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THE EUROPEAN UNION**

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**LIMITE**

**VISA 303  
CODEC 1344  
COMIX 973**

**OUTCOME OF PROCEEDINGS**

|                 |   |
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| of:             | Visa Working Party/Mixed Committee (EU-Iceland/Norway/Switzerland)                                    |
| dated:          | 14 and 15 November 2006   |
| No. Cion prop.: | 11752/1/06 VISA 190 CODEC 771 COMIX 662 REV 1   |
| Subject:        | Draft Regulation of the European Parliament and of the Council establishing a Community Code on Visas |

The Visa Working Party examined Articles 3 - 9. The outcome of this examination is set out in the Annex to this note. In addition the below issues were raised:

**1) Legislative provisions vs. Instructions on the practical application of the Visa Code**

Responding to queries from **AT** and **DE**, the **Commission representative (COM)** emphasised that the basic principle followed while drawing up the draft Regulation had been to make a clear distinction between legislative provisions and practical Instructions to be drawn up later (cf. Article 45). Basically the legal provisions covered all the rights and obligations for visa applicants. COM would be willing to listen to suggestions for issues to be dealt with in the practical Instructions.

**2) Clarifications to points made in relation to Articles 1-3**

- a) Article 1 (3): FR** suggested the following formulation of this paragraph as this delegation was not in favour of introducing one single list of third countries whose nationals require ATVs:

"3. This Regulation also defines the lists of third countries whose nationals require an airport transit visa and establishes the rules for processing visa applications for transit through the international transit areas of Member States' airports."

- b) Article 2: HU** suggested that the following definition be added "**consulate**" : "**diplomatic mission or consular post entitled to issue uniform visas**" in order to avoid having to use the long formulation throughout the text.

- c) Article 2 (4): SK** suggested the following formulation of this paragraph:

"(4) "visa with limited territorial validity" (type "LTV B" or "LTV C" visa) means a short-stay **and transit** visa entitling the holder only to stay in or transit through the territory of the issuing Member State or several Member States."

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## TITLE II: Receipt and processing of visa applications

### Chapter I

#### Authorities taking part in the processing of visa applications

##### Article 3

#### Authorities competent for processing visa applications

1. Without prejudice to Article 37, only diplomatic missions or consular posts<sup>1</sup> of Member States shall be entitled to process visa applications.
2. By way of derogation from paragraph 1, short-stay and transit visas may, in exceptional cases, be issued at the border by the authorities responsible for checks on persons; ~~including the issue of such visas to seamen~~<sup>2</sup>.

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<sup>1</sup> **BE** wished to add a reference to central authorities as these are involved as well and in charge of extending visas in the Schengen territory. **NO, SE, NL, AT, DK** and **LT** supported this suggestion, whereas

**FR** noted that extension of visas of persons already present in the Schengen territory should be distinguished from issuance of entry visas.

**EE** wondered whether "processing" was not a too general term. **PL** warned against mixing up "central authorities" and "competent authorities".

**FR** recalled that in French DOM-TOM did not belong to the Schengen territory and that prefectures were in charge of issuing visas in these locations. **COM** agreed that a provision should be added to cover this situation, but suggested that such text might fit better in Title V "Final Provisions".

**COM** maintained that diplomatic missions and consular posts are responsible for the processing of visa applications and drew delegations' attention to the articles that specifically referred to cases where central authorities were involved in the processing: Articles 6, 8, 9 and 28. A cross reference to these provisions could be added in the text. As far as **COM** was concerned the draft Regulation only contained one exception from the principle set out in Article 3 (1), i.e. Article 37 ("outsourcing").

**BE, DK, SE** and **NO** did not find that such cross reference would cover all cases. **IT** was not in favour of such specification and found that the current wording was adequate as diplomatic missions and consular posts are the ones who process visa applications although consulting central authorities during the processing.

**FR** found that it could be useful to introduce a clear distinction between the different parts of the handling of visa applications: submission, processing, issuance.

**AT** noted that Austrian authorities cannot extend visas in Austria. In case such a request be made, a full examination of the application starts from scratch. **COM** referred to the existing Schengen acquis in relation to extension of visa which is applicable to all Member States applying that acquis and reminded delegations that the Visa Code will be directly applicable in Member States.

<sup>2</sup> **DK, PL, BE, SE, LT, NL** and **AT** wondered whether the reference to seafarers was necessary. The **Chair** suggested that this reference be deleted. **COM** could accept this.

#### Article 4

#### "Territorial" competence

1. Third country nationals shall apply for a visa at the diplomatic mission or consular post of a Member State in their country of <sup>1</sup> residence<sup>2 3</sup>.
2. By way of derogation from paragraph 1, applications may be lodged by third country nationals, legally present in a third-country different from their country of residence in that third-country. Such applicants shall provide justification<sup>4</sup>, for lodging the application in that country and there must be no doubt as to the applicant's intention to return to the country of residence<sup>5</sup>.

In that case, the diplomatic mission or consular post located in the applicant's country of residence or the central authorities of the issuing Member State may<sup>6</sup> be consulted.

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<sup>1</sup> **CZ** suggested to add "legal" in order to ensure that only legally residing persons can apply for a visa.

<sup>2</sup> **HU** suggested to insert "or origin" and add the following:

"The consulate located in the applicant's country of origin has to consult (by e-mail, fax) with the consulate located in the applicant's country of residence, if there is such consulate."

**SI** and **AT** supported the first part of the suggestion.

**COM** noted that the word "country of residence" has been chosen deliberately as it has both a legal and practical meaning contrary to "country of origin".

<sup>3</sup> **LT** mentioned that all Schengen States were not present in all third countries and therefore applicants might be forced to apply for a visa in a country other than his/her country of residence, because a diplomatic mission or consular post might cover a jurisdiction of several countries and the text should take account of such situations as well. **COM** would reflect on how to express this.

<sup>4</sup> **IT** wondered what "justification" referred to and found that it was superfluous as the applicant would always have to have a valid reason for applying for a visa.

<sup>5</sup> **DK** suggested this addition: "or origin".

<sup>6</sup> **BE** and **DE** were of the opinion that this requirement should remain mandatory. **COM** recalled that the current rules required such consultation only in case of doubt. **IT** found this paragraph redundant as it describes what is current practice. **COM** recalled that the draft Regulation sets out the rights and obligations of visa applicants, and the rules should be spelt out.

## Article 5

### Member State responsible for processing a visa application

1. The diplomatic mission or consular post responsible for processing an application for a short-stay visa shall be :
  - (a) the diplomatic mission or consular post of the Member State in whose territory the sole or main destination<sup>1</sup> of the visit is located<sup>2</sup>, or
  - (b) if the Member State of main destination cannot be determined, the diplomatic mission or consular post of the Member State whose external border the applicant intends to cross in order to enter into the territory of the Member States.

When a visa with multiple entries is applied for, the Member State of usual<sup>3</sup> destination shall be responsible for processing the application. Such visas shall be issued only in the applicant's country of residence<sup>4</sup>.

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<sup>1</sup> **AT** and **DE** did not find this definition satisfactory. **COM** noted that the text of the CCI was merely practical guidelines but if Member States wished some of the elements to be added, COM would be open to suggestions.

**BE** wished to maintain the wording of Part II, section 1.1, a) and b), emphasising that such specification ought to be inserted into the legal instrument rather than contained in the separate "Instructions". Such addition would "legally" clarify which Member State mission would be responsible for examining a given visa application.

<sup>2</sup> "When the Member State responsible for processing the application does not have a consulate in the applicant's country of residence, the applicant may apply for a visa at any consulate of the Member State concerned."

<sup>3</sup> **IT** and **PT** found that this wording problematic. **COM** recalled that the second paragraph of Article 5 was not covered in the current acquis and the reason for adding a reference to "usual destination" was to give concrete expression to the main destination in the case of an application for a multiple entry visa.

<sup>4</sup> **NL** wished to delete "only in the applicant's country of residence, as business travellers would often be compelled to apply for a visa outside their country of residence. **COM** maintained that the diplomatic mission in the applicant's country of residence would always be the most appropriate for examining the application and was of the opinion that business travellers would plan trips well in advance. However, should the need arise for applying elsewhere than in one's country of residence, Article 4 (2) would apply.

**SI** and **HU**: scrutiny reservation. **BE** and **DE** wished to maintain the text, **DE** adding that flexibility must be added in relation to multiple entry business visa. **FR** suggested this addition: "unless special circumstances apply"

2. The diplomatic mission or consular post responsible for processing an application for a transit visa shall be :
- (a) in the case of transit through only one Member State, the diplomatic mission or consular post of the Member State concerned, or
  - (b) in the case of transit through several Member States, the diplomatic mission or consular post of the Member State whose external border the applicant intends to cross to start the transit.
3. The diplomatic mission or consular post responsible for processing an application for an airport transit visa<sup>1</sup> shall be :
- (a) in the case of a single airport transit, the diplomatic mission or consular post of the Member States on whose territory the transit airport is situated, or
  - (b) in the case of double or multiple airport transit, the diplomatic mission or consular post of the Member State on whose territory the first transit airport is situated<sup>2</sup>.

#### *Article 6*

#### **Competence in relation to issuance of visas to third country nationals legally present within a Member State's territory**

Third country nationals who are legally staying in the territory of a Member State, without holding a residence permit of that Member State, allowing them to travel without holding a visa as provided for in Article 5(1)(b) and Article 34(1)(a) of the Schengen Borders Code, and who have justified reasons for travelling to another Member State, shall apply for a visa at the diplomatic mission or consular post of the Member State of destination.

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<sup>1</sup> Cf.: FR comment in introduction, page 2

<sup>2</sup> **BE** and **FR** gave examples of how this formulation could give rise to problems of interpretation and wished the text to be clarified. **COM** would reflect on these practical aspects but referred delegations to the definition of an "internal flight" in the "Schengen Borders Code" (Article 2 (3)).

## *Article 7*

### **Arrangements on representation**

1. Without prejudice to Article 5, the diplomatic mission or consular post of a Member State may agree to represent another Member State for processing applications for short stay visas, transit visas and airport transit visas. The arrangement shall specify the duration, if only temporary, and procedures for termination of such representation, as well as arrangements in relation to possible provision of premises, staff and payments by the represented Member State.

Such bilateral arrangements may stipulate that visa applications from certain categories of third country nationals are to be transmitted by the representing Member State to the authorities of the represented Member State for prior consultation, as provided for in Article 9(3).

- [2. A Member State may also represent one or more other Member States solely for the reception of applications and the enrolment of biometric identifiers. The reception and transmission of files and data to the represented consular post shall be carried out respecting the relevant data protection and security rules.]<sup>1</sup>
3. The represented Member State shall inform the Commission about new arrangements on representation or the termination of such arrangements at the latest three months<sup>2</sup> before the agreement enters into force or terminates.

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<sup>1</sup> This paragraph was not examined as it is part of the separate proposal amending the CCI, currently under examination.

<sup>2</sup> **PT** found this provision problematic, as such representation might be necessary in situations of emergency. **FR, AT, IT, BE, DK** and **NL** wished to delete the reference to 3 months. **COM** emphasised that it was important to increase the transparency of the visa policy and for applicants to know where they should apply for a visa (the 3 months period corresponds to the deadline set for applying for a visa (cf Article 10 (1)), and moreover experience had shown that Member States often notify agreements of representation several months after they have entered into force. As for notification of "temporary representation", COM would not be opposed to reformulate the text, but wondered whether this would be necessary as such ad hoc representation seemed to be very rare. As major sports events are planned a long time in advance notification on temporary representation related to such events could be made according to the deadline proposed in the text.

4. Simultaneously<sup>1</sup>, the representing Member State shall inform both the diplomatic missions and consular posts of other Member States and the delegation of the European Commission in the jurisdiction concerned when arrangements on representation have been concluded and when they enter into force<sup>2</sup>.
5. The diplomatic mission or consular post of the representing Member State shall, ~~when acting on behalf of another Member State,~~<sup>3</sup> comply with all the rules on the processing of applications for short stay visas, transit visas and airport transit visas<sup>4</sup> set out in this Regulation and the issuing times set out in Article 20(1) shall apply.

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<sup>1</sup> **COM** noted that a more vague term had been chosen for the representing Member State to inform other diplomatic missions locally.

<sup>2</sup> The **Chair** suggested to add: "and when they terminate" in order for this provision to be parallel to the provision in paragraph 3. **COM** approved this addition.

<sup>3</sup> **BE** found this sentence redundant and suggested that it be deleted. **COM** could accept that.

<sup>4</sup> Replying to a question from **HU**, **COM** noted that due to their specific nature, it would not seem appropriate that this type of visa be issued in representation.



6. When a diplomatic mission or consular post of the representing Member State envisages refusing an application, the complete file shall be [submitted to the central authorities]<sup>1</sup> of the represented Member State in order for them to take the final decision on the application within the time limit set out in Article 20(1).
7. If the diplomatic mission or consular post of the representing Member State decides to cooperate with commercial intermediaries or to outsource part of the visa handling process, such procedures shall also cover applications handled by way of representation. However, the central authorities of the represented Member State shall be duly informed in advance.<sup>2</sup>

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<sup>1</sup> Some delegations (NL, AT, PT) expressed concern about the implication of this provision. FI suggested to replace the text in square brackets by the following: "sent to the nearest regional embassy". Thus the obligation to motivate refusals (cf. Article 23) would be done by the represented Member State, which would make possible appeal procedures easier. SE and SI supported this suggestion. BE found the suggestion good but maintained a scrutiny reservation. EE supported the Finnish suggestion but noted that this should only be an option as it would not make sense to transmit all this when all information would be stored in the VIS.

DK and LT preferred the original proposal.

IT wondered why this would be necessary as the representing Member State should take upon itself to take all decisions in relation to applications.

FR recalled that the problem with "refusals in representation" arise in the case of dispute, as national rules govern appeal etc. However, since the introduction of the handling fee to be paid upon application, additional problems had been created. FR could accept that not too voluminous files be transmitted to central authorities, and suggested that this be an option in order to maintain as many solutions as possible.

COM maintained that this was a legal problem and not one of trust when it came to negative decisions on visa applications and referred to examples of unsatisfactory situations encountered on the ground where applicants were not formally refused but advised to contact the nearest mission of the represented Member State which might be situated far away. Therefore, COM maintained the text, acknowledging that transfer of files would be facilitated by VIS. COM drew delegations' attention to Article 19 (1) which introduced the concept of "inadmissibility" of applications, noting that this might be an element that would reduce the scale of the problems related to representation.

<sup>2</sup> COM informed delegations that this paragraph had been added because of practical experience in New Delhi ("TM 2004"), but suggested that this paragraph be examined, once the separate proposal amending the CCI had been dealt with.

IT could not accept that the represented Member State should have a say on the way the representing Member State organised its consular post, recalling that the system of representation is based on works on a voluntary basis. AT supported this point of view.

## *Article 8*

### **Prior consultation of the Member States' own central authorities**

1. A Member State may require its diplomatic missions or consular posts to consult<sup>1</sup> its central authorities before issuing visas to nationals of certain third countries or specific categories of such nationals.

The third countries in respect of whose nationals or specific categories of nationals such consultation is required shall be as set out in Annex I.

2. Such consultation shall be without prejudice to the time limit<sup>2</sup> for examining visa applications, set out in Article 20(1)<sup>3</sup>.
3. If a Member State represents another Member State pursuant to Article 7(1), the central authorities of the representing Member State shall carry out the consultation provided in paragraph 1.

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<sup>1</sup> **PL** suggested that border control authorities when issuing visa should not be obliged to carry out such consultation. **COM** suggested that this matter be raised in relation to Article 32, if necessary.

<sup>2</sup> **IT** found the formulation too vague and suggested this text: "within the time limits set out in...".

<sup>3</sup> **HU** and **DE** found that this would not allow enough time to carry out necessary checks. **COM** referred to the explanatory memorandum (11752/1/06, page 8-9).

*Article 9<sup>1</sup>*

**Prior consultation and information of central authorities of other Member States**

1. A Member State may require the central authorities of other Member States to consult its central authorities before issuing visas to nationals of specific third countries or specific categories of such nationals.

The third countries in respect of whose nationals or specific categories of nationals such consultation is required shall be as set out in Annex II<sup>2</sup>.

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<sup>1</sup> Alternative text submitted by HU after the meeting on 14-15.11.2006:

HU suggests that the "simplified" consultation as proposed in paragraph 3 becomes general practice and suggests reformulating the first three paragraphs of Article 9, by changing the order of the paragraphs as follows:

*"1. A Member State may require that its central authorities be informed of visas issued by diplomatic missions or consular posts of other Member States to nationals of specific third countries or to specific categories of such nationals.*

*The third countries in respect of whose nationals or specific categories of **nationals such information is required shall be as set out in Annex II.***

*2. A Member State **may furthermore** require the central authorities of other Member States to consult its central authorities before issuing visas to nationals of specific third countries or specific categories of such nationals.*

*The third countries in respect of whose nationals or specific categories of nationals **such consultation is required are marked by (\*) in Annex II.***

*3. The central authorities consulted shall react within three working days of receiving the request. The absence of a reply from the consulted authorities within this deadline shall be deemed an authorisation for the consulting central authorities to allow their diplomatic mission or consular post to issue the visa."*

<sup>2</sup> COM recalled that currently these lists are not available to the public, but had proposed that they be published for the sake of transparency and such disclosure might also make Member States more cautious about adding third countries for which consultation was required.

FR and IT were not in favour of making this information publicly available because of the likely negative political repercussions. COM noted that a final compromise might be to keep secret who had launched the request for prior consultation but to publish the list of third countries subject to such consultation. However, this provision should also be examined in the light of the introduction of mandatory motivation of refusals.

2. The central authorities consulted shall react within three<sup>1</sup> working days<sup>2</sup> of receiving the request. The absence of a reply from the consulted authorities within this deadline shall be deemed an authorisation for the consulting central authorities to allow their diplomatic mission or consular post to issue the visa.<sup>3</sup>
3. A Member State may require that its central authorities be informed only of visas issued by diplomatic missions or consular posts of other Member States to nationals of specific third countries or to specific categories of such nationals.  
The third countries for whose nationals such information is required are marked by (\*) in Annex II.<sup>4</sup>
4. Prior consultation and information shall be carried out in accordance with Article 14 (2) of the VIS Regulation n°....<sup>5</sup>

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<sup>1</sup> **BE** and **IT** found this deadline too short, other delegations suggested different deadlines: 5 working days (**NL**), 7 working days (**SK, PL**). **FR** wondered why current deadlines could not be maintained.

**COM** recalled that the current system does not function well and it has been stated at several occasions that only in extremely few cases a response was given by the consulted Member State. In addition previous attempts to change the system had revealed that in many cases Member States merely wish to be informed and therefore the distinction between "consultation" and "information" had been introduced. The **Chair** recalled that sometimes the prolonged issuing times give rise to political problems.

<sup>2</sup> A number of delegations wondered what 3 working days meant.

The Council Legal Service referred to the existing Community legislation on deadlines, of which the 2 basic elements are that the day which triggers the deadline does not count and if the deadline would never start on a holiday but be postponed to the first working day after that. (cf. Regulation (EEC, Euratom) No 1182/71 of the Council of 3 June 1971 determining the rules applicable to periods, dates and time limits, OJ L 038, 15/02/1980, p. 35).

<sup>3</sup> **DK**: scrutiny reservation.

<sup>4</sup> **IT** and **ES** supported this provision.

<sup>5</sup> **COM** informed delegations that the basic idea would be to carry out the consultation via the VIS and should the draft Regulation be adopted before the VIS was operational, it might be necessary to introduce a transitional period.

5. If a Member State represents another Member State pursuant to Article 7(1), the central authorities of the representing Member State shall carry out the consultation provided for in paragraph 1 and/or the information provided for in paragraph 3.<sup>1</sup>
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<sup>1</sup> **PL** suggested that this provision could be made more flexible but adding the following: "unless agreed differently between the representing and the represented Member States". **COM** would reflect upon this.