Council of the European Union

Brussels, 15 July 2021
(OR. en)

10859/21

Interinstitutional File: 2021/0233(NLE)

VISA 163
MIGR 149
RELEX 666
COAFR 198
COMIX 387

PROPOSAL

From:	Secretary-General of the European Commission, signed by Ms Martine DEPREZ, Director
date of receipt:	15 July 2021
To:	Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union
No. Cion doc.:	COM(2021) 413 final
Subject:	Proposal for a COUNCIL IMPLEMENTING DECISION on the suspension of certain provisions of Regulation (EC) 810/2009 of the European Parliament and of the Council with respect to The Gambia

Delegations will find attached document COM(2021) 413 final.

Encl.: COM(2021) 413 final

EUROPEAN
COMMISSION

Brussels, 15.7.2021
COM(2021) 413 final

2021/0233 (NLE)

Proposal for a

COUNCIL IMPLEMENTING DECISION

on the suspension of certain provisions of Regulation (EC) 810/2009 of the European Parliament and of the Council with respect to The Gambia

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

• Reasons for and objectives of the proposal

Under Article 25a(2) of the Visa Code[1], the Commission shall regularly assess third countries' cooperation on readmission and report to the Council at least once a year.

Under Article 25a(3) of the Visa Code, a Member State may also notify the Commission that it is confronted with substantial and persisting practical problems in the cooperation on readmission with a third country. In this context, it should be noted that readmission of own nationals is an obligation under international law.

On 10 February 2021, the Commission adopted its assessment, based on 2019 data and information provided by EU Member States and Schengen Associated Countries, and transmitted the report[2] to the Council.

Following a notification by Germany, the Commission completed its examination and informed the European Parliament and the Council of the results on 7 May 2021 that it assessed Germany is confronted with substantial and persisting practical problems in cooperation with The Gambia in the readmission of irregular migrants, in line with the procedure set out in Article 25a(4) of the Visa Code.

Based on the above analysis, and taking into account the Union's overall relations with the third country concerned, the Commission may conclude that the given third country does not cooperate sufficiently and that action is therefore necessary. If this is so, the Commission, in accordance with Article 25a(5), point (a), of the Visa Code, shall submit proposal for a Council implementing decision suspending the application of certain provisions of the Visa Code in respect of nationals of that third country. At all times, the Commission shall continue its efforts to improve cooperation with the third country concerned.

• The case of The Gambia

The Commission noted in the above-mentioned report that at the end of February 2019 the Gambian authorities unilaterally decided to impose a moratorium on all forced return operations and this prevented effective returns throughout most of 2019 (by charter and commercial flights). In addition, Member States were also confronted with uneven cooperation hampering all phases of the return process, including when applying the Good Practices on identification and return procedure that have been in place with The Gambia since 2018. The EU readmission arrangement and the equivalent bilateral arrangements that three Member States have are rarely respected. For two-thirds of the Member States that have issued almost half of the return decisions, identification processes (including through interviews) are not conducted satisfactorily and travel documents are not issued timely.

Developments after 2019 further corroborate this assessment, in particular by the recurring obstacles imposed by The Gambia on the organisation and implementation of return operations when the moratorium was officially lifted in January 2020, and despite the agreement in February 2020 on the modalities for return flights. Those setbacks were attested

[1] 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), OJ L 243, 15.9.2009, p. 1.

[2] COM(2021) 55 final (EU Restricted).

by the latest Gambian communication (on 6 April 2021), arguing that the country was not in a position to receive returnees until further notice. The Commission's examination of Germany's notification also confirmed that this Member State faces substantial and persisting practical problems in the cooperation with The Gambia.

Over the last two years the EU and the Member States have continuously and proactively engaged with The Gambia to establish a more predictable and reliable cooperation on readmission. In particular, the Commission and Member States have since 2019 engaged with the Gambian authorities to move towards a resumption of return flights and improving cooperation on readmission, taking account both of the Gambian capacity concerns and of Member States' needs to return Gambian nationals illegally staying in the EU.

The EU has consistently reaffirmed its will to find mutually agreeable solutions and to continue supporting The Gambia in the field of migration, including on return and readmission by various means : through training and projects covering handover procedure for immigration and police staff; capacity building of the Gambian administration regarding readmission procedures; strengthening of communication on migration management and returns; support of EU and Gambian authorities on the coordination of return operations from the EU; deployment of an EU Return Liaison Officer (EURLO); reinforcement of the operational capacities of the Gambia Police Force' and other law enforcement agencies in the fight against migrant smuggling and trafficking in human beings (Common Operational Partnership).

On numerous occasions, the EU side has also emphasised the increasing dissatisfaction and the possible consequences of failing to improve the situation, in line with the modalities agreed between the EU and The Gambia. The Commission and the Member States have carried out several joint or separate visits to The Gambia and conducted targeted discussions at both technical and political level. Verbal Notes were regularly exchanged. Finally, high level exchanges between the Commission services and the Head of Mission of the Gambia to the EU and dedicated meetings between the EU Delegation and relevant Gambian authorities in Banjul have taken place – the latest of which on 14 April 2021 in Brussels and on 22 April 2021 in Banjul. As a follow-up to these meetings and in response to the Gambian Note Verbale (received 6 April), the EEAS formally informed the Gambian authorities by Note Verbale (11 June 2021) of the implications of the revised Visa Code.

The Gambia's replies and reassurances have so far not led to sustained changes or concrete improvements in the cooperation on the basis of the indicators set out in Article 25a(2), including in the timely identification of persons illegally staying on the territory of the Member States, the issuance of travel documents and the organisation of return operations. In its exchanges with a Member State, in June, the Mission of the Gambia to the EU confirmed the existence of "a moratorium on forced return or repatriation until after the elections in December".

On that basis, considering the steps taken so far by the Commission to improve the level of cooperation, and taking into account the EU's overall relations with the Gambia (see below), it is considered that The Gambia's cooperation with the EU on readmission matters is not sufficient and that action is needed.

- **The Union's overall relations with The Gambia**

The EU's overall relations with The Gambia are guided by the objective of supporting a peaceful transition to a democratic, pluralist and inclusive political system. Since 2016, the

EU has focused on supporting democratic governance, regional stability and security, and economic recovery and development. The EU will continue in the future on promoting good governance, human development, and the green economy for sustainable growth and job creation.

The Cotonou Agreement and the National Indicative Programme 2017-2020 guide the partnership with The Gambia. Since 2017 the EU and its Member States are the country's main donor. The EU is the second trading partner. The cooperation on migration is comprehensive, focusing in particular on the creation of job opportunities, protection, reintegration of returnees, border management, fight against smuggling of migrants and trafficking in human beings.

- **The visa measures**

Scope of measures

The Council implementing decision should temporarily suspend the application of certain provisions of the Visa Code in respect of Gambian nationals. The suspension, however, does not apply to family members of (mobile) EU citizens covered by the Directive 2004/38/EC[3] and of third country nationals enjoying a right of free movement equivalent to that of Union citizens under an agreement between the Union and its Member States on the one hand and the third countries concerned on the other.

Content of the visa measures

The Gambia's failure to cooperate on readmission justifies the activation of all the measures set out in point(a) of Article 25a(5) of the Visa Code: suspension of the possibility of waiving requirements with regard to the documentary evidence to be submitted by visa applicants referred to in Article 14(6), suspension of the general 15 calendar days processing period referred to in Article 23(1) (which as a consequence also excludes the application of the rule on the extension of this period up to a maximum of 45 days in individual cases), suspension of the issuing of multiple entry visas (MEVs) in accordance with Article 24(2) and (2c) and, suspension of the optional visa fee waiver for holders of diplomatic and service passports in accordance with point (b) of Article 16(5).

Period of application of the visa measures

The Visa Code stipulates that the visa measures shall apply temporarily but there is no obligation to indicate a specific period of application of those measures in the implementing decision. However, under Article 25a(6) the Commission shall continuously assess progress in readmission cooperation on the basis of the indicators set out in Article 25a(2), including in the timely identification of persons illegally staying on the territory of the Member States, the issuance of travel documents and the organisation of return operations. The Commission shall report whether substantial and sustained improvement in the cooperation with the third country concerned on readmission can be established and, taking also account of the Union's overall relations with that third country, may submit a proposal to the Council to repeal or amend the implementing decision. If by contrast, the visa measures in accordance with the implementing decision have proven ineffective, it should be considered to trigger the second stage of the mechanism (provided for by Article 25a(5), point (b)).

---

[3] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ L 158, 30.4.2004, p. 77).

In addition, pursuant to Article 25a(7), the Commission shall - at the latest six months after the entry into force of the implementing decision - report to the European Parliament and to the Council on the progress achieved in the given third country's cooperation on readmission.

- **Consistency with existing policy provisions in the policy area**

The proposed decision is consistent with the set of harmonised rules of the common visa policy governing the procedures and conditions for issuing visas for intended stays on the territory of the Member States not exceeding 90 days in any 180-day period.

- **Consistency with other Union policies**

The EU promotes a comprehensive approach on migration and forced displacement, based on shared values and responsibilities. The New Pact on Migration and Asylum foresees developing and deepening tailor-made comprehensive and balanced partnerships to foster co-operation on all relevant aspects:

– Providing protection to those in need of protection and support to host countries and communities;

– Building economic opportunity and addressing the root causes of irregular migration and forced displacement;

– Supporting partners to strengthen migration governance and management;

– Fostering co-operation on return and readmission;

– Developing legal pathways to Europe.

– The cooperation between Member States and third countries on the readmission of illegally staying third country nationals is an important element of this policy. To reinforce such comprehensive partnerships and ensure full cooperation from third countries, the EU needs to mobilise all available tools, including development co-operation, trade or visa.

2. LEGAL BASIS, SUBSIDIARITY AND PROPORTIONALITY

- **Legal basis**

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), Article 25a(5), point (a).

- **Subsidiarity (for non-exclusive competence)**

n.a.

- **Proportionality**

The proposed measures the purpose of which is to stimulate The Gambia to improve its cooperation on the readmission of illegally staying third country nationals are proportionate to the objective pursued. These measures do not affect the possibility for the applicant to apply for and be granted visas, as such, but cover certain aspects of the procedure for issuing the visa or the level of the visa fee.

3. RESULTS OF EX-POST EVALUATIONS, STAKEHOLDER CONSULTATIONS AND IMPACT ASSESSMENTS

- **Ex-post evaluations/fitness checks of existing legislation**

n.a.

- **Stakeholder consultations**

n.a.

- **Collection and use of expertise**

n.a.

- **Impact assessment**

n.a.

- **Regulatory fitness and simplification**

n.a.

- **Fundamental rights**

The proposed measures do not affect the possibility to apply for and be granted visas and respect the fundamental rights of applicants, in particular the respect for family life.

4. BUDGETARY IMPLICATIONS

n.a.

5. OTHER ELEMENTS

- **Implementation plans and monitoring, evaluation and reporting arrangements**

n.a.

- **Explanatory documents (for directives)**

n.a.

- **Detailed explanation of the specific provisions of the proposal**

n.a.

2021/0233 (NLE)

Proposal for a

COUNCIL IMPLEMENTING DECISION

on the suspension of certain provisions of Regulation (EC) 810/2009 of the European Parliament and of the Council with respect to The Gambia

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to 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], and in particular Article 25a(5), point (a), thereof,

Having regard to the proposal from the European Commission,

Whereas:

(1) At the end of February 2019, Gambian authorities unilaterally decided to impose a moratorium on all forced return operations, which prevented effective returns for most of 2019. After the lifting of the moratorium in January 2020, Member States have been confronted with recurring obstacles imposed by The Gambia to the organisation and implementation of return operations and fluctuating cooperation hampering all phases of the return process, including when applying the existing Good Practices and further operational arrangements agreed between the Union and The Gambia. Such setbacks are also attested by the latest Gambian communication on 6 April 2021, announcing that the country was not in a position to receive returnees until further notice. Since then, Gambian authorities confirmed, in June, the existence of "a moratorium on forced return or repatriation until after the elections in December".

(2) Since 2019 the Commission has taken steps to improve The Gambia's level of cooperation in the readmission of illegally staying third country nationals. Those steps consisted of several meetings to find mutually agreeable solutions with the Gambian authorities at both technical and political level and to agree on further support projects to the benefit of The Gambia. In parallel, high-level exchanges between the Commission and the Gambian counterparts have taken place. The issues were also raised as a part of other meeting organised by the EEAS.

(3) Taking into account the steps taken so far by the Commission to improve the level of cooperation and the Union's overall relations with The Gambia, it is considered that The Gambia's cooperation with the Union on readmission matters is not sufficient and that action is therefore needed.

(4) The application of certain provisions of Regulation (EC) No 810/2009 should therefore be temporarily suspended for nationals of The Gambia who are subject to the visa requirement pursuant to Regulation (EU) 2018/1806 of the European Parliament

[4] OJ L 243, 15.9.2009, p. 1.

and of the Council.[5] This is considered the most efficient action to take in view of stimulating the Gambian authorities to undertake the necessary actions to improve cooperation on readmission matters. The temporary suspension does not apply to nationals of The Gambia applying for a visa and who are family members of a Union citizen to whom Directive 2004/38/EC applies or of a national of a third country enjoying a right of free movement equivalent to that of Union citizens under an agreement between the Union and its Member States on the one hand and a third country on the other.

(5) The measures temporarily suspended are set out in point(a) of Article 25a(5) of the Visa Code: suspension of the possibility of waiving requirements with regard to the documentary evidence to be submitted by visa applicants referred to in Article 14(6), suspension of the general 15 calendar days processing period referred to in Article 23(1) (which as a consequence also excludes the application of the rule on the extension of this period up to a maximum of 45 days in individual cases), suspension of the issuing of multiple entry visas (MEVs) in accordance with Article 24(2) and (2c) and, suspension of the optional visa fee waiver for holders of diplomatic and service passports in accordance with point (b) of Article 16(5).

(6) Article 21(1) of the Treaty on the Functioning of the European Union provides that every citizen of the Union has the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect. Directive 2004/38/EC of the European Parliament and of the Council[6] gives effect to those limitations and conditions. This Decision does not affect the application of that Directive, which extends the right of free movement to family members independent of their nationality when joining or accompanying the Union citizen. This Decision thus does not apply to family members of a Union citizen to whom Directive 2004/38/EC applies or of a national of a third country enjoying a right of free movement equivalent to that of Union citizens under an agreement between the Union and its Member States on the one hand and a third country on the other.

(7) Given that Denmark decided to implement Regulation (EC) No 810/2009 which builds on the Schengen acquis in its national law, in accordance with Article 5 of the Protocol on the position of Denmark annexed to the Treaty on European Union and to the Treaty establishing the European Community and Article 4 of Protocol (No 22) on the position of Denmark, annexed to the Treaty on the European Union and to the Treaty on the Functioning of the European Union, Denmark is bound under international law to implement this Decision.

(8) This Decision constitutes a development of provisions of the Schengen acquis in which Ireland does not take part, in accordance with Council Decision 2002/192/EC[7];

---

5 Regulation (EU) 2018/1806 of the European Parliament and of the Council of 14 November 2018 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 (codification) (OJ L 303, 28.11.2018, p. 39).

6 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ L 158, 30.4.2004, p. 77).

7 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 (OJ L 64, 7.3.2002, p. 20).

Ireland is therefore not taking part in the adoption of this Decision and is not bound by it or subject to its application.

(9) As regards Iceland and Norway, this Decision 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 latters' association 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[8].

(10) As regards Switzerland, this Decision constitutes a development of the provisions of the Schengen *acquis* within the meaning of the Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen *acquis*[9] which fall within the area referred to in Article 1, point B of Decision 1999/437/EC read in conjunction with Article 3 of Decision 2008/146/EC[10].

(11) As regards Liechtenstein, this Decision constitutes a development of the provisions of the Schengen *acquis* within the meaning of the Protocol between the European Union, the European Community, the Swiss Confederation and the Principality of Liechtenstein on the accession of the Principality of Liechtenstein to the Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen *acquis*[11] which fall within the area referred to in Article 1, point B of Decision 1999/437/EC read in conjunction with Article 3 of Decision 2011/350/EU[12].

(12) This Decision constitutes an act building upon, or otherwise relating to, the Schengen *acquis* within, respectively, the meaning of Article 3(2) of the 2003 Act of Accession, Article 4(2) of the 2005 Act of Accession and Article 4(2) of the 2011 Act of Accession.

---

8 Council Decision 1999/437/EC of 17 May 1999 on certain arrangements for the application 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* (OJ L 176, 10.7.1999, p. 31).

9 OJ L 53, 27.2.2008, p. 52.

10 Council Decision 2008/146/EC of 28 January 2008 on the conclusion, on behalf of the European Community, of the Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen *acquis* (OJ L 53, 27.2.2008, p. 1).

11 OJ L 160, 18.6.2011, p. 21.

12 Council Decision 2011/350/EU of 7 March 2011 on the conclusion, on behalf of the European Union, of the Protocol between the European Union, the European Community, the Swiss Confederation and the Principality of Liechtenstein on the accession of the Principality of Liechtenstein to the Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen *acquis*, relating to the abolition of checks at internal borders and movement of persons (OJ L 160, 18.6.2011, p. 19).

HAS ADOPTED THIS DECISION:

Article 1
Scope

1. This Decision shall apply to nationals of The Gambia who are subject to the visa requirement pursuant to Regulation (EU) 2018/1806 of the European Parliament and of the Council.[13]

2. It does not apply to nationals of The Gambia who are exempt from the visa requirement under Article 4 or Article 6 of that Regulation.

3. This Decision does not apply to nationals of The Gambia applying for a visa and who are family members of a Union citizen to whom Directive 2004/38/EC applies or of a national of a third country enjoying a right of free movement equivalent to that of Union citizens under an agreement between the Union and its Member States on the one hand and a third country on the other.

Article 2
Temporary suspension of the application of certain provisions of Regulation (EC) No 810/2009

The application of the following provisions of Regulation (EC) No 810/2009 shall be temporarily suspended:

(a) Article 14(6);

(b) Article 16(5), point (b);

(c) Article 23(1);

(d) Article 24(2) and (2c).

[13] Regulation (EU) 2018/1806 of the European Parliament and of the Council of 14 November 2018 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 (codification) (OJ L 303, 28.11.2018, p. 39).

Article 3

Addressees

This Decision is addressed to the Kingdom of Belgium, the Republic of Bulgaria, the Czech Republic, the Federal Republic of Germany, the Republic of Estonia, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Republic of Croatia, the Italian Republic, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Grand Duchy of Luxembourg, Hungary, the Republic of Malta, the Kingdom of the Netherlands, the Republic of Austria, the Republic of Poland, the Portuguese Republic, Romania, the Republic of Slovenia, the Slovak Republic, the Republic of Finland and the Kingdom of Sweden.

Done at Brussels,

For the Council
The President