with Article 20(2) CISA.

*Amended text of Article 54**Amendment to the Convention implementing the Schengen Agreement*

In Article 20, of the Convention implementing the Schengen Agreement, paragraph 2 is replaced by the following:

- "2. Paragraph 1 shall not affect each Contracting Party's right to extend beyond 90 days in any 180-day period an alien's stay in its territory in exceptional circumstances or if [...] a bilateral agreement concluded before the entry into force of this Convention **and notified to the Commission**, provides a right to stay beyond 90 days in any 180-day period.

The stay of an alien in the territory of a Contracting Party may only be extended upon request of the alien and lodged with the competent authorities of that Contracting Party upon entry or during the stay of the alien at the latest on the last day of his/her 90-day stay in any 180-day period.

In case where the stay is extended, the competent authorities of that Contracting Party shall enter the data related to the extension in the latest relevant entry/exit record in accordance with Article 17 of the Regulation of the European Parliament and of the Council establishing an Entry/Exit System (EES) to register entry and exit data and refusal of entry data of third country nationals crossing the external borders of the Member States of the European Union and determining the conditions for access to the EES for law enforcement purposes and amending Regulation (EC) No 767/2008 and Regulation (EU) No 1077/2011..

The alien shall exit at the external borders of that Contracting party.

[In exceptional situations the alien may transit through the territory of other Contracting Party(ies) and exit at the external borders of that other Contracting Party. In that case the other Contracting Party(ies) have to agree with this procedure and the data that shall be added to the last relevant entry/exit record by the Contracting Party which has extended the stay.]

For the purposes of the application of this paragraph, the Contracting Parties shall notify to the Commission within three months after entry into force of this regulation their relevant applicable bilateral agreements. The Commission shall make the information available to the Contracting Parties (and eu-LISA) and the public through publication in the Official Journal of the European Union. "
