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NOTE

From:	Presidency
To:	Visa Working Party/Mixed Committee (EU-Iceland/Norway and Switzerland/Liechtenstein)
Subject:	Revision of the visa suspension mechanism: outstanding issues and way forward

After several fruitful discussions under the Spanish Presidency, the legislative proposal for the revision of the visa suspension mechanism has been improved substantially. The pace of the discussions was high, considering the **willingness of Member States to quickly reach a Council position**, so that negotiations with the European Parliament could be finalized before the end of the legislative term.

However, it is becoming increasingly clear that final adoption of the text won't be achieved under the current legislature. Indeed, on the Parliament side, **no rapporteur has yet been appointed on this file** and the chances of it happening are diminishing by the day. Moreover, the deadline imposed on the Belgian Presidency to conclude the negotiations won't allow for sufficient time.

Taking this into consideration, and the fact that the revision of the suspension mechanism is of great importance for the Member States, the Belgian Presidency believes that this "extra" time could be used to have an in-depth discussion on **four outstanding issues**.

Indeed, while the objective of the Belgian Presidency remains a swift adoption of a general approach, it is equally important to ensure that the revised suspension mechanism is **clear, operational** and provides for **substantial improvement**, in order to be truly **future proof**.

The Belgian Presidency has identified the following four outstanding issues to be discussed during the next Visa Working Party:

I. Link between the visa suspension mechanism and short-stay visa waiver agreements

a) General principle

In cases where Member States wish to suspend visa-free regime for a third country with which a short-stay visa waiver agreement has been concluded, **two procedures will have to be followed in parallel**. Firstly, it will be necessary to **suspend the visa waiver agreement** through the adoption of a Council decision. Additionally, it will also be necessary to provide for the **suspension of the exemption at the level of Union law**, using the “suspension mechanism” provided for in Article 8 of Regulation (EU) 2018/1806 (the Visa Regulation). To this end, the current mechanism foresees the adoption by the Commission of an **implementing act**, temporarily and partially suspending the exemption from the visa requirement for a period of nine months. If the circumstances that lead to the initial suspension persist and in the absence of action of the third country, the Commission will then adopt a **delegated act** temporarily (but fully) suspending the visa exemption for a period of 18 months.

Although the current suspension mechanism does not make any reference to the need to suspend the short-stay visa waiver agreement on top of the procedure foreseen in Article 8, this “dual” procedure has already been applied in the case of Vanuatu.

In the Commission’s proposal on the revision of the suspension mechanism, **Article 8(2) was actually “filling the gap” between the two procedures**, as it provided that “in cases where an agreement on the short-stay visa waiver between the Union and a third country listed in Annex II includes provisions on different grounds or procedures for suspension, those provisions shall be applied **instead of Articles 8a, 8e and 8f of this Regulation**.”.

Even though the Council legal service deemed necessary to rephrase Article 8(2) and replace the terms “*instead of*” by the usual wording “*without prejudice*”, the objective of the provision shall remain the same: **ensuring that Member States have the possibility to make full use of the relevant provisions of a short-stay visa waiver agreement when suspending a visa exemption in EU law.**

b) *Grounds mentioned in visa waiver agreements and link with the suspension mechanism*

As mentioned in the communication of the Commission published in May 2023¹, until now, “the visa suspension mechanism [*did*] not consider the possibility that visa waiver agreements between the EU and third countries might provide for suspension grounds that are not included in the Visa Regulation, for example to address circumstances that are specific to the relations between the negotiating parties”. Consequently, the current mechanism does not foresee the possibility to suspend a visa exemption using specific ground(s) that would be mentioned in a visa waiver agreement but not in Article 8(a).

Following up on this issue, the original Commission’s proposal provided for such a possibility in Article 8(2), ensuring that where the EU decides to suspend the application of a visa waiver agreement with a third country, based on a specific ground mentioned in the agreement, this ground should be applied instead of the relevant provision of the Regulation.

The Presidency believes that this possibility represents a major improvement, as it will provide real meaning to the negotiations of **tailor-made visa waiver agreements with third countries in the future.**

However, as stated above, the terms “*instead of*” were replaced by the usual wording “*without prejudice*” in the revised compromise proposal, to respect the hierarchy of norms between the visa waiver agreements (international law) and the Visa Regulation (EU law).

¹ Commission Communication on the monitoring of EU's visa free regimes, doc. 9508/23.

While the new wording certainly ensures legal consistency, it might not be as straightforward as the original Commission's proposal. Consequently, the Belgian Presidency proposes to add a new letter (h) within Article 8a(1), so that it is perfectly clear that it is possible to apply **solely** the grounds mentioned in a visa waiver agreement, that would be different (or broader) from those already foreseen in Article 8a(1). Such provision could be as follows:

*“Article 8a
Grounds for suspension*

1. The suspension mechanism may be triggered on the following grounds:

(h) any other ground for suspension set out in a short-stay visa waiver agreement between the Union and a third country listed in Annex II”, limited to the scope of application of such agreement.

Furthermore, this addition would have the merit of clarifying that in such a case, **the entire procedure foreseen in Article 8a to 8f** would also be **applicable** (notification, evaluation of the notification by the Commission, report to the Council and the Parliament,...) to suspend the visa exemption, **on top of the procedure foreseen in the visa waiver agreement.**

Can Member States agree with the reasoning of the Presidency and support the addition of a new letter (h) in Article 8a(1)?

II. The thresholds

During the last Visa Working Party, the Spanish Presidency presented the Member States with several options to facilitate the debate and the adoption of a compromise on the thresholds². The discussions showed that option 2b enjoyed the most support, and that Member States wanted to increase the percentage of “low recognition rate” (of asylum applications) from 4% to 20% and to decrease the percentage of “substantial increase” (in irregular migration, unfounded asylum applications or serious criminal offences) from 50% to 30%.

² 16909/23.

However, to get a clearer picture of what those adapted numbers would imply in practice, several delegations called for simulations, particularly with regard to the increase of the recognition rate. The table below³ shows the visa-free countries that could be further included in the scope of the suspension mechanism, should the recognition rate be increased from 4% to 10 or 20%⁴.

The EU Recognition rate 2022 ⁵							
0,1-4%		4-10%		11-20%		>20%	
Moldova	0,6%	Paraguay	4,7%	Mexico	12,0%	El Salvador	30,7%
North Macedonia	0,9%	Chile	5,1%	Panama	13,6%	Nicaragua	24,8%
Montenegro	1,1%	Peru	5,3%	Malaysia*	14,3%	Mauritius*	29,4%
Bosnia and Herzegovina	1,2%	Colombia	5,9%	Guatemala	16,8%	Trinidad and Tobago*	33,3%
Argentina	1,5%	Albania	6,3%	Honduras	17,2%	UAE*	100,0%
Serbia	2,8%	Brazil	8,5%	Saint Lucia*	20,0%		
Uruguay	2,8%	Kosovo	7,4%				
Georgia	3,6%						
United States	3,7%						
Venezuela	3,8%						

* less than 100 decisions were taken in 2022 with regard to the citizens of these countries

In view of the above figures, do delegations confirm their willingness to increase the current recognition rate from 4% to 10 or 20%? What would be the preferred option?

With regard to the percentage related to the “substantial increase” mentioned in Article 8a(2), the Presidency considers that delegations clearly expressed themselves in favor of a lower threshold of 30% during the last Visa Working Party and, consequently, does not see the necessity to reopen the debate on this point or to present simulations.

³ Source : Eurostat

⁴ Considering that for the majority of visa-free countries, no decision has been recorded (and the recognition rate is therefore 0%), these countries have not been included in the table for visibility purposes

⁵ The EU recognition rate includes EU-regulated forms of protection (refugee status and subsidiary protection) and excludes national protection forms (humanitarian reasons). It is calculated by dividing the number of positive first instance decisions (granting refugee status or subsidiary protection) by the total number of decisions issued.

III. The alignment between the criteria for exemption and the grounds for suspension

Under the Swedish Presidency, the Member States discussed on several occasions the need to ensure better alignment between the criteria for visa exemption (Article 1 of Regulation (EU) 2018/1806) and the grounds for suspension (Article 8). The Schengen Council in March 2023 even insisted on taking this into account when amending the visa suspension mechanism.

Although the Commission's proposal reflects many of the considerations put forward by the Council, it does not provide for a solution in this regard.

During the first discussions held under the Spanish Presidency, Czechia however proposed to add a new ground for suspension to improve alignment with the reasons that lead the EU to exempt third countries from visa requirements, as specified in Article 1 of the Visa Regulation, and suggested to add the following ground in article 8a(1):

- “1. The suspension mechanism may be triggered on the following grounds:
a significant and abrupt deterioration in the Union's external relations with a third country listed in Annex II, considering, in particular, human rights and fundamental freedoms, as well as the implications for regional coherence and reciprocity.”

Considering that we will not have another opportunity to review the suspension mechanism in the near future, the Belgian Presidency would like to receive clear guidance from the Member States on this point.

Do you believe better alignment between Article 1 and Article 8 of Regulation (EU) 2018/1806 should be pursued through the revision of the suspension mechanism?

If so, do you think that the inclusion of a broader “political” ground could help achieve this goal? In this regard, do you think that the Czech proposal abovementioned is an appropriate basis for discussion?

Alternatively, do you believe that the current text already represents a major improvement and that such a discussion might not be as necessary anymore, especially considering the addition of new grounds in Article 8a(1), including Article 8a(1)(h)?

IV. The urgency procedure

Considering the necessity to be able to rely on an efficient and quick mechanism, in particular to prevent a mass influx of third-country nationals arriving irregularly in a Member State from the territory of a visa-free third country or a serious damage to the public policy or internal security of Member States, the Commission introduced a new urgency procedure in Article 8e.

This procedure allows the Commission to suspend a visa exemption through an **immediately applicable implementing act** when it considers that **imperative grounds of urgency** exist. This procedure, provided for in Article 8 of Regulation (EU) 182/2011, enables the Commission to adopt an act without first consulting a committee. No later than fourteen days after its adoption, the act is submitted to a committee and in the event of a negative opinion, the implementing act is immediately repealed.

Taking into account the will of the Member States to preserve the role of the Council in this new expedited procedure, the Spanish Presidency proposed an alternative procedure, conferring **implementing powers on the Council** when imperative grounds of urgency require expedited action. In such cases, the Commission, according to its own analysis or after receiving a notification from a simple majority of Member States, would submit a proposal for a Council implementing act within one week, on which the Council would decide without delay.

However, some delegations pointed out the shortcomings of this proposal, and notably the fact that it could actually take longer to convene the Council, whereas the Commission could act immediately.

Considering that neither of these two procedures seem to be fully convincing at this stage, the Belgian Presidency would like to table a third option, that it believes would allow for a prompt and adequate response, as well as sufficient involvement of the Council. Such proposal would imply **restricting the possibility for the Commission to adopt an immediately applicable implementing act to cases where it has received a notification from a simple majority of Member States**.

This way, we would ensure prompt action from the Commission through the well-established urgency procedure foreseen in comitology, while at the same time ensuring *in fine* sufficient support from the Council, as the urgency procedure could only be triggered in cases where the Commission receives a notification from a simple majority of Member States, as provided for in Article 8e, paragraph 1, alinea 3 (c).

In order to move forward on this issue, the Presidency would like to receive clear guidance from the delegations:

Do Member States see added value in introducing an urgency procedure to the mechanism and if so, what would be the delegations' preferred option?

- *The procedure as provided for in the original COM proposal*
- *The procedure as proposed by the Spanish Presidency*
- *The procedure as proposed by the Belgian Presidency*

Alternatively, do Member States prefer to delete the urgency procedure from the text?
