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NOTE

From:	Presidency
To:	Visa Working Party/Mixed Committee (EU-Iceland/Norway and Switzerland/Liechtenstein)
Subject:	Digitalisation of the visa procedure: outstanding issues and proposals on the way forward

Thanks to the diligent and thorough work undertaken by the Czech presidency, the proposal for the eVisa regulation has been improved substantially and numerous issues have been resolved. Currently, the Swedish Presidency can identify three outstanding concerns¹ which will be addressed during the upcoming meeting of the Visa Working Party.

- Continued use of the paper visa sticker.
- Article 5 of the Visa Code: Member State competent for examining and deciding on an application.
- Article 3.5 (b) and (c) of the Visa Code and revision of Annex V of the relevant regulation: visas and residence permits issued by the UK entitling the holder to transit through airports of Member States without an Airport Transit Visa (ATV).

¹ The issue of the mandatory or voluntary use of EU-VAP will not be covered in this paper.

1. Continued use of paper visa stickers

Several Member States have underlined the need to keep a physical visa sticker as a safeguard measure. As the Presidency understands it, is not the sticker in itself that is important to be maintained but the *possibility* to issue a visa in specific situations where it is not possible to access the VIS. For example, the central VIS may be fully operational but the national VIS-system is not, or the network communication between a border post and the national system may be down. In some situations it will not, whatever technical solutions and means used, be possible to access the VIS due to technical problems. Some Member States have expressed a need to be able to issue a visa in emergency situations also during these periods of unavailability.

a. *Technical force majeure according to the Visa Code and the VIS regulation*

The Visa Code and the VIS regulation provide the possibility to manually fill in a visa sticker in case of technical force majeure.² Article 27 point 4 and 5 of the Visa Code states that:

4. *A visa sticker for a visa for one entry may be filled in manually only in the case of technical force majeure. No changes shall be made to a manually filled in visa sticker.*
5. *When a visa sticker is filled in manually in accordance with paragraph 4 of this Article, this information shall be entered into the VIS in accordance with Article 10(1)(k) of the VIS Regulation.*

The Visa Code and the VIS regulation explicitly foresee and regulate a *technical force majeure* only for the printing of the visa sticker, and not for the visa handling procedure. This may become problematic when there is no access to the VIS as it will not be possible to perform required checks such as in the SIS, the VIS and other systems before deciding on the application. Moreover, it will not be possible to capture biometrics and store them, as well as to launch searches in the VIS or other systems using them. The Presidency interprets Member States concerns as not limited to the handling of a technical force majeure when printing the physical sticker but also to the procedure when handling the visa application.

² According to statistics on manually issued visa stickers provided by eu-LISA, around 100 such visas were issued per month during the period 01/04/2022 to 31/8/2022.

The digital visa will improve the current situation as there is no need for a working printer and access to a paper sticker to issue a visa.

One possibility to address the issue could be to allow the issuance of a visa without an operational technical infrastructure limited to border posts. The time frame for handling a visa application at a consular post is 15 calendar days so it should be possible to solve a technical error before that. There is also a possibility in line with Article 8 point 11 of the Visa Code to use an *ad hoc representation* in case of prolonged technical force majeure, i.e. another Member State can issue the visa if the infrastructure of the first Member State is not working. As the proposed digital visa would not need a physical affixation in the passport, it would also be possible to have the central authority issue a visa for a person in specific locations on the request of the consular post in that location.

b. EES

Another matter to consider for manually issued visa stickers issued outside of the Schengen area that are not registered in the VIS is the Entry Exit System (EES). The carriers will check the visa against the EES before boarding, another check will then be made in the EES at the border. Hence, if there is no information about the visa in the EES this could lead to problems for the third country national travelling with such a visa.

The Presidency suggests that the possibility to issue the paper visa sticker without a working VIS-system should be limited to the borders where it may be necessary to issue a visa.

According to Article 21 of the EES regulation, a technical failure in the EES-system should be addressed according to the following:

- 1. Where it is technically impossible to enter data in the EES Central System or in the event of a failure of the EES Central System, the data referred to in Articles 16 to 20 shall be temporarily stored in the NUI. Where that is not possible, the data shall be temporarily stored locally in an electronic format. In both cases, the data shall be entered in the EES Central System as soon as the technical impossibility or failure has been remedied. The Member States shall take the appropriate measures and deploy the required infrastructure, equipment and resources to ensure that such temporary local storage may be carried out at any time and for any of their border crossing points.*

2. *Without prejudice to the obligation to carry out border checks under Regulation (EU) 2016/399, the border authority, in the exceptional situation where it is technically impossible to enter data in both the EES Central System and in the NUI and it is technically impossible to temporarily store the data locally in an electronic format, shall manually store the data referred to in Articles 16 to 20 of this Regulation, with the exception of biometric data, and shall affix an entry or exit stamp in the travel document of the third-country national. That data shall be entered in the EES Central System as soon as technically possible.*

Member States shall inform the Commission of the stamping of travel documents in the event of the exceptional situations referred to in the first subparagraph of this paragraph. The Commission shall adopt implementing acts concerning the detailed rules on the information to be provided to the Commission. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 68(2).

3. *The EES shall indicate that data referred to in Articles 16 to 20 were entered as a result of a fall-back procedure and that the individual file created pursuant to paragraph 2 of this Article is missing biometric data. The biometric data shall be entered in the EES at the next border crossing.*

One possibility is to allow the issuance of the paper visa sticker at the borders in certain situations in a similar way as has been done in the EES regulation regarding the stamping of passports in some situations and with a limited validity of the visa.

In summary, the Presidency suggests two options to resolve the issue of continued use of visa paper sticker:

1. **Remove the possibility to use a paper sticker altogether, in accordance with the proposal of the Commission.**
2. **Allow for a “safeguard” procedure to be used at the border in case of a *technical force majeure* of the VIS. The visa can take the form of either the current paper visa sticker or another format defined in an implementing act.**

Which of the options above can you support?

2. Article 5 of the Visa Code; Member State competent for examining and deciding on an application

Several Member States have suggested that “the purpose of stay” as a criterion for determining which Member State is competent for handling the visa application, should be kept in the proposal. In the current revised text, “the purpose of stay” has been deleted. The reason for this is that the current wording “length of stay **or** the purpose of stay” is unclear and it is not possible for neither a case handling officer nor an IT-system to determine the competent Member State based on this wording.

The current proposal in the text reads as follow:

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, the Member State whose territory constitutes the main destination of the visit(s) in terms of the length of stay, counted in days, ~~or the purpose of stay~~; 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.*

With a view to reaching a compromise, the Presidency has identified the following options and invites Member States to share their view and express their support for one of them:

1. **Keep the text in accordance with the proposal, i.e. the purpose of stay is not considered when determining the competent Member State for examining and deciding on the application.**
2. **The text in point 1(b) is kept as proposed but a new paragraph is added. The new paragraph would allow the Member State to *manually* determine based on the purpose of stay if it is the competent Member State, in accordance with the current practice. The purpose of stay would not be included in the algorithm of the EU-VAP.**

- 3. The purpose of stay is included in the algorithm that determines the competent Member State. A hierarchy between the purposes would be established based on a pre-defined weight multiplied by the number of days requested.³ The resulting figure would then determine which Member State is competent.⁴**

The current wording in the Visa Code does not allow the case handling officer or the IT-system to determine the competent Member State. While the algorithm described above constitutes merely an example that can be modified, it would provide predictability and could be operational within the EU-VAP.

Which of the options above can you support?

3. ATV requirement for visas and residence permits issued by the UK

The issue of the UK and ATV requirement has been discussed at length during the previous meetings. In accordance with the latest amendments of article 3(5) of the Visa Code, the UK is excluded from the list of countries whose resident permit holders are exempt from the requirement to hold ATV. This is mainly due to risk of delaying a Council mandate and the complexity of defining a list of residence permits to be included in Annex V of the Visa Code. Nevertheless, several Member States have maintained their support for the inclusion of the UK on the list of countries exempted from ATV requirement. In order to find a way forward, the Presidency has drafted a list of residence permits issued by UK that may exempt the person from holding an ATV. Since it is still unclear when or if a revision of the current Visa Code will be launched, the Presidency believes that the issue should be addressed during the course of the ongoing negotiations. The proposed amendment would require the involvement of both the Visa Working party and the UK Working Party.

The current proposal, if accepted by delegations, will lead to revision of Annex V of the Visa Code and amendment of Article 3(5) lett. b) and c) as follows:

³ For example: Tourism 0.4, Business 0.8, Visiting family or friends 0.6.

⁴ For example, a visit to Sweden with the purpose of tourism for 10 days would generate the number 4 (10 x 0,4), a visit to Denmark for 8 days with the purpose of Business would generate the number 6,4 (8 x 0,8), and hence Denmark would be determined as the competent Member State.

Annex V of the Visa Code

UNITED KINGDOM

UK Biometric Residence Permit (BRP) (for citizens from non-EU countries);

EU Settlement Scheme Biometric Residence Card (for family members of EU, EEA and Swiss citizens living in the UK).

Article 3(5) b and c:

- (b) *third-country nationals holding a valid residence permit issued by a Member State 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 V issued by Andorra, Canada, Japan, San Marino, **the United Kingdom** or the United States of America guaranteeing the holder's unconditional readmission, or holding a valid residence permit for one or more of the overseas countries and territories 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 Canada, Japan, **the United Kingdom** or the United States of America, or holders of a valid visa for one or more of the overseas countries and territories 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;*

A biometric residence permits (BRP) is issued to all third-country nationals who are staying in the UK for more than 6 months, this includes those who applied to settle in the UK, long-term work visas and students coming to study in the UK.

Contrary to the residence permits issued by Canada and USA (currently listed in Annex V of the Visa Code) which mostly include permanent resident cards, the list for UK will also include temporary residence permits with different validity periods.

- 1 Can you support the proposal of the Presidency regarding article 3(5) and Annex V of the Visa Code?**
- 2 If you cannot support the proposal, would you support to initially only include visas and permanent residence permits issued by UK to citizens from non-EU countries?**